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Indigenous
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Indigenous Peoples and Real Estate Valuation

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Indigenous Peoples and Real Estate Valuation

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The ARES Foundation was created by the ARES Board of Directors in 1986. The intent was to create an entity capable of developing an endowment and using that endowment and the income it produces to support ARES' long-term interests. At the most general level, this means furthering the interests of real estate education and research. The foundation provides an appropriately flexible vehicle for supporting various activities important to ARES members, activities that ARES may not be able to provide on its own. The Foundation's endowment also provides a degree of stability to ARES' long-term future not possible within the constructs of ARES itself.

The ARES Foundation is an entity distinct from ARES with its own corporate charter, bank accounts, and investments. Because stability, continuity, and a working knowledge of ARES are of critical importance in the governance of the Foundation, the ARES Board of Directors in 1986 provided that past presidents of ARES serve twelve-year terms on the Foundation Board. A predetermined schedule was established so that each ARES past president serves as vice-president and president of the Foundation. Within the Foundation Board, the important three-person investment committee is chaired by Arthur L. Schwartz, Jr., G. Donald Jud serves as treasurer of the Foundation, and James R. Webb serves as Executive Director. The Foundation Board holds its annual meeting in conjunction with the ARES meeting each year.

When the ARES Board created the Foundation, it also created the ARES Fellows program to fund it. Revenue from the strictly voluntary Fellows program goes to the ARES Foundation. A goal from the outset has been the development of an endowment sufficient to assure an adequate level of support for ARES long-term activities. Accordingly, the Foundation Board has sought to balance current expenditures with endowment growth and has gradually increased its support of ARES programs.

Programs supported by the Foundation have focused on assisting individual participation in ARES activities. The Foundation has funded the Doctoral Dissertation Seminar by defraying costs for graduate students to attend the seminar and ARES' annual meeting and holding a dinner in their honor the evening of the seminar. The Foundation has also funded the participation of real estate scholars from Africa, Latin America and Eastern Europe at ARES' annual meetings. Involving these scholars has enhanced the meeting experience for all ARES members. In the spirit of joining academics and practicing professionals, the Foundation funds a $1,000 manuscript prize for the best paper presented by a practicing professional at each ARES annual meeting and a manuscript prize for the European Real Estate Society annual meeting, the Asian Real Estate Society annual meeting and the Pacific Rim Real Estate Society annual meeting.

The Foundation will continue to broaden and deepen its support of ARES' long-term goals. Likewise, the Board will continue to look for better ways for the Foundation to achieve its goals and realize its potential. None of this would be possible without the support of the ARES Fellows and other Foundation contributors. Each ARES Fellow currently contributes $250 per year and each ARES Distinguished Fellow contributes $500 per year over and above ARES dues. The vision and generosity of these individuals and organizations should be appreciated by all ARES members. Won't you join today and make a difference?

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Editor's Foreword

Dear Reader,

I am pleased to introduce you to the ARES Research Monograph on *Indigenous Peoples and Real Estate Valuation*. This idea was developed by John Baen and others several years ago. I originally got involved in the project as a contributing author, when I was researching indigenous property practices, while on a Fulbright Scholarship at Wits University in Johannesburg, South Africa, in 2005. When I returned to the next ARES meeting, Jim Webb asked me to take over the lead role in getting this project to press, and I eagerly agreed.

The reason I was so interested in this comparative work was because there is a real need for real estate research that can help scholars and students in developing countries bridge the gap between the available real estate and property texts and models they have, which are primarily generated by Western Europe and the United States, and the situations they face on the ground. The other reason is that I find these varied property systems to be stimulating, challenging, and interesting, compared to the generally high quality and quantity of property data available in the United States.

In addition to the generous sponsors and contributing authors, I would like to thank several people who had a large role in working with the seventeen authors who contributed the twelve articles in this peer-reviewed monograph. Rachel Malmgren, a Master's student in the Urban Planning, Design, and Development program in the Levin College of Urban Affairs at Cleveland State University, was one of my graduate students last year and acted as associate managing editor for this project. Her steady work in portraying the attention span of the median reader, re-reading submissions, and handling the correspondence and keeping track of the various drafts is greatly appreciated. Associate Editor Garrick Small from the University of Technology, in Sydney, Australia also did a fine job in editing and arranging peer-review of several manuscripts of this Monograph. I would also like to thank the peer-reviewers who toiled for free on the twelve articles that appear in this volume and also on the three submissions that did not make the final cut. These include Jim Webb, Ph.D., Richard Klein, Ph.D., Kimberly Winson Geideman, Ph.D., Ron Throupe, Ph.D., Jesse Saginor, Ph.D., Aly Karam, Ph.D., Professor Francois Viruly, and at least two other anonymous reviewers. Finally, I would like to

thank the Almighty for giving me the energy and wisdom to pursue this project, my wife Donna for encouraging me, always being available as a sounding board with great advice and guidance, and helping keep my home life stable and calm, so I could have the time to devote to this important work, and also my sons Dan, Marc, Joel, and Sam for their cooperation and for giving me the need to pursue excellence wherever I find it.



Robert A. Simons

Cleveland, Ohio
September 2007

Preface 1

The Appraisal Institute and the Appraisal Institute Education Trust are pleased to support the publication of this research monograph on Indigenous Peoples and Real Estate Valuation. Over the years, the Appraisal Institute has had a long and collegial relationship with the American Real Estate Society (ARES), and we are delighted to continue that relationship by cosponsoring a monograph such as this.

Although we have entered an era when both real estate markets and valuation practice have become global in nature, this monograph presents some insights on unique issues that may fall outside generally accepted value concepts. Despite the growing globalization of valuation standards and practices, this monograph aims to shed light on how property rights are perceived among various indigenous peoples and the effect those beliefs have when issues of property valuation arise in a wider context. It is an area that has been little researched until now, and we are grateful to the contributors of this monograph for bringing these issues to our attention.

For more than 50 years, the Appraisal Institute's Education Trust has had, as part of its mission, the mandate to promote and encourage research in every aspect of real estate appraisal and to provide support to individual professionals and other organizations, such as ARES, in their efforts to advance the real estate valuation profession around the globe.

Again, on behalf of the Appraisal Institute and the Appraisal Institute Education Trust, we congratulate ARES on the publication of this monograph and for ARES' ongoing efforts to expand the valuation body of knowledge.

Sincerely,

Terry R. Dunkin, MAI, SRA
2007 President
Appraisal Institute

Sara Schwarzentraub, SRA
2007 Chair
Appraisal Institute Education Trust

Preface 2

The Appraisers Research Foundation (TARF) is pleased to be a sponsor of the monograph on Real Estate Valuation and Indigenous Peoples. This topic has become an important one to valuers in the United States and in Canada. The discussion and research is a project TARF is happy to support. Thanks to the American Real Estate Society for providing this opportunity.

The Appraisers Research Foundation (TARF) is a non-profit foundation whose purpose is to provide grants for research that assists valuation specialists in providing appraisal services. The following is a partial list of topics TARF would consider in funding research.

- Water rights and their impact on irrigated farmlands.
- Impact of conservation easements on contiguous and surrounding property.
- Provenance issues resulting from internet sales of fine arts.
- Alternative uses of contaminated properties.
- Supported allocation of value components of properties that include real estate, personalty, and business value.
- Peculiarities of church valuations, their sales, conversions, and the applicable approaches to value.
- Non-market supported sales.
- Trends in housing designs and demands.
- Conversion of big box properties.
- Trends that affect the valuation of food processing and distribution facilities.
- Changing consumer trends and the impact on property use and value.
- Provenance issues resulting from internet sales of fine arts.
- Contemporary issues in business, personal property, and real estate valuation.

TARF's website includes the results of recent research projects and a partial list of grants in progress. You may be interested in the findings of one or more of the research grants, listed below.

Please see the Research Results and Grant Work in Progress pages at http://www.appraiserresearch.org for more information.

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http://www.appraiserresearch.org/rr_4.htm Highest and Best Use after a Disaster: A New Paradigm by Don Epley, PhD, CCIM, MAI, Distinguished Professor of Real Estate University of South Alabama

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Entities receiving grants include associations, university professors, practicing real estate appraisers, institutions and professional organizations. TARF is interested in all topics that affect valuation. Our website www.appraiserresearch.org includes a partial list of special interests.

If you, or someone you know, would be interested in applying for a grant, please have them visit the TARF website for more information.

Very truly yours,
The Appraisers Research Foundation

Contents

1 **Introduction to the ARES Monograph on Indigenous Peoples and Real Estate Valuation** **1**
Robert A. Simons, Rachel Malmgren, and Garrick Small

2 **Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana.** **19**
Raymond T. Abdulai and Issaka E. Ndekugri

3 **Real Estate Practices Among Indigenous Peoples in Southern Africa: A Clash of Real Estate Systems on the Urban Fringe** **39**
Robert A. Simons and Francois M. Viruly

4 **A Brief History of Native American Land Ownership** **63**
Hans R. Isakson and Shauntreis Sproles

5 **Indigenous Land Claims in Canada: A Retrospective Analysis.** **77**
Robert A. Simons and Shwetha H. Pai

6 **The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value** **103**
Garrick Small and John Sheehan

7 **A Just Integration of Western and Customary Land Rights in Australia** **121**
Garrick Small

8 **Valuation of Yoruba Sacred Shrines, Monuments, and Groves for Compensation.** **145**
Bioye Tajudeen Aluko, Emmanuel Olufemi Omisore, and Abdul-Rasheed Amidu

9 Land Restitution and Restitution Valuation in South Africa 175
Valmond Ghyoot

10 Property Rights and Land Market Dynamics: An Economic Interpretation of the Indigenous Land Tenure Transformation Process in Nigeria 201
L. Jide Iwarere and Isaac F. Megbolugbe

11 The 21st Century Property Challenge: Reconciling Spirituality, Sacred Places, and Profit-Seeking Property Involvements 219
Stephen E. Roulac

12 This Land Is Your Land, This Land Is My Land: Toward a Global Analysis of the Determinants of Successful Indigenous Tribal Land Claims 255
Robert A. Simons and Rachel Malmgren

Index 281

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Introduction to the ARES Monograph on Indigenous Peoples and Real Estate Valuation

Robert A. Simons, Rachel Malmgren, and Garrick Small

The American Real Estate Society (ARES) sponsored this monograph dedicated to *Indigenous Peoples and Real Estate Valuation*. A variety of indigenous property topics and issues affecting numerous countries is presented here. From the issues caused by spread of cities into indigenously owned land, to issues of land claims of former indigenously occupied land, this monograph covers several property issues that have emerged throughout the world. *Indigenous Peoples and Real Estate Valuation* provides 12 chapters by 17 authors that include timely research on these complex topics and also some policy suggestions and case studies that can be of use to government leaders, developers, lenders, urban planners, and industry professionals.

When two or more different systems of property ownership or rights come together, issues and even conflicts are bound to surface. In many parts of the world, particularly in developing countries, this is becoming a big problem, while in other parts of the world the conflicting viewpoints have long coexisted, but reparation of past conflicts has more recently become a pressing matter.

Numerous indigenous issues that affect property rights and valuation emerge in this volume. These issues and conflicts include, but are not limited to, the following: ancestral burial, historical record of occupancy, plebiscite decision making, current occupation, treaty implementation problems, layers of occupation, eminent domain, large governmental change, dealing with and financing projects under formal and informal title or deed document systems, rights attached to ownership vs. nonexclusive use rights, age and size of land claims, public land ownership, tribal or family land claim rights and policies, insurgency or war in the country or with neighbors, legal value & legal system of ownership, prior government expropriation of lands, moral obligation to indigenous peoples, colonial occupation, and common land leases. These issues can also be grouped into broader topics, such as conflict between indigenous and Western property rights, communal land

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ownership, land transfer by force, legacy issues related to past colonization and apartheid, largely in Africa, and metaphysical/indigenous land value.

The rest of this chapter covers each of the 11 remaining research articles. Each chapter is summarized, and salient common property points are set forth. Next, each broad issue is examined in greater detail, crosscutting each chapter. Exhibit 1 includes a summary of each chapter, with the indigenous property issues covered.

Chapter 2: Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana

In "Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana," Raymond Abdulai and Issaka E. Ndekugri use two case studies (Tamale and Bolgatanga, Ghana) to report on the theory that the communal nature of traditional land ownership does not permit the rights of individual land ownership. In Ghana, 90% of the total land area is communally owned. Communal land can be granted to individuals once they pay for it; then, they receive an "allocation note" giving grantees property rights to the land, when the following steps are completed:

1. Initiate steps for the preparation of a formal document (indenture) evidencing the land transaction;
2. Register his or her title after the indenture has been prepared at the Deed Registry;
3. Pay ground rent to the Office of the Administrator of Stool Land after the formal document has been prepared;
4. Commence development within one year and complete within two years from the date of the allocation note, and where this condition is not complied with, the grantor-chief reserves the right to re-enter the land granted and take possession thereof.

A literature review on traditional land ownership in Ghana was done to provide a background of the relevant theories associated with the topic. Qualitative research methods were used by surveying land grantors (Chiefs or families) and grantees in the two communities Tamale and Bolgatanga. The literature review concluded that theoretically communal land ownership hindered the rights of the grantee, and economic benefits are lost because full rights to the land do exist. In contrast to the literature review, the survey results revealed that full ownership rights are enjoyed by the recipients of land grants and that land grantees are fully recognized as owners of the property. The paper concluded that although community and individual rights exist in customary land, this does not hinder individual ownership or economic development of the land.

Exhibit 1 Property Topics/Issues

Author	Title	Communal land ownership	Land transfer by force	Conflict between indigenous and Western property rights	Western influence from colonies	Apartheid influence	Cash in-lieu for land or claims	Communal ownership hinders rights	Metaphysical value of land	Other topics
Robert A. Simons, Rachel Malmgren, Garrick Small	Introduction to the Ares Monograph on Indigenous Peoples and Real Estate Valuation									
Raymond Abdulai and Issaka E. Ndekugri	Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana	90% of land is communally owned by chiefs or families	Descendants of chiefs can conquer land and then take over rights for tribe					Rights are enjoyed by the grantees and recognized by grantors and community		
Robert A. Simons, Francois M. Viruly	Real Estate Practices among Indigenous Peoples in South Africa: A Clash of Property Systems on the Urban Fringe	Communal rights a factor in property decisions		Colonials ignored the traditional system of property rights	Dutch and British influence	Seperated Blacks and Whites, kept Blacks out of urban areas		RSA government is developing system to extinguish tranditional land ownership to gain all rights associated with Western ownership		Seperated Blacks and Whites, kept Blacks out of urban areas

Exhibit 1 (continued)

Author	Title	Communal land ownership	Land transfer by force	Conflict between indigenous and Western property rights	Western influence from colonies	Apartheid influence	Cash in-lieu for land or claims	Communal ownership hinders rights	Metaphysical value of land	Other topics
Hans R. Isakson, Shauntreis Sproles	A Brief History of Native American Land Ownership	No concept of private ownership among Native Americans	Pre-Equestrian – Conflicts between neighboring tribes over which tribe could enjoy the fruits of the land, but not ownership Post-Equestrian – tribal warfare increased Post Columbian – by 1850 the number of treaties diminished, while violent conflicts between Europeans and Native Americans rapidly increased.	Land was segmented and given to Native Americans by US government but has continued to be segmented and no right of alienation exists	Private ownership rights came about due to the fur trade with Europeans		The Indian Removal Act of 1830 $500,000 to pay for the voluntary relocation of NA into "Indian Territory"			
Robert A. Simons, Shwetha H. Pai	Indigenous Land Claims in Canada: A Retrospective Analysis		Colonizers gained ownership by military domination	Treaties were established to maintain agreed upon rights, but often were violated. Land claims result	US and Canada colonizers used treaties to gain control over NA territories		Monetary settlement made and some First Nations have made successful investments with the money		Deep spiritual and material relationship with land, right to land is vital for survival and identity	

Exhibit 1 (continued)

Author	Title	Communal land ownership	Land transfer by force	Conflict between indigenous and Western property rights	Western influence from colonies	Apartheid influence	Cash in-lieu for land or claims	Communal ownership hinders rights	Metaphysical value of land	Other topics
Garrick Small, John Sheehan	The Metaphysics of Indigenous Ownership: Why Indigenous Ownership Is Incomparable to Western Conceptions of Property Value	Land is believed to be owned by past, present, and future members of the tribe		Indigenous no right of alienation, compensation difficult. Western highest and best use not true in indigenous			Valuation is difficult in this case because of the difficulty in placing a monetary value on the land		Attempts to place a monetary value on metaphysical value of indigenous land has not proved to be satisfactory ethical/spiritual/legal matrix of rights, obligations, and community relationships	
Garrick Small	A Just Integration of Western and Customary Land Rights in Australia	Indigenous customary title are communal		State leaseholds transfer to indigenous control and problems in doing that, new tax, lease raise to market rate					A relationship between people and the land exists instead of rights associated with land	State-owned land being leased below market rate

Exhibit 1 (continued)

Author	Title	Communal land ownership	Land transfer by force	Conflict between indigenous and Western property rights	Western influence from colonies	Apartheid influence	Cash in-lieu for land or claims	Communal ownership hinders rights	Metaphysical value of land	Other topics
Bioye Tajudeen Aluko, Emmanuel Olufemi Omisore, and Abdul-Rasheed Amid	Valuation of Yoruba Sacred Shrines, Monuments and Groves for Compensation	For the most part sacred sites are owned communally			Bristish colony until 1861		Assessments have been 30–40% below market value		Difficult to place a monetary value on a cultural treasure	
Valmond Ghyoot	Land Restitution and Restitution Valuation in South Africa					Land used by Blacks was taken away during the apartheid government and now is being restored by land claims to Blacks	If property is restored to the original owners, the current owners will be compensated taking into account the current value, the history of the acquisition and the use of the land			Land used by Blacks was taken away during the apartheid government and now is being restored by land claims to Blacks
L. Jide Iwarere, Isaac F. Megbolugbe	Property Rights and Land Market Dynamics: An Economic Interpretation of Indigenous Land Tenure Transformation Process in Nigeria									

Exhibit 1 (continued)

Author	Title	Communal land ownership	Land transfer by force	Conflict between indigenous and Western property rights	Western influence from colonies	Apartheid influence	Cash in-lieu for land or claims	Communal ownership hinders rights	Metaphysical value of land	Other topics
Stephen E. Roulac	The 21st Century Property Challenge: Reconciling Spirituality, Sacred Places and Profit-Seeking Property Involvements	Part of property culturalist approach		Traditional property culturalist approach vs utilitarian and financially driven property modernist approach						Tension between traditional and financially driven property perspectives, recognizing they overlap and do share common ground
Robert A. Simons, Rachel Malmgren	This Land Is My Land, This Land Is Your Land: Toward a Global Analysis of the Deteruinates of Successful Indigenous Tribal Land Claims			Seeks to determine ways to resolve conflicts						

Property Issues Brought Forth in This Chapter Are as Follows

- Land ownership was determined by the chiefs or families who first settled on a piece of land and that land remains in the family line.
- Descendants of chiefs can conquer land and take the rights.
- Land can be used (cultivated) by members of the community or people outside the community, but once the land is granted, those people have to leave.
- Communal land ownership does not hinder the rights of the grantee, and economic benefits are not lost since full rights to the land exist.

Chapter 3: Real Estate Practices among Indigenous Peoples in South Africa: A Clash of Property Systems on the Urban Fringe

"Real Estate Practices among Indigenous Peoples in South Africa: A Clash of Property Systems on the Urban Fringe" by Robert A. Simons and Francois Viruly presents an investigation into the real estate practices of indigenous people in the countries of the Republic of South Africa (RSA), Swaziland, Lesotho, and Botswana in Southern Africa. The research method consisted of case studies and interviews. The purpose of the investigation was to determine whether all or part of the conventional U.S. model of real estate bundle of rights applies to cultures in Southern Africa and whether it should be applied to indigenous lands in developing countries. The results of the research found that the bundle of rights applies in parts, but communal rights play a very important role in property decisions and practices in Southern Africa. While a dual land system applies, the governments are developing land management and ownership systems, which will end traditional land ownership. However, on the urban fringe settlements, the tribal systems of rural areas and formal systems of urban areas are brought into conflict, because there is no system in place to dissolve the customary rights before land is reallocated for development. This conflict is a challenge for policy makers. Simons and Viruly suggest the transfer of land held under the customary system to a formal structure under a national deed registry, which would create a formal coordinated method and reduce conflict at the urban fringe.

Property Issues

- Both the Dutch and British systems influence land ownership arrangements for privately owned land in conflict with tribal legal systems, consisting of unwritten customs passed on through generations.
- Colonial authorities ignored the indigenous systems.
- The apartheid era separated Blacks and Whites and kept Blacks out of urban areas in the Republic of South Africa.
- Adjacent or coexisting informal and formal land systems are created due to the inefficient transfer of land from tribal to formal markets at the urban fringe.

- The challenge for developing countries is to ensure that land held under a 'formal' indigenous system is transferred to a formal structure under a national deed registry system.

Chapter 4: A Brief History of Native American Land Ownership

In "A Brief History of Native American Land Ownership," the authors, Hans R. Isakson and Shauntreis Sproles, examine literature to show the relationship between Native Americans and land. The objectives of this study were to examine some of the key economics literature regarding how private property rights evolve, to look at some of the archeological and anthropological literature regarding the relations between Native Americans and land during the eras of pre-Columbian and post-Columbian, and to discuss the implication of the past on the present and future relationship of Native Americans and land. Several Acts of Congress were passed in order for the federal government to deal with Native Americans, but often these Acts had negative effects that last to this day. The following are a list of the Acts discussed in this chapter: the Indian Removal Act of 1830, the General Allotment Act of 1887 (Dawes Act), The Indian Reorganization Act of 1934, and the Indian Land Consolidation Act of 1983. The various acts succeeded to allot property, which became so fragmented that it is now virtually worthless. The conclusion of this chapter is that until Native Americans have the right of alienation restored, it will be very difficult for them to enjoy all the rights of private property ownership because transaction costs are very high. This factor, along with the laws of the land set in place by local Indian government and the remnants of federal governmental acts, makes the development or economic use of Native American land by non-Indians very difficult even when done in partnership with Native Americans.

Property Issues

- There were broken treaties between Native Americans and the government due to improper enforcement of law.
- There was no concept of private land ownership among the Native American community.
- No right of alienation (right to sell, lease, or mortgage property) exists for Native American land held in trust by the Federal Government.

Chapter 5: Indigenous Land Claims in Canada: A Retrospective Analysis

"Indigenous Land Claims in Canada: a Retrospective Analysis," by Robert A. Simons and Shwetha H. Pai, is a study of the indigenous land claims process (specific claims and comprehensive claims) in Canada. The chapter reports on,

and analyzes, outcomes and also suggests policy recommendations for other countries that are developing a process for aboriginal land claims. In the United States and Canada, governments typically used treaties to gain control over Native American territories. After treaties were signed, problems sometimes arose in implementing the agreements. However, it was not until the 1960s that the issue of Native American or First Nations land claims became prominent. Since then, a formal system to handle land claims has been successfully established in Canada. The process rarely resulted in the return of land to First Nations (recognized indigenous tribes), but more typically monetary compensation was given for the taken land, which is currently privately owned by nontribal members. First Nations have used the monetary settlements for investment in airlines, other transportation companies, construction companies, and eco-tourism projects. Attention has to be paid in public administration and planning to make the settlements success stories. The unbiased formal process of land claims can serve as a successful model for other nations reconciling indigenous land claims.

Property Issues

- In many cases, actual land could not be returned to the First Nations, because it is currently privately owned, so cash compensation is used;
- In 1763, aboriginal title was confirmed, and making a treaty before settlement was insisted upon;
- Indian reserves were created, which was crucial to protect the way of life for First Nations;
- Acts passed gave the power for control and management of Indian land and resources to the Canadian Government;
- The Office of Native Claims was created in 1974. Then the Canadian federal government established the Indian Claims Commission in 1991 as an alternative to going through the costly and time-consuming court system;
- Land claims arise when one of the rights established by a treaty is violated.

Chapter 6: The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value

"The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is incomparable to Western Conceptions of Property Value," by Garrick Small and John Sheehan, investigates the relevance of the cultural theory of property to the compensation and valuation of that property. The contrast between Western property valuation and indigenous property value is explored in this chapter. A history of the development of Western philosophy leading to the

ability to place a monetary value on land is outlined here. While in Western culture a bundle of rights is associated with the ownership of land, Small and Sheehan describe the indigenous view on property as an "ethical/spiritual/legal matrix of rights, obligations, and community relationships." To indigenous people, land is more than an asset to be bought and sold—it is provided by the creator as a gift and as a brother or mother. These strong bonds between the indigenous people of Australia and the land make it impossible to place an acceptable monetary value on the land. However, this does not mean that it cannot be used to gain monetary value. The authors suggest that the best way to use the land without violating indigenous traditions is via lease agreements. The leaseholder could utilize the land and most of the bundle of rights associated with land ownership, while respecting the indigenous traditions in relation to land.

Property Issues

- Valuation of indigenous interests by equating them to a set of material use and rights and assessing their market values is flawed, because it dilutes the indigenous understanding of people's relationship to the land.
- Attempts to place a monetary value on the metaphysical value of indigenous land has not proved to be satisfactory.
- The reason indigenous laws do not permit the alienation of land is because it is believed that the land belongs to the tribe, including past, present and future peoples, and land rights belong equally to all of them. If land is sold the, purchaser only compensates the currently living people, and a major portion of the total tribe receives nothing.
- Anglo-Australian law did not recognize indigenous land rights until 1992.

Chapter 7: A Just Integration of Western and Customary Land Right in Australia

In "A Just Integration of Western and Customary Land Right in Australia," Garrick Small examines the indigenous customary land rights in Australia. As recently as in 1992, the Mabo case opened the possibility for recognition of indigenous customary land rights. Small's chapter aims to explore the consequences of the relationship between the newly recognized indigenous land owners, the Wik people, and the pastoral leaseholder who hold valid, yet limited, lease rights to the land. Small examines the circumstances of the pastoral leaseholders, who are currently paying below-market rate land rent. Also, Small provides a strategy for correcting the inequities in the pastoral leases, which will gradually correct the lease payments making them market rate. He also provides strategies for indigenous peoples to realize their ownership through involvement in planning controls and taking appropriate material

benefits from their land. The policy recommendations provided are meant to integrate Western and customary property rights to be applied to other cases.

Property Issues

- The State has been charging below-market rent level for pastoral lease holders.
  - Farm produce prices have been bid down.
  - Resale prices have been pushed up – leasehold competition.
  - Excess leaseholder income equates to elevated demand for good and services required to higher prices.
- Indigenous peoples have a metaphysical relationship with land that is unlike the Western concept of the bundle of rights.

Chapter 8: Valuation of Yoruba Sacred Shrines, Monuments, and Groves for Compensation

"Valuation of Yoruba Sacred Shrines, Monuments, and Groves for Compensation," by Bioye Tajudeen Aluko, Emmanuel Olufemi Omisore, and Abdul-Rasheed Amidu provides a detailed analysis of sacred site valuation in Yorubaland, Nigeria. The chapter uses survey techniques and investigation of literature to determine fair compensation for sacred places. Often, the sacred sites are in danger of intrusions from modern land uses and tourism. The findings of this chapter conclude that sacred site valuation is difficult to do because of the complexity of placing a monetary value on a cultural treasure. Additionally, the land is considered as being owned by not just one individual but rather a family, village, or community, including ancestors and future family members. In sample sites in Delta and Akwa Ibom, the sacred sites were consistently sold at about 30–40% below market value. The authors' conclusion was that this was due to the stigma associated with living on sacred sites, which entails cohabiting with spirits. Additionally, the chapter concludes that a fair valuation of sacred places should be done by qualified Estate Surveyors and Valuers. Good practices should be codified to ensure fair and adequate assessment for compensation of sacred and other nonmarket land uses.

Property Issues

- Sacred sites have been valued at 30–40% below comparable market properties.
- There is intrusion of sacred places by tourists and commercial activity.
- Land decisions are made with respect to past and future tribe members.

Chapter 9: Land Restitution Valuation in South Africa

Valmond Ghyoot's "Land Restitution Valuation in South Africa" provides an overview of the land restitution and valuation process in South Africa. Ghyoot begins by providing a historical background in South Africa. He then describes the legal foundation of land tenure, based on the constitution after the 1994 elections. Additionally, a process of implementation of land restitution is given, as well as proposals for the improvement of the implementation process. To improve the restitution implementation, the South African government needs to provide more administrative services, as well as funding to support new farmers. Additionally, a land database should be kept to track transactions. Due to several failures in the farming business after restitution, the focus needs to shift from rural areas to urban areas, where many people would prefer to live and work. Finally, valuation for land restitution is covered, including problems with valuation, valuation guidelines, and lack of case studies. Ghyoot concludes that the national leadership has set ambitious land reform goals for South Africa, which are admirable, but since problems with land restitution have emerged, progress has been slow.

Property Issues

- Apartheid government took land from Blacks, which is now being returned through land claims.
- Government has a goal to distribute 30% of agricultural land to the Black population.
- Blacks are receiving farmland, but they are not trained to run them.
- Valuation is complex due to distortion of perceptions of highest and best use; over time, value implications of circumstances that existed decades ago; and compounding values over time to reflect today's value.

Chapter 10: Property Rights and Land Market Dynamics: An Economic Interpretation of Indigenous Land Tenure Transformation Process in Nigeria

"Property Rights and Land Market Dynamics: An Economic Interpretation of Indigenous Land Tenure Transformation Process in Nigeria," by L. Jide Iwarere and Isaac F. Megbolugbe, examines the role market forces have on the evolution of property rights. First, the market maturation process and change dynamics in land tenure systems is discussed. Then "a framework for assessing the market effects of regulatory and political shocks to the tenure state as landowners and other market participants formulate their responses to the Nigerian Land Use Act" is developed. Next, studies and gathered data are used to explore the

observed results of the framework. Iwarere concludes that, although the Nigerian Land Use Act had noble intentions, it actually became a "cumbersome regulatory machinery and a property rights dilemma." Policies need to be created that consider the socioeconomic dimensions of land use. Finally, the author points out that land allocation in the hands of administrators is "an appeal to arbitrariness and excessive administrative discretion in land use decisions."

Property Issues

- The establishment of the crown colony and settlement by the British led to the institution of private property rights in Lagos and other urban areas in Nigeria
- Land tenure system is the result of cultural, political, and economic impacts
- As societies are subject to change over time, land tenure systems cannot be static but will reflect those changes
- Wealth is a key factor in the property rights process.

Chapter 11: The 21st Century Property Challenge: Reconciling Spirituality, Sacred Places, and Profit-Seeking Property Involvements

"The 21st Century Property Challenge: Reconciling Spirituality, Sacred Places, and Profit-Seeking Property Involvements," by Stephen E. Roulac, poses some important questions for future real estate perspectives: Does property serve culture, or does property serve commerce? Roulac distinguishes between the more traditional, old school, indigenous perspective, where property serves culture and the modernist view, dominated by a progressive, futurist outlook, where property serves commerce. Those who favor the idea that the institution of property has important cultural connotations will connect property most specifically with indigenous people. The modernist view of property is more universal, favoring clean lines and a fresh slate, minimalism over adornment, is coolly unsentimental about who a property interests' and owners, occupants, and service providers might be. It is utilitarian.

So far, Roulac asserts that the resolution of these competing concepts more often favors the property modernists. But a significant emerging issue is that if the property modernists have their way, and trample into oblivion the values and priorities of the property culturists, then the very appeal of the places that the property modernists have now come to dominate shall be destroyed. "Inevitably, if left unchecked, the property modernists would turn sylvan settings into the urban equivalent to a denuded strip mine. Consequently, the *property culturists* values are ultimately highly beneficial to the *property modernists*, even though the latter may not initially necessarily recognize that perspective outcome."

Property Issues

- The conflict between the indigenous cultural property perspective and rights and modern, utilitarian use of land, in general
- Ways of framing property investment decisions based on time, shared vs. individual values, and East/West cultural perspectives
- The symbiotic relationship between property culturists and property modernist perspectives in preserving the property that both favor

Chapter 12: This Land is Your Land, This Land is My Land: Toward a Global Analysis of Indigenous Tribal Land Claims

In "This Land Is Your Land, This Land Is My Land: Toward a Global Analysis of Indigenous Tribal Land Claims," Robert A. Simons and Rachel Malmgren explore the effects of colonial occupation, independence, migration, inter-tribal warfare, and changes in government could have on indigenous and tribal communities, and the land claims that result in these shifts. Indigenous people have lost communal property rights, rights to use the land, and their rights to keep others from utilizing their traditional lands. A global perspective is taken, and many countries' land claims systems to return some rights to the indigenous people are being studied, including that of the United States, Canada, India, South Africa, and others. Each of the countries has a different legal system for resolving land claims, and they are analyzed here. A research design for analyzing internationally successful land claims is set forth.

Common Themes on Indigenous Property

Several recurrent themes came up in the chapters, including communal land ownership in indigenous cultures, land transfer by force, conflict between indigenous and Western property rights, Western colonial influence, cash payment in-lieu of land for claims, and the metaphysical value of land. These are summarized and contextualized below. Exhibit 1 summarizes these points for each chapter.

Communal land ownership is a common thread throughout most indigenous cultures. In Ghana, approximately 90% of the land is still owned communally. Communal ownership presents a challenge on the urban fringe of some African communities, where communal rights and ownership conflict with the Western bundle of rights of the urbanized areas. Also, in some places land is believed to be communally owned not only by the current tribe but also by those of the past and future. This is of special of concern at sacred sites, where it is believed that the spirits of ancestors still exist. African, Australian, and Native American indigenous peoples often had no concept of private ownership before European colonization of their land.

The influence of European colonization is another reccurring theme in many of the chapters. Europeans came to the Americas, Australia, and Africa to establish new colonies. In doing so, they brought with them the Western concept of private land ownership. They ignored the traditional systems of the indigenous peoples and communal property rights and established their own territories. Often, in North American and Canada, colonizers used treaties as a means to gain control over Native American land. In North America, with the increase in the value of territory due to the increasing value of fur, private ownership rights to the land came about in native tribes. Although sometimes these property rights came about peacefully through treaties, violent conflicts over property arose as well.

Colonization of indigenous lands by nonindigenous settlers also led to violent conflicts. In North America, conflicts even began before Europeans settled on the land. In the pre-Equestrian era, there were conflicts between neighboring tribes over who could enjoy the fruits of the land but not the land itself. Then, in the post-Equestrian era, tribal warfare increased substantially, because the tribes had more mobility, and territories began to overlap causing additional conflicts. In the post-Columbian time period (by 1850), the number of treaties between the White settlers and the Indians diminished, while violent conflicts rapidly increased. In North America and in Canada, colonizers gaining ownership by military domination was a regular occurrence. In Ghana, land transfers can occur if descendants of chiefs conquer the land then take over the right to that land. Many violent land transfers have occurred throughout the world and not just in relation to indigenous land, but for this monograph the previous examples have been mentioned in this volume.

Often, conflicts occur when two cultures merge into one location. The understanding of land and the associated rights are very different for indigenous people compared to the bundle of rights associated with Western culture . Often, when European colonizers came to a new place where a traditional system of land rights was established, the rights were ignored and resulted in further problems. In the United States, when trying to resolve the problems associated with Indian Reservations, a series of acts led to the segmentation of Indian land which only got further segmented when passed on to the next generation. This occurred because there is no right of alienation, and though the owners of the land have most of the rights associated with land ownership, this is left out due to the tribes' desire to keep the land within their tribe. Also the concept of highest and best use of the land is foreign to indigenous peoples. The land represents more than a tool to gain money from. It is almost a living being in many cultures. Since the fundamental view of land is so different, conflict arises when indigenous customary rights meet Western property rights. Righting these perceived historical wrongs is easier said than done, according to the interesting and detailed work presented in South Africa by Ghyoot and for Nigeria by Iwarere.

One of the main differences between the way Western and indigenous people view land can be attributed to the metaphysical value land holds in many

indigenous cultures. This may also be said to frame the differences between how Eastern and Western societies view property as a communal treasure or as a simple commodity. The livelihood of many indigenous nations came from the land on which they lived. To them, the land was more than just a piece of dirt: It was their means of survival and through this relationship a strong, permanent, multigenerational bond was formed between the people and their land. The land became part of the people's identity, and placing a value on this relationship (rather than its' asset disposal value) proves to be a very difficult challenge. In addition, many community treasures are associated with the land, so it would be like someone trying to sell a unique piece of land with a valuable community monument on it, such as the Statue of Liberty. This is consistent with the property culturist perspective set forth by Roulac.

Often, it is difficult to ascertain the full value of land to indigenous peoples or in the marketplace. When land claims are settled by cash payments, it is almost impossible to determine a value, because the relationship between people and the land is more than just rights to the land. In Aluko's, Omisore's, and Amidu's chapter, they describe their finding that sacred sites were sold for 30–40% below market value. In this case, there was no definitive reason that the land would be valued at this low rate other than the stigma of living with the spirits. In Isakson's chapter, examples were provided, where the first nations used monetary settlements for successful investments in business ventures. In Canada, first nations received money instead of their land for virtually all their government land claim cases. Hence, monetizing indigenous lands can be done, but clearly there is still a clash in expectations between the indigenous property holders and the monetarist, modern view of land as a simple commodity.

This monograph, dedicated to *Indigenous Peoples and Real Estate Valuation*, sponsored by the American Real Estate Society (ARES), further explores the chapters, the topics briefly summarized above, and many other indigenous land issues. The complexities of tribal land claims, land uses, restitution, valuation, and so forth are brought to the forefront in this collection. The editors hope that the readers enjoy reading this monograph as much as they enjoyed putting it together and working with the authors.

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Indigenous Landholding Institutions as an Impediment to Economic Use of Land: Case Studies of Tamale and Bolgatanga in Ghana

Raymond T. Abdulai and Issaka E. Ndekugri

Abstract In Ghana, traditionally, the allodial (paramount) interest in land is vested in communities represented by chiefs/kings and/or families/clans referred to as indigenous landholding institutions. The system of landownership has been perceived as communal landholding, which does not permit individual ownership of land rights. It has been argued that such communal ownership does not incentivise individuals to invest in land-based economic activities. Thus, the traditional landownership system is viewed as an obstruction to economic growth. This chapter reports on a study carried out to test the assertion that traditional land tenure does not permit individual ownership. It is based on case studies of the two localities of Tamale and Bolgatanga in Ghana. The study shows that the landownership system is dual with both communal and individual ownership. Therefore it does not appear to constitute an impediment to economic growth as claimed in the literature.

Introduction

Land is a very important commodity that provides space for economic activity. Its importance cannot be overemphasized. In Ghana, the traditional land tenure system operates alongside the state system (Larbi, 1994; Antwi, 2000; Abdulai and Antwi, 2005a,b; Abdulai, 2006). The former originates from traditional societies, and the allodial interest[1] in land is vested in communities

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[1] In the traditional scheme of interests in land, the allodial interest or title, referred to as paramount interest, absolute interest, final interest, ultimate interest, or radical interest is the highest, beyond which there is no interest in land again. An interest in land is a bundle of land rights. The next interest after allodial interest is the usufructuary interest, also called customary freehold interest. That is the interest both members and nonmembers of the community acquire from the allodial interest holders.

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represented by chiefs/kings and families/clans.[2] The chiefs/kings and heads of families/clans, also referred to as indigenous landholding institutions (ILIs), hold the land on trust for the communities.

Indigenous landholding is estimated to be over 90% of the total land area of 92,100 sq. miles in the country (Kasanga, 1984). Access to land is governed mainly by the indigenous system of landownership. This type of landownership is communal landholding (Agbosu, 2000; Hooko, 2000; Kotey and Yeboah, 2003; Asiama, 2005).

It is believed that the communal landholding system does not permit individual ownership of land rights (Agbosu, 2000; Kotey and Yeboah, 2003) and hence does not provide incentives for investment in land-based economic activities. Commentators have argued that the lack of incentives acts as an impediment to economic growth. For example, Lewis (1955), commenting on the traditional system of landholding, observed that while the extended family system has tremendous advantages in societies living at a subsistence level, it does not appear to be appropriate for societies embarking upon economic growth. He argued that in such societies, it is almost certainly a drag on sustained economic growth; for growth depends on initiative, and initiative is likely to be stifled, if the individual who makes the effort is required to share the rewards with many others whose claims he does not recognize.

In a similar vein, an agronomist, La Anyane (1962) has indicted the customary tenure system as highly deficient in the ability to fulfil the basic requirements of good tenure conditions (tenure systems that permit individual ownership and initiative). According to La Anyane, it is inadequate to meet the problems created by marked density of population, scarcity of land, and the growth of commercial agriculture, which calls for more settled systems of landholding that will produce the same effect as leaving the land in good condition for continuous production. It means that the system provides poor incentives for investment by the farmer and other investors and therefore can neither be the basis for access to credit nor enable a market in land to develop, which would ensure that the land is available to the most efficient users for economic development.

Dorner (1972), Myrdal (1974), World Bank (1974), and Mensah (2001) have made similar criticisms. Other commentators have analyzed the problem in terms of cost of exercising land rights and responsibility for such cost. For example, Demsetz (1967) observed that communal ownership fails to concentrate the cost associated with exercising a communal right by a person on him/her. And that is because the costs of any decision or choice are less fully thrust upon the selector than under individual ownership (Alchian, 1967, p. 827). This

[2] Anthropologists define a clan as a group of people who are the descendants of a common remote ancestor/ancestress (not specified) and who are bound together by common totems and other common taboos. A family is similar to a clan. With a family, however, there is a specified ancestor/ancestress. In the African context, it refers to both the nuclear and extended family.

implies that communal land rights systems do not provide the right incentives for high productivity.

The chapter reports on a study examining the way the traditional landownership operates and the extent to which it is communal and does not permit individual ownership of land rights using two case studies, Tamale and Bolgatanga in Ghana. To intimate what follows, the next section reviews the relevant literature. Following this is a section that looks at the research methodology adopted for the study. The penultimate section is devoted to data analysis and discussion of results while the last section deals with the conclusion.

Literature Review

A Brief Overview of the Traditional System of Landownership in Ghana

Ghana is located in Africa (specifically in West Africa) near the equator and on the Greenwich meridian. It is bounded on the north and northwest by Burkina Faso (formerly Upper Volta), on the east by Togo, on the south by the Atlantic Ocean, and on the west by La Cote D'Ivoire (known as the Ivory Coast). Ghana is divided into ten regions for political administrative purposes, and each region has a capital, which is the administrative center, but the capital of the country as a whole is Accra.The Map of Ghana is shown in Exhibit 1.

According to the Ghana Bureau of Languages, there are over 30 different ethnic tribes in Ghana. The allodial interest is vested in chiefs or families depending on the tribe. Among the tribes in the southern part[3] of the country (for example, Asante and Fanti), chiefs as traditional rulers sit in state on specially designed stools/chairs,[4] while in the northern sector they sit on a specially prepared skin of an animal (cow or sheep). Examples of northern tribes include Dagomba and Frafra. The symbol of authority is therefore the stool or skin. Where the allodial interest in land is vested in the chief, it is called skin or stool land among these tribes. Among other tribes, the allodial interest in land is vested in families represented by family heads or tindamba; there is therefore family or tindana land.

The two main modes of land acquisition by chiefs are conquest and first settlement. Some of them as allodial landowners derive their legitimacy from conquest, and they are the descendants of chiefs who led their people in the past to invade and conquer other people or tribes. Other chiefs derive their

[3] Ghana is divided into ten regions for political administrative purpose. Seven of the regions form the southern part of the country, whilst the rest of the three constitute the northern part (northern Ghana).

[4] Chiefs in the southern sector of the country in the olden days sat in state on stools. However, as time progressed, and with modernization, they started using specially designed chairs. Thus, today most chiefs use chairs, but the stool remains the symbol of the chief's authority.



Exhibit 1 Map of Ghana

legitimacy from first occupation – their forebears first settled at particular places and subsequently became chiefs. Families also derive their legitimacy from prior settlement. Where land is vested in chiefs, they play two roles – they are in charge of the traditional governance of the areas and at the same time own and manage the land within their jurisdictions. Even though among most southern tribes both men and women can be chiefs, only a few are women. In the northern part of Ghana, however, custom does not permit women to become chiefs. Where the allodial interest in land is vested in families, chiefs play only the traditional governance role.

Traditional Landownership Structure in Tamale and Bolgatanga

Tamale and Bolgatanga are the political administrative capitals of the Northern and Upper East Regions, respectively. Both Regions are located in northern Ghana. Dagomba is the indigenous tribe in Tamale while that of Bolgatanga is Frafra.

Tamale is part of Dagomba Kingdom.[5] A discussion of the land ownership structure in Tamale cannot, therefore, be divorced from that of Dagbon (Dagomba Kingdom), as they are inextricably linked. Dagbon has a local governance and traditional land ownership structure based on chieftaincy or kingship. At the apex is the Overlord or King of Dagbon called Ya-Na.[6] All Dagbon land is vested in him, which he holds in trust for the people of Dagbon. The Ya-Na who resides at Yendi[7] is the supreme traditional leader and at the same time has authority to manage lands vested in him. However, the day-to-day management or administration of the land is delegated to subchiefs who are also the traditional leaders of their respective communities. The hierarchical structure extends in series of levels from the Overlord downwards as shown in Exhibit 2.

The chiefs owe their allegiance through high-ranking chiefs to the Ya-Na. Because the responsibility of land administration and allocation is delegated to the lower ranking chiefs, they report dealings in land to their higher ranking chiefs – paramount or divisional chiefs. To be valid, land allocations require the consent of the paramount or divisional chiefs. However, the Ya-Na, as King of Dagbon, confirms every formal land document.

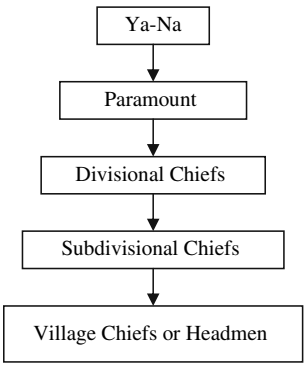


Exhibit 2 The traditional governance and land ownership structure of Dagbon

[5] Dagomba as a tribe has a Kingdom.

[6] Na means King and Ya means powerful. Ya-Na, therefore refers to a powerful King.

[7] Yendi is the headquarters of the Dagomba Kingdom and is located to the East of Tamale. See Exhibit 1.

Tamale is composed of various neighborhoods, and each neighborhood has a chief. The historical perspective of landownership is outlined as follows. Since the land ownership structure in Tamale is inextricably linked to that of Dagbon, discussing the history of landownership in Tamale necessarily implies a discussion of land ownership structure of Dagbon as well. Various writers like Tamakloe (1931), Duncan-Johnstone and Blair (1932), Eyre-Smith (1933), Manaoukian (1952), Staniland (1975), and Mahama (2004) have traced the history of Dagbon, which is divided into two separate periods. The first period deals with the history of the commoners (land priests and owners) called the Tindamba and the second with the ruling class, the Nabihi. The rulers have a common ancestor but the ruled do not, since it is not clear where they originated from.

The commoners migrated to the present day areas occupied by Dagomba around the early part of the eleventh century. As the first settlers in their respective areas, the families became the landowners, hence the name tindamba. Apart from being the landowners, they also played the role of fetish priests who made sacrifices to the gods/goddesses on behalf of the community. They therefore played two roles – one as spiritual leaders of the communities and the other as the administrators of land. However, the dual role played by the tindamba families ended with the advent of the ruling class personified by the Ya-Na.

The son of Sitobu is the founder of Dagomba Kingdom and their great-ancestor is Na Gbewaa who ruled Pusiga[8] for so many years. Na Gbewaa is said to have migrated from Zamfara in Northern Nigeria around the mid-eleventh century. Having failed in a bid to ascend the throne, Sitobu moved with a large following at the beginning of the twelfth century from Pusiga to Karaga,[9] which was inhabited by the aboriginal Dagbamba (later changed to Dagomba) where he became a chief. The first son of Sitobu, after ascending the throne, waged wars on the tindamba. He conquered them and extended his conquest to other parts. Some of the tindamba were annihilated, while others surrendered and therefore relinquished their power of control over land. Through the conquest, he turned the whole territory into a single political unit (Dagomba Kingdom) with himself as the Ya-Na and finally established his headquarters at Yendi. He appointed chiefs to oversee the other settlements, including Tamale. This system has been maintained up to the present day via inheritance. In some communities in Dagbon today, tindamba exist, but they do not have control over land.

In Bolgatanga and the whole of Upper East Region, the allodial interest in land is vested in families represented by tindamba. These families control land, while the power of traditional governance is vested in the chiefs. The tindamba are the descendants of their ancestors who first discovered, cleared, and settled at the various communities. Even though the allodial interest in land is vested in the tindamba, mostly farm owners who have acquired the usufructuary interest

[8] Pusiga is a town in the Upper East Region near the Ghana–Togo border.

[9] Karaga is one of the settlements of Dagbon.

from the tindamba over time do the allocation of land to prospective purchasers. However, where vacant (virgin) land exists, the tindamba control it. Vacant land refers to land in which no usufructuary interest has been granted to a member or stranger. The tindamba therefore allocate such land.

The nature of the land claim is based on oral history. One Abolga migrated from a village called Anewure in Burkina Faso and settled in present-day Bolgatanga. The specific place in which Abolga settled was named Yikene. He gave birth to four children, and as the community started growing with the advent of other families, Abolga asked three of his children to settle at three different places to ensure that nobody claimed ownership of the area. Abolga and his family welcomed all incoming families and gave them land to settle on; the families therefore acquired the usufructuary interest in that land. This system has been maintained through inheritance until today. Thus there are four tindano areas in Bolgatanga and Abolga is their great-ancestor. The name Bolgatanga originates from Abolga, the pioneer settler.

It is this socio-political arrangement of traditional landownership, described in the preceding sections, which is perceived as communal landholding and does not permit individual ownership of land rights, as evidenced in the next section.

Commentaries About the Traditional Landownership System

The perception that the traditional land tenure system does not permit individual ownership dates back to the colonial era. As aptly observed by Ssekandi (2002), the notion that customary land tenure admitted of no individual property became a convenient tool of the colonialist; the protection of the right to individual property known under most European legal systems did not extend to the usufruct rights as the customary tenure was conceived. The discussion of the future of African landownership in the colonial era, therefore, invariably proceeded on this premise. Thus, colonial policy throughout the subcontinent, as well as expert advice, generally envisaged the reform of the traditional system in terms of the progressive individualization of ownership of land rights (Liversage, 1945; Oluwasami, 1957).

Governor W. E. Maxwell, the governor of the Gold Coast (1895–1897), as Ghana was then known, strongly favored radical individualization of customary ownership of land and canvassed for individual proprietorship of property rights to land, free from the operation of traditional laws, which in his opinion often makes lands practically inalienable by the recognition of the right of every member of a family to an undivided share in property (Cited in Branney, 1959, p. 210). The Governor initiated the promulgation of a land law (Public Lands Bill of 1897), and his prime object was to use the statute to transmute tribal or family landholdings into individual property. As noted by Branney (1959), it was to be adopted in other British colonies and protectorates. The Bill was ultimately dropped by the Governor due to the mounting opposition.

Although the Public Lands Bill was never promulgated, the process of individualization of ownership was apparent, which was subsequently recognized by the West African Lands Committee. The Committee was set up by the colonial office in 1912 to investigate the land laws in force in the British colonies and protectorates in West Africa. The work of the Committee was, however, disrupted as a result of the First World War in 1914. Thus, apart from the draft report in 1916, there was no final report. The draft report recommended among other things, the individualization of the ownership of property rights to land comparable to the freehold in English common law (Meek, 1946). Just like the Public Lands Bill of 1897, the proposals of the Committee were never implemented, but the perception that traditional landownership never permitted individual ownership remained.

In a report on traditional land tenure of southwestern Nigeria prepared in 1898, Rayner, a Chief Justice, observed: "Land belongs to the community, the village, the family and not the individual" (Cited in Asante, 1975). As Asante (1975) notes, this statement was subsequently endorsed by the Privy Council decision of *Amodu Tijani v Secretary, Southern Nigeria* [1921] A. C. 399 as a principle of West African Native Law and religiously applied by the superior courts of West Africa (Ghana included), as well as the Privy Council for many years thereafter.

Agbosu (2000) has itemized the following as the features of traditional land tenure: an inherent right in the individual member of landholding group to benefit from the land regarded as a common asset and resource; the recognition of certain members of the community as having the power of control over how rights to benefit may be exercised; and the lack of individual ownership of the land, the paramount title of which is accepted by communities as vested in the groups such as the stool, the clan, or the family, all of which are corporate juristic entities. Kotey and Yeboah (2003), commenting on the essential characteristics of the usufructuary interest observed:

> The usufructuary interest is not a species of ownership but rather it consists of perpetual rights of beneficial user in customary held land. It can never mature into ownership but so long as the subject occupies the land, so long is it considered his/hers against all others. The member's usufructuary right is subject to that of the community as a whole. The holder cannot block the community's right of way over his portion of the land and he cannot put the land to use that will affect the legitimate right of others.

Similar sentiments have been expressed about the traditional landownership in Africa as a whole; see for example Lord Hailey (1958), UN (1966), Mountjoy (1975), Posner (1981), Naire (1984), Harrison (1987), Fisher (1993), Ensminger (1997), Payne (1997) and Toulmin and Longbottom (2001). These commentators have noted that the common feature of traditional systems of landownership across Africa is that land is communally owned and does not permit individual ownership.

It is clear that treatise on customary land ownership is characterized by one recurrent theme: the notion that there is communal landownership, which is

inherently lacking in any incentives for the individual to invest his or her energy and resources in the subject matter of common ownership. Does it therefore mean that it is a free-for-all situation?

Research Methodology

As part of the research design, qualitative, quantitative, and mixed method research inquiry approaches were examined for their appropriateness to the objective of the study. The approach finally adopted was the qualitative research method. This method has been discussed by writers like Creswell (2003) and Mertens (2003). In particular, the case study philosophical strategy within the qualitative research paradigm was used.

The first part of the research method consisted of a review of literature on the traditional landownership system in Ghana, in general, and the case study areas in particular, and commentaries about the system of landownership. The aim was to identify the theoretical framework relevant to the research question and to help design the rest of the methodology.

Empirical qualitative data were generated through a cross-sectional field survey conducted in Tamale and Bolgatanga, Ghana, from September 2005 to February 2006. In Ghana, land in the indigenous sector is vested in either chiefs or families, depending on the tribe. In all the ten regional capitals, land is vested in chiefs or families or in a combination of the two. The regional capitals of Ghana constituted the sampling frame. Tamale and Bolgatanga were purposively selected for two reasons. In Tamale, land is vested in chiefs, while in Bolgatanga it is vested in families. The land tenure systems in the two cities were therefore deemed to be a fair representation of what exists in Ghana. The cities were also selected because of the researcher's familiarity with them. According to Ghana Statistical Service (2002), Tamale has a population of 293,881. It is a nodal city that serves as convergence zone, as well as the commercial center of three regions – Northern, Upper East and Upper West Regions. Tamale is a city where an architectural blend of traditional slum and modern buildings can be found. The indigenous tribe of Tamale is Dagomba. The population of Bolgatanga is 228,815 (Ghana Statistical Service, 2002). It is the main city of the Frafra tribe, and it is often described as the crafts center of northern Ghana, with a large central market.

Both land grantors (supply side) and land grantees (demand side) were interviewed. On the supply side, there are 49 allodial land titleholders (chiefs) in Tamale; the sampling frame was obtained from the Registry of the Northern Regional House of Chiefs.[10] The chiefs control, manage, and grant land in the various neighborhoods of Tamale. The number of chiefs does not necessarily correspond to the number of neighborhoods as a chief can have control over land in more than one neighborhood. Thirty-two chiefs (two-thirds) of the sampling frame were

[10] The Regional House of Chiefs is an association of chiefs or traditional rulers in each region.

purposively selected for the survey, and this was deemed to be representative. Chiefs in Tamale are all men, as traditionally women cannot be chiefs.

Given the objective, the study focused on primary land transactions (direct land transactions between the chiefs and grantees) as opposed to secondary land transactions. Developing neighborhoods at the periphery of the city were therefore preferred, as they satisfied this criterion. The chiefs were purposively selected to ensure that the neighborhoods chosen were not concentrated in one area. Eight neighborhoods each in the northern, southern, eastern, and western orientations of Tamale were selected. On the demand side, four land grantees in each of the neighborhoods that the 32 chiefs control were selected with the help of the grantor-chiefs (making a total of 128). Grantees were composed of both men and women; there is no gender discrimination in the use of land.

For Bolgatanga, the allodial interest in land is vested in four tindamba[11] (family heads). All of them were interviewed. Even though women can become tindamba, currently, they are all men. However, the allocation of land is done in most cases by family units or households that have acquired the usufructuary interest from the tindamba over time. The households are referred to as "farm owners" as the predominant use of land is farming with related dwellings. Twenty-four farm owners were selected through snowball sampling (a nonrandom sampling technique) in each tindano area[12] (making a total of 96) and interviewed. For a particular tindano area, 6 farm owners each were selected in the northern, southern, eastern, and western orientations. On the demand side, 25 land grantees were interviewed in each tindano area, making a total of 100. They also consisted of men and women.

All the land grantees were purchasers. In each case study area, they were composed of members of the communities, with nonmembers often referred to as "strangers." Some of them had more than one plot, but they were interviewed based on the ownership of one plot. Exhibit 3 gives a summary of the number of the survey participants. There were no data on the total population of the farm owners in Bolgatanga, and the land grantees in both study areas.

Two categories of structured questionnaires were designed and administered face-to-face. One set of questionnaires were for traditional landowners (supply side) and the other set for land grantees (demand side). The questionnaires covered various issues, including the conditions imposed on land grants, the rationale and enforcement of conditions, the consequences of flouting of conditions, and the recognition of the land rights of grantees by members of the community and strangers. There was pervasive use of open-ended questions. It allowed the participants to give the answers they thought were right, thereby minimizing bias.

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[11] Where the allodial interest is vested in families, they are represented by family heads in some communities. In other communities, the family is represented by a tindana (tindamba for plural). Tindana literally means 'landowner'.

[12] A tindano area refers to the jurisdiction of a tindana.

Exhibit 3 Survey participants

Case study	Sampling frame	Sample responses	Response rate
	Traditional landowners (supply)		**%**
Tamale	49	32	65
Bolgatanga	4	4	100
	Farm owners (supply)		
Bolgatanga	–	96	–
	Grantees (demand)		
Tamale	–	128	–
Bolgatanga	–	100	–

Six university graduates (three for each study area) were recruited to assist in administering the questionnaires. In Ghana, even though English is the *lingua franca*, many local dialects are also spoken. The majority of the citizenry communicate effectively in the local dialects. Since the questionnaires were written in English, and some of the respondents were illiterate, the university graduates were selected, based on the local dialects in which they were very proficient. The recruited research assistants were trained to be able to interview the respondents effectively.

The data collected were coded for analysis. Nudist Vivo (NVivo), a qualitative software was used to facilitate the coding process. The information collected was first transcribed using Microsoft Word, then it was exported to the NVivo program and coded for analysis and interpretation.

Data Analysis and Discussion

To be able to analyze individual ownership of land rights within the traditional communal ownership there is the need to (a) identify and examine the sort of controls exercised by land grantors (supply) after the land has been granted and (b) examine whether the land rights of land grantees (demand) are recognized by members of the community after the land grant.

Controls Exercised by Land Grantors

On the supply side, in Tamale the study established that various conditions accompany any land grant made by the chiefs. The conditions are uniform across all the neighborhoods and are normally specified in what is called an "allocation note." The allocation note is the evidence of land transfer, and it is issued to the land grantee after the price of the land has been paid. The grantor-chief signs the allocation note, which is witnessed by his secretary. The allocation is, however, confirmed by the divisional or paramount chief. The conditions of any land grant are that the land grantee is required to

(1) initiate steps for the preparation of a formal document (indenture) evidencing the land transaction;
(2) register his or her title after the indenture has been prepared at the Deed Registry;[13]
(3) pay ground rent to the Office of the Administrator of Stool Land (OASL)[14] after the formal document has been prepared;
(4) commence development within one year and complete within two years from the date of the allocation note, and where this condition is not complied with, the grantor-chief reserves the right to re-enter the land granted and take possession thereof.

The first three conditions are analyzed in the next section. The fourth condition is very important in terms of the controls exercised by the grantor-chiefs after the land grant. All the grantor-chiefs were unanimous in their answers to a question, which sought to find out whether the condition is normally enforced. None of them had ever re-entered anybody's land where the condition had been broken. All the chiefs explained that they do not enforce such a condition, since they do not give the purchasers money to develop after they have sold the land. Also, due to lack of money, people spend many years developing their land, and the rationale for such a condition is to minimize land speculation. All the chiefs acknowledged that despite the condition, some primary purchasers still resell their land, but according to them, very few purchasers do that, and they believe it is because of the fourth condition noted above.

The evidence from the grantor-chiefs that they do not enforce the fourth condition is corroborated by responses from the purchasers. Some of the questions to the 128 purchasers sought to investigate the exercise of control over them in terms of the enforcement of the condition after purchase. Their responses are enumerated in Exhibit 4. Out of the 128 purchasers, 90% had not complied with the condition. However, their land had not been re-entered. According to them, their grantor-chiefs or members of the chiefs' families had never told them about any re-entering.

From Exhibit 4, it is observed that 35% (30 + 5) had started building but not finished, 20% (18 + 2) had not started development, and 42% had used more than 2 years to complete their developments. When asked to explain why they could not finish building within 2 years or why they had not started building at all or used more than 2 years to complete their developments, purchasers in all these categories cited lack of money as the cause.

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[13] The Deed Registry is a land sector institution where land is registered.

[14] The Office of the Administrator of Stool Lands is a land sector agency, and its functions include the collection of all stool and skin land revenue, the disbursement of the revenue according to a prescribed formula, and the administration and development of stool and skin land in consultation with the Lands Commission, another land agency responsible for the management of state land.

Exhibit 4 Stages of land development by purchasers in Tamale

	Stage of development	No. of purchasers	%
First 2-years of purchase	Completed	4	3
	Started but not completed	6	5
	Bare land	3	2
3–15 years after purchase	Completed	54	42
	Started but not completed	38	30
	Bare land	23	18
Total Observations	–	128	100

Source: Authors' Field Data

It was also established that 15% of the purchasers had resold some plots of land in the past, and they had not informed the grantor-chiefs before selling. This confirms the evidence from the grantor-chiefs that despite the fourth condition, some primary purchasers still resell their land. All the purchasers had a different view on the rationale of the condition, as claimed by the land grantors. They did not think the condition could prevent somebody from selling his or her land. One purchaser said, "I do not think this condition can deter me from selling my land if I need money."

It is obvious from the analysis that the fourth condition is of no practical use. It is even significant to note that the condition is not meant to be binding on the land grantee so as to be enforceable. The study established that the land grantee does not sign or thumb print the allocation note to indicate acceptance of the condition. It is signed or thumb printed by the grantor-chief and witnessed by the secretary to the chief who also signs. It is then confirmed by the paramount or divisional chief, who signs or thumb prints, which is then witnessed by his secretary who signs. However, only the name of the grantee appears on the allocation note.

For Bolgatanga, the evidence of land grant can be only a receipt (where the area is not planned) or a receipt issued with a site plan (where the area has a planning scheme). The receipt is issued when the purchaser insists on it. Where there is no such pressure and the area is not planned, no documentary evidence of title is given. There are normally witnesses from both parties to the transaction, and no condition is attached to the grant of land. The purchaser normally buys some local drinks, and before or after the payment is made, the drinks are shared. The preceding analysis indicates that land grantors in both case study areas do not control land grantees in any way once a land grant is made.

Recognition of Grantees' Land Rights by Grantors

In terms of the recognition of the land rights of grantees, the first three conditions in the allocation note in Tamale clearly show that the grantors recognize the ownership of the land by the grantee as his individual property. It is in the

interest of the land grantee (demand side) to prepare an indenture, register his title and pay ground rent to OASL. By doing so, his ownership will be officially recorded, and this is a form of notice to the public that the property belongs to the grantee. Also, the fact that grantors do not control grantees in any way is further confirmation of the grantors' recognition of the grantees' land rights in Tamale and Bolgatanga. Indeed, when the land grantors were asked whether they consider land allocated to purchasers as the personal property of the purchasers, they all answered in the affirmative.

Recognition of Grantees' Land Rights by Community Members and Strangers

Members of the community equally recognize the land rights of individuals who have been permanently allocated portions of communal land by chiefs in Tamale, as well as by tindamba or farm owners in Bolgatanga. This is irrespective of whether the individual is a member of the community or a stranger. In the neighborhoods, which were selected for interviews for both case study areas, agricultural activities are carried out on a very small scale, especially at the periphery of the neighborhoods. As members of the community, they can carry out agricultural activities on any land, which has not been permanently allocated (virgin/vacant land). The chiefs and tindamba explained that in the past when land was in abundance, members of the community could appropriate vacant land for agricultural use, without reference to them as the custodians of the land. Only strangers needed permission before they could use such land. However, with the contraction in supply of virgin land in the urban centers due to population increase over the years, it is usual even for members of the community to seek permission before appropriating such land.

It was established that when a portion of the communal land is under cultivation by a member or stranger, and that land is subsequently permanently allocated to another person for residential or any other use, the person using the land for agricultural purpose ceases to cultivate the land once he is informed that the land has been permanently allocated. The purchaser can, however, still allow the person cultivating the land to continue to use it, if he (the purchaser) is not going to use it immediately. This shows that other members of the community and strangers recognize the ownership of land by an individual as his private property once it is permanently allocated to him. Any other person who temporarily wants to use the land, where the land is not in use by the purchaser, needs permission. But permission to use somebody's land does not amount to ownership of the land. The land grantees themselves recognize that the land they purchase is their property. When a question was put to the purchasers as to whether the land they purchased was their property, they were all unanimous in their responses to the effect that it was their individual property. In fact, a lot of them expressed shock

at such a question. In the words of a respondent: "How can you buy something and that thing will not belong to you?"

The analysis has shown that in both study areas when land is permanently allocated, land-grantors do not interfere in the actions of land grantees in the use of their land. When land is purchased, the land grantees acquire the customary freehold or usufructuary interest in the land, and the allodial ownership by the community in such land becomes notional (existing only as an idea, not in reality). Therefore, the land grantees have ample scope for their own initiative within the framework of notional ownership – the land can be inherited and can also be assigned or resold. The property only reverts to the community when the land grantee dies and there are no heirs. However, any land that is not permanently allocated (for example, vacant land, water ways, and pasture land) is still vested in the community, and, therefore, any member of the community or stranger can use such land. Thus, the traditional land tenure system can be perfectly described as dual. The dual nature of traditional landownership is shown diagrammatically in Exhibit 5.

This evidence is corroborated by the observations of some scholars. According to Pogucki (1951, 1952, and 1955), once a customary freehold comes into existence the community has no power to grant conflicting rights to anyone else unless the interest-holder consents. Asante (1975), in supporting the view that customary land tenure permits individual ownership, observed that the declarations of courts on traditional land tenure systems, based on Chief Justice Rayner's report of 1898, demonstrates, first, the tenacity with which the courts clung to the concept of communal ownership as the first postulate of customary land law, and second, it discloses the essential a priori approach of the courts; a judge first proceeds by postulating that land belongs to the community and then applies the postulate to the case before him.

Woodman (1985) noted that in the traditional land sector, for practical purposes, the community's allodial title is extinguished when a usufructuary title arises in the land, and the community's interest becomes as insubstantial as the English Crown's ultimate ownership of English land. The usufructuary title is analogous to the modern fee – simple in that it is in theory a tenancy but in practice ownership of all rights in the land, subject only to general restrictions imposed by the state on the enjoyment of the land (Woodman, 1985). Also, according to Gyekye (1998), the communal land ownership system is actually a private property right system in that though communally owned, several

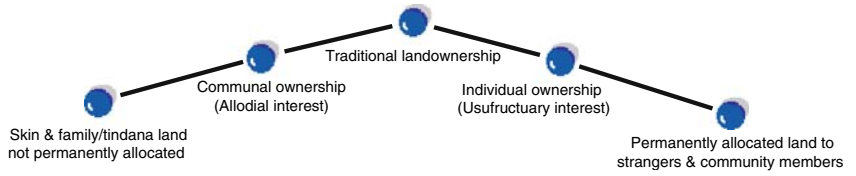


Exhibit 5 Dual nature of traditional landownership in Tamale & Bolgatanga

people, namely, the individual members of the clan (usufructs) have a share or interest in it. The proceeds from the land allocated to a person belong to that person and not to the clan.

The evidence is further supported by decided cases. In *Ohimen v. Adjei* (1957) 2 W.A.L.R. 275; *Tawiah v. Gyampo* (1957) 3 W.A.L.R. 293; and *Amoabimaa v. Okvir* [1965] G.L.R (S.C), it was decided that the customary freeholder could sue the community for a declaration of title, damages for trespass, or recovery of possession (Cited in Woodman, 1996). Furthermore, in *Kotei v. Asere Stool* [1961] G.L.R. 492, Lord Denning had this to say: "Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in land which the subject can use and deal with as his own" (Cited in Kasanga, 1984).

Conclusion

This chapter has analyzed the traditional system of landownership in Ghana, using Tamale and Bolgatanga as case studies, and this offers a better understanding of the way the systems operate in practice. The relationship between the community and the land in the customary land sector may seem complex in that the rights of the individual members often coexist with those of the community, but the individual members definitely hold ascertained and well-recognized rights within the comprehensive landholding group.

The traditional systems of landownership have been explained through the notion of the "tragedy of the commons" (free-for-all situation), the thesis of Hardin (1968). Migot-Adholla et al. (1991) have aptly observed that most foreign anthropologists, colonial administrators, and nationalist ideologues have incorrectly represented indigenous land rights systems.

As rightly observed by Woodman (1985), the dual nature of traditional landownership in Ghana is analogous to the English system of land ownership. The allodial interest in land in England is vested in the Crown on trust for the citizenry (which is communal ownership), while any other person or the citizenry holds the usufructuary interest (which is individual ownership). The allodial ownership of the Crown in any land owned by an individual is jurisdictional or ceremonial. However, nobody describes the English landownership system as communal, which does not permit individual ownership. The criticisms of customary land tenure systems in Ghana are exaggerated or ill informed and rest on insufficient knowledge of how the systems function in practice. The assumption that there is some common factor labeled communal land tenure, which does not permit private individual ownership of land rights, betrays a gross misunderstanding of the operation of customary land tenure systems.

The findings of the study have two main implications. Clearly, the traditional land tenure systems do not constrain individual ownership so as to be an impediment to the economic use of land. This is a very important signal for

both policy makers and development agencies for the correct regulatory systems to be adopted and implemented in the interest of economic development. Elsewhere, writers and observers share the same misconception about the way the traditional systems operate. Therefore, the findings also serve as the basis for research to be conducted in other countries.

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Real Estate Practices Among Indigenous Peoples in Southern Africa: A Clash of Real Estate Systems on the Urban Fringe

Robert A. Simons and Francois M. Viruly

Abstract This investigation into the real estate practices of indigenous peoples in Southern Africa is accomplished through an extensive literature review and interviews undertaken with tribal members across Southern Africa. Literature of indigenous real estate studies and South African real estate history and laws are addressed. The conventional U.S. and North European model of real estate (e.g., the real estate bundle of rights) is examined and juxtaposed with the scenario that exists in six tribes in four nations, as well as three overlapping/derivative/melded cultures in South Africa and adjacent countries in Southern Africa. The study draws the conclusion that the U.S. bundle of rights applies in parts, but communal rights, (which are often not reflective of the private bundle of rights) play a dominant and important role in real estate decisions and relationships. Communal arrangements implemented and managed by tribal Chiefs in Southern Africa often dominate outside urban areas. Yet, in South Africa, tribal lands operate in a dual system, with the tribal systems placing substantial limits on control and disposition, without offering the potential for conventional financing, and often not offering formal ownership. Governments across the Southern African region are developing land management and ownership systems that challenge traditional African land ownership and transfer systems, making it possible for households to acquire some of the rights associated with formal real estate ownership. But, at the same time, the formal system comes with its problems, which include slow bureaucratic procedures and associated costs which the poor cannot afford. This also implies that Real estate development in a dual land title system along the urban edge of cities, remains a challenge for policy makers, The challenge lies in finding institutional mechanisms that gradually transform one type of real estate ownership into another, but which at the same time offers the advantages of the market and indigenous land transfer and management systems.

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Introduction

This study is an investigation into the real estate practices of indigenous peoples in Southern Africa. Through case studies and interviews, the study seeks to determine if all, or part of, the conventional U.S. model of real estate ownership (e.g., the real estate bundle of rights) applies and whether it should be applied to the often poverty-stricken indigenous, overlapping/derivative/melded cultures of South Africa and nearby Southern African countries. The real estate bundle applied under these scenarios is disaggregated into its constituent parts, and each component (e.g., right to control, right to dispose and usage) is considered separately. The research approach is closely related to real estate studies undertaken, by, for example anthropologists, and this body of literature is considered and analyzed. The now defunct South African apartheid laws continue, through existing legislation and land management systems to influence land ownership patterns, and the issue is covered in detail. Generally, it is found that the U.S. bundle of rights applies in parts, but that communal rights, which are not part of the bundle, also play an important role in real estate decisions and practices in Southern Africa. In fact, communal arrangements dominate outside the major urban areas, and conventional financing is generally unavailable. This study indicates that there is growing evidence that governments in the region are developing land management and ownership systems that, with difficulty, attempt to extinguish the traditional land ownership and transfer systems of indigenous peoples and replace such arrangements with systems based on private ownership based on formal legal principles. At the same time, informal property development and land invasion at the urban periphery brings tribal and formal systems into conflict, often prior to intervention by policy makers.

In this study, Southern Africa consists of the Republic of South Africa (RSA), Swaziland, and Lesotho, the latter being independent nations entirely landlocked within RSA. The neighboring country of Botswana is also included in the study. Exhibit 1 is a map that shows the relative locations of these countries.

From a methodological perspective, the focus is, however, primarily on South Africa, which has an open economy fully engaged and affected by global markets. Developing countries, such as South Africa, also offer an economic duality, which includes both 1st and 2nd world components and which are difficult to manage under a single set of policies and interventions. Added to this is the country's colonial past, where both Dutch and British systems influenced the existing legal framework and land ownership arrangements.

The country has a dozen or more indigenous tribes who have specific cultural characteristics and related land ownership arrangements. In the early 1990s, apartheid, the South African social and political policy that separated the country on a racial basis, was overthrown, and major changes to the political and business environment have occurred since. Moreover, as the prospects for South African economic growth and development accelerate, there is growing



Exhibit 1 Map of Southern Africa here
Source: US CIA website

pressure on land on the periphery of metropolitan areas, where there is often the intersection of multiple cultures. The formal, indigenous (tribal) and informal real estate systems (which predominate both in rural and urban settings) are increasingly intertwined in such locations, resulting in a system that is a hybrid. One focus of this research is to analyze how indigenous land systems adapt to formal market forces or whether these indigenous arrangements are being extinguished through the prevalence of market forces.

The study is organized as follows: the next section is the literature review of real estate anthropology, and coverage of South African land legislation, followed by characterization of South Africa land settlement schemes. The land systems of three neighboring countries (Botswana, Swaziland and Lesotho) are then set forth. The focus then shifts to the comparative analysis of tribal real estate practices, framed by the categorization of the real estate bundle of rights associated with freehold title in the U.S. and other western nations. The research design, sample, and fieldwork results are presented. This is followed by a focused discussion of urban fringe issues, where formal and indigenous systems are in conflict. Conclusions are then drawn that highlight the difficult policy dichotomies that arise in integrating formal and indigenous land ownership arrangements.

Literature Review on Indigenous Real Estate Rights in General

Real estate studies and land ownership arrangements have been the focus of anthropological and socially based studies for decades. Several recent studies on the topic of real estate rights among indigenous peoples have been published, mostly under the auspices of the Max Planck institute in Germany.

Widlok (2001) reviewed collective land ownership among Australian aborigines and the San (Bushman) tribe in Namibia. The study did not identify or comment upon individual ownership, as both areas were colonialized, and European land ownership concepts have dominated current real estate arrangements. He found corporate ownership (including trusts) to be a collective form of ownership, flexible enough to allow changing membership required in a communal context. He also suggests that when lands were held in the name of an individual (e.g., the king), the King was considered to have both a personal self and a corporate self, and that these could be different, the second permitting the usage of land by communities and individuals. He found the San were attempting (unsuccessfully at the time of writing, but eventually successfully, as of late 2006) to obtain title (or reclaim their traditional use rights) to their lands, using a corporate or trust entity. One reason believed to delay their success was the political upheaval and transition from the old apartheid system. In Australia, a group of aboriginal members, the Torres Strait Islanders, were able to collectively reclaim tribal lands and were entitled to "possession, occupation, use and enjoyment of the lands of the Murray Islands" (Mantiziaris and Martin, 2000: p98). The ownership was to be corporate, e.g., "held as a group."

Widlok (2000) also studied the real estate ownership rights among the Aoni, a Khoisan- speaking people in Namibia (also known as Bushman). The study focused on rural real estate ownership, use and enjoyment of the [!nara] plants, a key main staple food in a generally dry and hostile environment. The traditional system was two-tiered: Land was owned communally, but the rights to certain [!nara] plants (but not necessarily the land they were on) and their fruits were "owned" by specific family groups. The chiefs and elders enforced these use rights. Thus, such a system has a mix of communal and private real estate rights, water rights being owned by the state. But, as is emphasized in this Chapter, the weakening of the chieftain system, changing environmental conditions, and a growing number of family members being in the wage economy, the [!nara] fields having become less important, and the use rights shifting to first come first served (e.g., similar conceptually to appropriative water rights in western U.S. states) have generally weakened the indigenous system. Further, no prestige or status was apparently accorded to owning the use rights to these plants.

Donahoe (2002) studied the property rights of reindeer-herding peoples in Siberia, both before and after the fall of the Soviet Union. The Tofa people traditionally had a combination of communal space accessible to all members for gathering near their villages and exclusive clans or family-allocated hunting

grounds that could be inherited. These indigenous peoples did not have a notion of exclusive property rights but killed game could be provided as "rent." After the fall of the Soviet Union, private property rights, with exclusivity, were instituted, based on traditional pre-Soviet land claims. These claims are equivalent to a lease in perpetuity. In the land allocation process, an appropriative system (first come first rights reserved) was instituted, but nonactive (where no rights were exercised) claims could be handed out to others.

Literature Review on South African Real Estate Issues

This section includes a history of South African law and real estate history, followed by a characterization of several types of formal and tribal settlement arrangements promulgated under the apartheid system, which among others, divided the country on racial lines.

The Republic of South Africa (RSA) has a democratic form of government, and with about 45 million people, is the largest country in southern Africa. It has a diversified and growing economy based in mining, ecotourism and regular tourism, agriculture, and general services. With its healthy economic growth rate of about 5%, it is a magnet that attracts immigrants from other African nations and investment from other parts of the world. Major cities include Johannesburg, Cape Town Pretoria, and Durban. South Africa has over a dozen recognized languages and tribal groups. Since the governmental policy of apartheid (enforced racial segregation, with substantial discrimination against the Black African majority population) was overturned in the early 1990s, the government has embarked on a sensible, measured policy of economic growth fully in tune with the world economic trends and also transferred wealth and land assets to its Black population. However, the gap between rich and poor, while shrinking, remains substantial. GDP per capita in 2005 (according to wikipwdia.com) was $12,200 U.S. For more detailed coverage of South Africa's economic condition, see Newell et al. (2002).

Historically, the South African legal and land ownership system was influenced by Roman Dutch law, a system that was never done away with when the British took over Cape Colony in the late 1800s. The core feature of the Roman Dutch rights of ownership is the right of disposal of some or the entire bundle of rights associated with a parcel of land. This feature was consistent with the capitalism of the Victorian/colonial era.

As discussed by Wilson et al. (2000) others, during this early stage in South Africa's history, Black African peoples were already present. They lived according to their own tribal legal land ownership systems. These were made up of unwritten customs that were passed on from one generation to the next. These arrangements differed from one tribe to the next and from one territorial area to the next. Such arrangements largely regulated the relationships between individuals and not relationships between individuals and the state. Such

indigenous structures also tend to be more communal orientated than the individualistic Western approach. Yet to this very day, the two systems operate alongside each other in South Africa, hence the dual formal (national, provincial, and local government systems of formal registration of land deed and title) and tribal (customary land management typically directed by chiefs, outside the formal government system) dichotomy. Wilson et al. (2000) also provide a nice summary of laws up to the late 1990s in South Africa.

The colonial authorities generally ignored the indigenous systems, although over time the indigenous systems were given increased recognition through special tribal courts. After 1913, and up through the Apartheid period (1948–1991), South African land policy was driven by apartheid legislation which, over time, not only severely reduced the potential for ownership by Blacks in urban area but to some degree promoted indigenous land ownership arrangements, especially in the homelands that were created for the Black population. Of particular importance was the Bantu Homeland Citizenship Act of 1950 that started to limit and control the movement of Black people (through the infamous Pass Laws) for the purpose of maintaining racial separation and other apartheid-driven policies. Also, with time, numerous legislative regulations where introduced in order to bring indigenous (tribal) arrangements within the public sector policy.

When the apartheid era was disintegrating, increasing consideration was given to the view that non-Whites should be provided with land title within rural areas. The policy shift was from expulsion to control. In 1988, The Prevention of Illegal Squatting Act 52 of 1951 was amended to strengthen powers against a widely defined notion of squatting, but the urban influx was too large to alter the trend. This continues to place considerable pressure on the demand for land on the periphery of existing metropolitan areas.

The next critical step was the formulation of the "White Paper on Land Reform" that was tabled in the RSA (South African) Parliament in March, 1991. The white paper's fundamental premise was that access to land was a basic human need and should be left to market forces and private ownership. The white paper sets out three principal policy objectives. These were to broaden the access to land rights to the whole population, to upgrade the quality and security of land title for the poor, and to promote the responsible utilization of national assets – such as land. Five acts were proposed and three became law. These were the "Abolition of Racially Based Land Measures Act." "The Upgrading of Land Tenure Rights Act," and "The Less Formal Township Establishment Act."

In the context of this study, it is worth noting that the Upgrading of Land Tenure Rights Act 112 of 1991 considers issues relating to tribal land. The Act states that any tribe is capable of taking ownership in land and provides mechanisms for the transfer of land owned by a tribe. On the basis of an application to the Minister, it would appear that a tribe is defined as a statutory entity for the purposes of acquisition in terms of the Act. The Act continued to give traditional authorities considerable say in the way tribal land is disposed

of, especially when it concerns the selling of land to individuals outside the tribe. As the fieldwork below illustrates, this is still the case today.

At the same time, the Less Formal Township Establishment Act 113 of 1991 reflected the acute and an increasing need for housing. It permitted the establishment of townships using a different set of procedures. The act also made special provision for the establishment of the township by an indigenous tribal group for its own exclusive use – thus recognizing land usage according to a communal/indigenous system. Of equal importance is the fact that the Act makes it possible for tribal authorities to establish a township and to dispose of land with the required authorization of provincial authorities. The main aspect of this legislation is that while traditional authorities retain control over how land is used, the registration of ownership is expected to increasingly fall under the (formal) national land transfer system.

The Interim protection of Informal Land Rights Act 31 of 1996 combats the difficulty inherent in an atmosphere of anticipated major social reform. The Act deals with the vulnerable (without tenure or property rights documentation) occupiers of land with little or no formal documentation, (as well as with the more formal land owners) and is primarily concerned with protecting the occupiers' rights, which were perceived to be subject to an unfair threat from new migrants entering urban areas. The operative section of the Act states that no person may be deprived of any informal right to land without his or her consent, but this is subject to the provisions of the Expropriation Act 63 of 1975, and also the Communal Property Associations Act 28th of 1996.

The Communal Land Rights Act (CARA) has been enacted and affects the transfer and management of land controlled by tribal authorities. The underlying principle of the Act is that it permits the transfer of land from tribal authorities to the community. The Act also provides a mechanism, which permits customary land ownership arrangements to be converted to full title.

To summarize, this historical analysis of land tenure legislation in South Africa suggests that Roman Dutch law and indigenous law have always been enforced side by side. The challenge has been to find mechanisms that allow these two systems to operate in a coordinated fashion. Recent legislative reforms suggest that tribal authorities and communities should have control over land usage – adopting largely the role of local government. Yet, at the same time, there is a desire that issues relating to land ownership and the transfer of properties should fall under a single legislative system.

Characterization of Land Development Schemes in South Africa

Mogale et al. (2005) recently studied informal and formal land settlement arrangements in South Africa. They identify four types of land ownership, namely, proclaimed (formal) townships; township establishment Act (RDP housing program), R 293 (former Bantustan areas), and title under R 188

denser settlements. These are presented below, beginning with those schemes that are considered the closest to the formal market in terms of real estate rights and services.

Proclaimed Townships

Proclaimed townships (legally platted subdivisions) are characterized by high levels of services, well-established infrastructure, and social facilities. Proclaimed townships tend to be located in formal municipal areas and land ownership is reflective of formal arrangements, with the emphasis being on private ownership fully registered with the local authority. Land placed in this category is equivalent to platted subdivisions in the U.S. real estate context.

Township Establishment Act

A further form of ownership is provided under the less formal Township Establishment Act, Act 113 of 1991 (right at the end of the RSA apartheid era). In such areas, residents generally occupy formal houses ranging from the basic "RDP" (Reconstruction and Development Programme) houses (two rooms), costing a minimum of 17,000 Rand (about $2,500) up to a maximum for larger houses (four rooms) of up to 80,000 Rand ($12,100). Ownership of the real estate is held in terms of registered freehold title, and informal (not formally registered) renting arrangements, which have little legal basis, tend to emerge rapidly within these areas. While residents of these two types of property tenure expect to hold their property in freehold title, the standard of infrastructure and levels of service compare more closely with those which occur in the R 293 townships (discussed below, with sewer, water, electricity) than the higher levels of service associated with proclaimed townships.

R 293 Townships

The R293 townships are developments of the former self-governing territory ("Bantustans") areas developed under the apartheid system and have been established under Regulation 293 of 1962. Such settlements typically have a general plan and surveyed stands (lots). In contrast to proclaimed townships, however, they have lower levels of infrastructure and of services notably as electricity, sewer, and water. Furthermore, these townships have limited social infrastructure, such as sports facilities, schools, retail and entertainment sites and parks. Zoning restrictions are less stringently applied, resulting in more overlap between industrial, commercial, residential, and agricultural land uses. Residents of the R 293 townships hold land in the form of Deeds of Grant. Alternatively properties are leased from Grant holders through formal and informal leasing arrangements. However, for the most part there is formal ownership at the lot level, and collective ownership is not the rule.

R 188 Denser Settlements

Established under Regulation R 188 of 1969 are a number of settlements commonly referred to as R 188 denser settlements. Service levels, as well as levels of bulk infrastructure and social facilities in these areas, are very low-to-nonexistent. R 188 settlements were generally administered by Tribal Authorities (the legal term under 1950s legislation for state-recognized traditional authorities), who could allocate lands for residential, commercial, and agricultural use by tribal members. Residents of these settlements occupied land through the issue of Permission to Occupy (PTO) certificate, issued by the tribal authority, which granted the holder utilization rights over the land. In theory, the tribal authority or another office kept records of PTOs, the overarching principle being that the tribal authority owns the land. Thus in South Africa land is held under different forms of ownership, with regulations 293 and 188 providing systems that have tried to bridge the tribal and formal land ownership arrangements.

To summarize, Mogale et al. (2005) suggest that several different land development and tenure schemes have developed over time in South Africa. The diversity of systems is mostly driven by apartheid-era legislation that existed in South Africa. The systems are markedly different and were designed to retain separation between races, and to control the Black population, not for ease of management or development. Several of these systems feature a tribal role in land management and control and still exist in one form or another in South Africa.

National Land Models Adjacent to South Africa

This section examines real estate practices in three neighboring countries: Botswana, Swaziland, and Lesotho. In general, land ownership arrangements beyond the South African borders feature a dual system of land tenure outside urban areas. Unlike the heterogeneous "rainbow" nation of South Africa, which has a dozen Black tribal groups, two distinct White groups (English-speaking and Afrikaner), and substantial Indian and Colored (mixed race) communities, all these three nations are quite homogeneous with respect to tribal membership.

Botswana

Botswana is a country located west of South Africa, and like its larger neighbor, it was also under British colonial occupation. Traditionally a pastoral society based on raising livestock, especially cattle, it has a substantial land area, but only about 1.7 million people. The population is largely from the Tswana tribal group, with remnants of the San people also residing there. English and Tswana

are official languages. The economy is strong, largely because of the diamond mining industry and tourism. The small population means that public services are very good, and poverty very low. GDP (according to Wikipedia.com) was $11,400 in 2005. Most of the population lives in the southeastern part of the country, near the capital of Gaborone. Outstanding game reserve areas are in the north and central parts of the country.

In the case of Botswana, the Tribal Land Act of 1968 transferred the authority over land from the chiefs to Land Boards, with the aim to reduce discrimination between tribes. At present, Botswana has three systems of tenure, namely, tribal or communal land, comprising (74%) total land, state land (23%), and freehold land (4%). Land Boards are mandated to carry out the tribal/communal land management, which involves land allocation, land use, planning, and listening to grievances. Under the tribal communal land tenure system, applicants are allowed to identify pieces of land for residential, commercial, industrial, and agricultural use. In allocating land, the land board may use a certificate of indigenous land grant or a common law lease. An indigenous land grant entitles applicants to user rights, as opposed to full real estate ownership rights.

Swaziland

Swaziland is a small nation, surrounded by South Africa, adjacent to Mozambique. The largest city is Mbabane. It is a monarchy. It is quite homogeneous, dominated by the Swazi tribe and language. It is a traditional society and not very developed economically. Its population is 1 million and per capita GDP was $5,200 U.S.

In Swaziland, two systems of land ownership exist, namely, the Individual Tenure Farms (ITF) and the Swazi Nation Land (SNL). The central objective of the Swazi monarchy has been to return land lost through alienation to settlers and to return this land to Swazis. The Swazi Nation Land (SNL) is vested in the King in trust for the Swazi nation, and, therefore, this land cannot be individually owned or sold. Individuals, therefore, have a right of use but not of ownership. The King governs the land through local chiefs, who act as the main administrators of the land tenure system. In principle, every household, through its main head, has a right to land for cultivation and residence and general rights to communal pastureland. Once an individual has allocated land, he enjoys some degree of security of tenure, including the right to pass the land use on to his children.

Lesotho

Lesotho is also a small nation surrounded by South Africa. The largest city is Maseru. It is a monarchy. It is quite homogeneous, dominated by the Sotho

tribe and language. It is a traditional society, and not very developed economically. It exports water to thirsty South African Cities such as Johannesburg. Its population is 1.8 million and per capita GDP was $2,100 U.S.

Land in Lesotho is vested in the Basotho nation. There is, therefore, no individual ownership of land. There are also no individual rights to grazing, since all members of the community are entitled to communal grazing. Before independence, in 1966, the King's powers of land allocation were delegated to the chiefs. After independence, land was transferred to the King, who holds the land in trust for the Basotho nation, but the chiefs retained control over land allocation. In 1979, these powers were transferred to community-based institutions. As is the case in other Southern African countries and tribal arrangements in South Africa, the beneficiaries of land have the right to occupy but not to transfer this land. Lesotho law also provides a life interest, which means that rights are transferred upon death. Community ownership occurs in communal stock grazing areas. No lease is issued on such land, since it is used for the duration of the association. There also seems to be some difference between land held in rural and urban areas. In urban areas, a leaseholder has complete control of the allocated land. Lessees are entitled to exclusive possession and may, subject to the consent of the relevant Minister, undertake normal commercial transactions.

Refocus: Western/U.S. Real Estate Rights Paradigm

This section reintroduces the real estate bundle of rights, as a means of setting the framework for the tribal interviews and investigation undertaken in Southern Africa. The freehold system in the U.S. market is used as a baseline, because it is largely similar to the systems found in other Western freehold market systems.

In the United States, about two thirds of all real estate is owned by private entities, with about one third owned by federal, state, and local governments. The bulk of government ownership is military, park, forest, and rangeland, concentrated in the Western states. About 2% is owned by the U.S. government on behalf of indigenous Native American Tribes (Miles et al., 2001). Virtually all the urban land and viable farmland is owned fee simple (subject to mortgage liens, of course). Fee simple land ownership typically includes a number of real estate rights, usually referred to as "the bundle of rights". This includes the right to control, use, quiet enjoyment, and disposal, of real estate, including the air, surface, and subsurface rights, subject to zoning and government regulations. The right to control means the right to exclude others (e.g., prevent trespass), to redevelop or make changes to the real estate, and use any financial equity imbued in the real estate by refinancing the real estate without sale. Use and quiet enjoyment are closely related. Use means the actual use of the property for all purposes, such as shelter services, gardening, occupation, and exercising

mineral rights if applicable. Enjoyment for rental or investment property indicates rental income or profit, whereas for owner-occupied residential real estate, it means quiet use and enjoyment. Disposal means being able to sell and finance the property. Air rights indicates future development rights or solar access, surface rights pertains to built improvement in the context of current zoning, and subsurface rights is indicative of mineral or water rights. These terms are used in the indigenous peoples interview table presented in Exhibit 2.

In the United States, a title deed system is used, with the title indicating the quality of real estate ownership, with respect to any prior claims, liens, tax assessments, easements, or other subtractions from fee simple ownership. The deed is an ownership registration document that indicates the status of the last transaction – from highest to lowest quality: general warranty (all prior claims are absolved), special warranty (almost all claims are absolved, but one or a select known few are outstanding), and quitclaim deed (only the last owner's claims are absolved). There are also trustee deeds and other types of deeds, which indicate special situations. Because almost all the private land in the United States has marketable title, virtually all can be considered part of the formal sector. The accepted formal land ownership system, therefore, does not impinge on any other land ownership arrangement. In the United States, there is almost no informal housing sector: All real estate is formally registered, the only exception being that of land or real estate bought on an installment (contract for deed) basis. In sum, the U.S. system has a well-defined bundle of property rights. These are vested in individual owners with formally registered real estate rights. Communal property ownership, as well as informal property issues, is rare in the United States.

Research Design

Having set the stage, this study focuses on the identification of the different types of land ownership systems and rights prevalent in South Africa and in Southern Africa. This is accomplished through the use of structured interviews, which attempt to determine how such ownership arrangements have changed with time. The interviews more specifically focused on the bundle of rights that owners have in different communities, including the right to enjoy, dispose, lease, and have rental arrangements, as well as finance and other specific particularities found in different communities. Communal and alternative governance systems are also explored.

Data were collected on 14 different land tenure situations in and around South Africa. This was accomplished through field visits and interviews with members of six tribes, including Zulu, Xhosa, Pedi, Tswana, Sotho, and Lemba (a Black tribe of Jewish extraction). The respondents were selected in order to obtain a sample of most of the larger tribes in South Africa (Zulu, Khosa, Tswana and Sotho) and a few other tribal entities. The data collected on nearby

counties of Lesotho, Swaziland, and Botswana have already been discussed above. Finally the institutional arrangements found in urban markets, such as informal settlements, formal suburbs, and RDP program participation, which are urban property markets guided by government and formal systems outside any tribal context, are discussed.

Results: Indigenous Real Estate Rights

The matrix which provides the outcome of the 14 interviews (presented in Exhibit 2) suggests that the land tenure arrangements vary from one South African tribal group to the next and from one Southern African country to the next.

Generally the tribal authority (in the name of the Chief) maintains control over the sale of land, especially with respect to who is entitled to initially acquire the land and to whom the occupant may dispose the land (e.g., they may not sell to nontribal members). Thus in the South African context, the possibility to participate in the real estate market can be influenced by one's affiliation to a particular tribe. Indigenous (traditional) law seems to be less stringent when it comes to the usage of land. In most of the interviews it was evident that once land is allocated, beneficiaries are relatively free to use land in its highest and best use – often within the constraints of local government development plans.[1] Such restrictions on land usage tend not to be substantially different from formal freehold property. The possible difference is issues of grazing land in rural areas, the destruction of structures, and the ability to rent the real estate (to outsiders) without the Chief's permission.

In South Africa, regardless of the tribal setting, the communal ownership of land by the tribe was typical. This included a mix of formally registered (with the municipality or sometimes only with a tribal registry) and unregistered title of individual holdings of real estate. Unlike in Botswana, 99-year leases in RSA are very rare. If they exist because of arrangements developed under the Apartheid system, they are rapidly being converted to freehold. Land is held in the tribal or Chief's name, (not in the state's), and tribes may or may not keep registries of individual ownership. In no case was real estate held in tribal name used for collateral in securing a bond (mortgage): houses were built with cash or with money from outside the banking system. This slows development in tribal areas because land cannot be used as collateral, but it also reduces the risk of mortgage default.

As a contrast to the tribal environment, formal urban townships (subdivisions) in South Africa are characterized by freehold title. Properties are

[1] In certain cases, there is also evidence that land ownership is influenced by gender issues. This is particularly true when property is transferred as part of an inheritance, with sons often receiving preference.

bondable (can be used to raise a mortgage) and have virtually all the rights associated with the conventional bundle of rights found in the United States and Western Europe. The exception is mineral rights, which are held by the state. Informal urban settlements (agglomerations of shacks) located on private (nontribal) and on public (municipal) lands, on the other hand, have only the right to use the real estate and to sell the right to use of the property to others. Recognition of informal ownership by the national government is generally associated with the right to acquire a space in the queue for RDP (low-income subsidized) housing.

The interview results also suggest that land reform initiatives, attempting to redistribute and reform land ownership, that are being implemented in South Africa and in the Southern African region are based on a desire to bring land transfer and ownership regimes under a single national system. The focus is on reducing the control of tribal authorities and the land policies that such authorities apply. Thus, while with time one should expect that tribal authorities will lose their influence over land ownership (which will increasingly move to private hands), tribal authorities will, on the other hand, continue to influence land usage for some time to come. The possibility also exists that communities in South Africa will obtain and maintain control of, for instance, mining rights, and grazing rights over agricultural land, as is common in Botswana and other neighboring countries.

Discussion: Urban Fringe Land Development and the Battle Between Indigenous and Market-Driven Property Systems

The fieldwork undertaken as part of this study (see Exhibit 2) suggests that indigenous tribal land ownership comes in different forms. The general principle applied by many tribal authorities is that the land is owned by the chief on behalf of the tribal authority and that members of the tribe are provided with some form of usage right.

Land is transferred in different ways. In certain instances, the tribal authority disposes of land, and in other instances the right to use the land and the improvements can be sold (often at full market value) to members of the tribe. Yet, land acquired through such a process often remains within the tribe, should the new owners decide to sell.

While indigenous land ownership arrangements are able to survive in rural areas, the pressure to change and adapt to more formal private ownership arrangements becomes more intensive closer to urban areas. Because the cost to the householder to obtain land on tribal lands is typically nominal, once the improvements are made, the householder may be tempted to “cash in” and sell the real estate at market prices for a substantial gain, especially in “hot” markets. This may lead to properties being sold to nontribal members. When this happens, the tribal dominated land ownership system (as well as the cohesiveness of the tribe and potential for social friction) may become stressed.

As the urban influence on tribal real estate markets grows, so does the need for the greater integration of the tribal systems into municipal infrastructure, the formal real estate market and the formal legal ownership system. Moreover, there is growing evidence suggesting that land owners close to municipal areas are tempted to undertake market transactions without the necessary formal approval of tribal authorities. The result is that a gradual chipping away of the traditional tribal system occurs. Sometimes this happens without an alternative. The rapid growth of cities in developing countries such as South Africa means that agricultural or urban fringe land has gradually come under pressure to be incorporated into the formal urban land market. A requirement of formal markets is clear title (e.g., without communal ownership), and the ability to obtain a mortgage (bond) for the real estate.

The United Nations Centre for Human Settlements (UNCHS) underlines that In Africa south of the Sahara, indigenous forms of tenure, whether or not formally recognized by states, are among the key forms – or are perhaps even *the* key form – under which people strive to access land, and to maintain secure residence upon it (UNCHS, 1999).

Yet, there is growing evidence that this tribal or indigenous held land is rapidly being engulfed by broader market forces – these often being stronger than the social and political arrangements that attempt to maintain the existing tribal *status quo* over land. This inevitable transfer of indigenous land to the formal sector often results in confusion and lack of security concerning household land tenure.

From a policy perspective, the transition from indigenous to formal land markets provides policy challenges since the peripheral urban land is often controlled by tribal authorities that wish to retain control over both political power and the land. On the other hand, local government authorities wish to bring land into the formal market to meet housing and other requirements.

In South Africa, this market encroachment of tribal land is evidenced in both the Pretoria (Tshwane) the Durban (eThekwini) peripheral urban real estate markets. Durban is a dynamic and growing southern coastal city with a population over 1 million. The growing demand for land arising from urbanization and the concomitant rise in real estate values means that households are tempted to sell land without the necessary approvals from tribal authorities. Such transfers increasingly occur in an informal environment market that is located between the formal and indigenous markets. A similar situation is evident in the South African administrative capital of Pretoria, where the western urban fringe areas encroach on Tswana tribal lands.

International examples exist suggesting that this transfer from indigenous/tribal to formal markets can be achieved in a coordinated manner through required township establishment arrangements. But, more often than not, the transition occurs in an haphazard way, driven by informal market arrangements, with little regard given to town planning and other municipal by-laws. As a result informal land becomes interwoven adjacent to or co-existing with the formal.

As a separate, but related issue, (generally outside tribal control) land use of an informal nature (e.g., squatters in shacks) starts to place further pressure on the formal infrastructure. In South Africa, about 15% of the housing inventory is informal shacks on both public and private (nontribal) urban land. While there is some propensity for immigrants from rural areas to congregate along tribal lines in squatter settlements, in general, tribal real estate customs do not apply here. South African post-apartheid government legislation supportive of squatters' rights, it is also not uncommon for these urban shacks to mature into perceived or actual rights to housing, often on the area where the informal settlement is located, regardless of that location's ability to provide infrastructure to the homes. This claim would then naturally mature into a RDP house, within several years.

New rural arrivals to urban areas (both from within RSA and from other African nations like Zimbabwe) are believed to have a poor understanding of real estate rights and ownership, and often lack the funds to register real estate formally and hence will move onto land whether held by tribal authorities are private households.

Therefore the challenge for developing countries is to ensure that land that is held under a "formal" indigenous system is efficiently transferred to a formal structure under a national deed registry system. Failure in this respect means that land ownership falls outside of the formal and tribal systems, with an informal system the outcome.

The critical observation is that when tribal authorities lose control over land, the shift often tends, because of poor municipal capacity and title issuance, to be towards the informal rather than the formal sector. The ability to direct the transfer of land towards the formal sector is reliant on an efficient transfer process and the ability of local authorities hand in hand with the relevant tribal authorities to effectively manage the transition.

Conclusions

This study draws the conclusion that indigenous (tribal) land ownership and control arrangements remain central to real estate law in Southern Africa, coexisting parallel to the formal real estate ownership system. In several countries in Southern Africa, but not in RSA, indigenous land ownership arrangements have been brought under the control of the state South Africa is in a difficult position of having to work with indigenous and formal land ownership systems working side by side, in the context of a very active private real estate market.

For instance in Lesotho, Botswana and Swaziland, a free market system has not been permitted to take over the land allocation system previously vested in the hands of tribal authorities. In South Africa the situation is different in the sense that the alternative to the traditional or indigenous land ownership system

would be a system based on the free market. A possible middle way would be to vest greater right in local communities, but such rights would be more in the sphere of land usage than ownership of land.

The interviews undertaken in this study also suggest that a difference exists between the manner traditional land ownership systems are applied in rural and urban areas. There is an acceptance that market forces place pressure on land ownership in urban areas. Thus as was illustrated in the ownership system in existence in Lesotho, urban land transactions are handled in terms of the transfer of rights attached to long-term leases. This creates an indirect way of transferring real estate rights, with land being retained by the state or traditional authority. A high level of urbanization has resulted in many Southern African countries urban land encroaching on urban fringe and rural land. The danger of this scenario is that systems are often not in place to adequately transfer land to the free market that was previously held under the control of traditional tribal authorities.

To be effective, such a transfer process requires an acceptance by all parties that the final outcome is acceptable from an economic, social and political perspective. While a free market argument may well suggest that traditional arrangements should give way to market forces (and formal rather than informal real estate title arrangements), in practice, the need exists to create interim socio-political arrangements that can provide acceptable solutions, this would, at a minimum, include the ability to obtain bond (mortgage) financing. The formal/free market approach is sometimes defended on the basis that communal ownership benefits the few who are part of a tribe, supports an inefficient market that is also inequitable because it may exclude female-headed families. On the other hand, the prices that householder occupants pay for the right to use these tribal lands appears quite low, and tribal traditions are an integral part of the social fabric and social security system in the countries which act as stabilizing influences on tribal members.

Even if a transitional approach is adopted, the lack of planning and service capacity at the municipal level means that the ability to absorb land into the formal urban market may be severely constrained. Thus, there is an argument for suggesting that some form of control should in the medium term be left in the hands of tribal authorities and that with time these structures should be integrated in the municipal structures. Alternatively, new municipal structures or sub-structures should be created around tribal authorities that start controlling land in terms of formal market arrangements. One model could be the local Land Boards that operate in Botswana. These feature long leases that allow residential financing to occur.

A transitional approach, therefore, relies on the creation of market institutions that attempt to create institutional structures that permit a gradual transfer of tribal land to private ownership, i.e., the formal market. For instance, it might be possible to create institutions that work from a municipal perspective hand in hand with indigenous procedures. Functions of such institutions and arrangements may include the formal registering of occupancy, the

enforcement of basic land-use guidelines, and mechanisms to settle land-related disputes. From a market perspective, such interim arrangements may mean the formalization of "communal markets", where tribal authorities retain control in the allocation of land, which is then incorporated with a formalized registration system once infrastructure becomes available. The overall objective is to ensure that tribal authorities maintain control over certain aspects of town planning and service delivery, such as the timing and scope of municipal road, water and sewer services, and title registration.

The failure in effectively following a transition from indigenous to private ownership argument is summarized in the "Tanzania Land Act", which suggests that;

> . . .expansion of existing towns and establishment of new towns takes place on land that is mainly held under customary land rights. No legal procedures are instituted to formally extinguish the customary rights before land is reallocated for urban development. Consequently disputes arise due to conflicts between statutory tenure and the unextinguished customary rights (S. Mundene, 2002, p.146).

The transfer of land from the indigenous to the formal sector has been researched in South African peripheral urban areas (Mogale et al., 2005). These studies reached the conclusion that land owners under communal land ownership arrangements are relatively happy with arrangements. They find that "The immediate issue addressed in the study was that many residents were hostile to any idea of change in their tenure conditions. The province had initiated projects (housing included) which required beneficiaries to have formal tenure, yet puzzling to many officials, the population remained unhappy about entering into new tenure relationships". One possibility is that residents are resistant to higher rates (real estate taxes), even if the levels of service go up.

Yet it can be argued that the expansion of South African cities means that in the longer term these tenure relationships will change or at least come under significant pressure. The policy challenge is to identify those issues that create "hostility" to the change in ownership structure and to ensure that to some degree these are mitigated through the implementation of appropriate policies.

There is evidence that little attention has been given to providing an environment that can successfully handle the transition of tribal land to formal land arrangements. Failure in paying attention to this issue will make it increasingly difficult for municipalities in developing countries to plan and manage cities. The overall consequence of neglecting the issue is that land on the fringe of cities becomes incorporated in a haphazard manner. For developing countries, this means developing national policies that effectively address formal township on land held by tribal authorities. This means finding avenues, whereby indigenous land ownership structures are extinguished in a systematic manner that takes cognizance of social, as well as political imperatives. Such policies primarily reflect a bridging mechanism that transfer land from indigenous arrangements to and private real estate markets.

Exhibit 2 Interview Results

Indigenous group or urban market segment	Bundle control	Bundle use and enjoy	Bundle dispose	Bundle air, surface, sub-surface	Fee sample private ownership	Land lease only-99 yrs etc.	Collective ownership	Can rent property	Infromal title and ownership not registered	Can use land us collateral in loan
					Zulu					
Smangele	Chief has the right	Can use for any purpose other than selling and commercial use	Cannot sell (dispose) property. Return it to the chief for other use	The chief has the right to sub-surface	Privately owned, only a small fee R200 + a beer and drink	No	Cemetery, agricultural and grazing land is communally owned	Can rent the property (house) and pay the owner except for the land	Not registered. Informal ownership, no title deeds	No
Zodwa	State	Can use for any purpose, including selling or profit making like running a business	Can sell the land and house	Has the right to air, surface and sub-surface	Private ownership. Sold	No	No	Can rent the property under the owner's name	Formal and registered property with title deed	No
					XHOSA					
Zukiswa	Not sure	Rights to enjoy and use land for any purpose including gardening	Land can be sold, although, they rarely do	N/A	Privately (family) owned, though no formal procedures are followed	No	No laws or policies with regard to that but land outside own yard is communally used	Cant but don't necessarily	Not registered. Informal ownership	No
Ntuli (Pedi Tribe)	State & chief	Can use and enjoy land for any purpose including multi use like house and a huge Garden	Land can be sold by the owner, though hardly done	Enjoy almost all the rights	Privately owned. Buy	N/A	Land for keeping livestock is not communally owned	Land is enough and cheap to access	Registered for purpose of service delivery. Some have and some on't have title deeds	N/A

Exhibit 2 (continued)

Indigenous group or urban market segment	Bundle control	Bundle use and enjoy	Bundle dispose	Bundle air, surface, sub-surface	Fee sample private ownership	Land lease only-99 yrs etc.	Collective ownership	Can rent property	Infromal title and ownership not registered	Can use land us collateral in loan
					Other	**Countries**				
Botsawna	State owned	Can enjoy land for any purpose	Can enjoy this	Enjoy almost all rights	In very few cases	Yes in certain instances	Yes – Some strictly held land title	Owners would be free to rent land	In certain cases this is not clear	Yes, on the basis of a long title
Swaziland	Dual System Government owns land	Enjoyment of full rights	Cannot be sold	Cannot be sold	No. Land is held by the state	Yes in certain cases	Not that significant	Yes	Informal title arrangements exist	No cannot be mortgaged
Lesotho	All land is vested in the Basotho Nation	Yes, including agricultural usage	Cannot dispose of these rights life interest of usage	Usage is enjoyed under a grant or title	Land cannot be trans-ferred but impro-vement can be sold	Yes & can be trans-ferred	Land committees control communal gardens and stock grazing areas	Property can be leased, lease can be trans-ferred including sub leases	There is no informal land ownership	Generally not in rural areas, but seen in Urban areas
Shangaan (tribal homeland)	No	Yes, but no rentals	No, chief decides	Mineral rights owned by state of SA	Owned, but not complete control	No	No	Yes, with permission of chief	Formally registered	Probably
Informal urban shacks	No. can be torn down	Yes	Yes, can sell use rights. No formal title	No	No	No	No	Yes	Yes	No
RDP (entry level formal housing)	Yes	Yes	Yes	Mineral rights owned by state of SA	Yes	Rare	No	Yes	No	Yes in theory, but very low appreciation and may not have credit
Middle class+ formal urban	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No	Yes

Exhibit 2 (continued)

Indigenous group or urban market segment	Bundle control	Bundle use and enjoy	Bundle dispose	Bundle air, surface, sub-surface	Fee sample private ownership	Land lease only-99 yrs etc.	Collective ownership	Can rent property	Infromal title and ownership not registered	Can use land us collateral in loan
Lemba	Once chief allows occupancy, near-full control	Yes, cannot destroy buildings	Yes, to other Lemba without permission, others with permission	Not mineral or sub surface rights	No	No	Yes. Land asserted to be owned by tribe	Yes, with chief's permission	Tribe asserts they own land, land claim filed. No formal ownership for parcels	No
Twswana (Bakgatla Tribe) in SA, former tribal homeland	Once past "income tax" paid, member can get land	Yes, but cannot destroy buildings	Yes, to other Bakgatla without permission, others with permission	Water yes, minerals owned by State of SA	No	Not any more	Land owned by chief as guardian for tribe	Within tribe OK, outside tribe need Chief's permission	Tribal has deed registry. Formally, only chief/ tribal ownership	No
Tswana in Botswana	Once formally leased from land board, yes	Yes, full	Yes	Not subsurface	No	99 year lease	Yes –state owned or local communal ownership	Yes	Formally filed with local land board	Yes

In sum, the issues of indigenous land systems in Southern Africa present challenges both for continued use and development on the urban fringe. Having dual formal and tribal systems confounds the issue of land development and keeps tribal developments outside conventional land development systems, such as bank financing. The challenge of retaining the cultural benefits and cohesiveness of tribal life and easing the indigenous lands into the modern capital markets are important policy questions and are also worthy of additional research.

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A Brief History of Native American Land Ownership

Hans R. Isakson and Shauntreis Sproles

Abstract This study examines the literature in several fields in order to paint a picture of the history of the relationship between Native Americans and land. The study is especially interested in how this relationship evolved over time and in identifying the key events that mark changes in this relationship. Literature from archeology, anthropology, economics, and Native American studies are examined in order to gain insight into the evolution of how Native Americans have related to land over the past few thousand years. Most of the emphasis in this study is upon the more recent past, primarily because it is more relevant to the present (and future), and because there is more information available.

First, the study examines some of the key economics literature regarding how private property rights evolve. Second, the study looks at some of the archeological and anthropological literature regarding the relationship between Native Americans and land during two major eras: pre-Columbian and post-Columbian. Finally, the study discusses the implications of the past on the present and future of the relationship between Native Americans and land.

The Emergence of Private Property Rights

Demsetz's (1967) study of the Montagne Indians of the Labrador Peninsula explains the economic forces that drive a society toward the adoption of private property rights in land. Demsetz argues, quite convincingly, that private property rights emerge as the result of the interplay between externalities. Treating a resource, such as land, as private property rather than as a common resource, is driven by the externalities of overusing a common resource and the externalities associated with treating the resource as a private good. Common resources tend to be overused, especially as the number of users increases, because the claims of the present users are given much more weight in the use of the resource than the claims of future users. Thus, common resources result

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in externalities. When the number of users of the resource in the present is small, the externalities are small. But as the number of users in the present increases, the externalities increase considerably. The present users have insufficient incentive to preserve the common resource for future users. Private ownership of the resource, such as land, will internalize many of the externalities associated with the overuse of common resources.

According to the well-known Coase theorem, in the absence of impediments to exchange, such as transaction costs, property rights will be allocated efficiently in the market regardless of their initial allocation by law. So, the initial allocation of rights in land is not relevant, if there are no impediments to the subsequent exchange of these rights. Unfortunately, the exchange of property rights can be inhibited by high transaction costs, especially when the bargaining agents come from two very different cultures. In order for voluntary exchange of property to occur, those with ownership rights in the property must communicate a series of offers and counter-offers with those who wish to acquire these rights until a meeting of the minds occurs. When the parties speak different languages and come from different cultures, this communication becomes very difficult. Moreover, when the property is owned collectively or is being acquired by a group, these groups are typically represented by bargaining agents. The bargaining agents must not only be able to communicate with each other, but they must also be able to act in the best interests of the entire group they represent. This process takes considerable effort and, subsequently, is costly. Furthermore, even when the parties can communicate effectively, the costs of documenting, recording, notifying others, and enforcing the agreement are also costly. Any system of private ownership of common resources must overcome these transaction costs before it will be voluntarily accepted by the parties involved.

If these transaction costs are too high, and the parties cannot reach agreement, conflict arises. Conflict can be resolved peacefully or nonpeacefully with violence. The clash of cultures that occurred between Native Americans and European settlers led to conflicts that were first resolved peacefully with treaties and later with force and violence.

A society will not voluntarily adopt private ownership of a common resource unless and until the benefits of internalizing the externalities associated with common resource ownership exceed the transaction costs of establishing and maintaining a system of private property ownership rights. As noted by Demsetz, the anthropologist Elanor Leacock observed that the Montagne Indians developed private ownership rights in land after enduring considerable externalities associated with the overhunting of game. These externalities were exasperated when the Montagnes began to trade furs for European goods. The emergence of the fur trade increased the value of furs to the Indians and, as a result, the scale of hunting activity increased dramatically, thereby increasing the externalities associated with free hunting. In order to internalize these externalities, the Montagne voluntarily adopted the concept of private ownership of land and the game on that land, because the benefits of internalizing

(not overhunting) the externalities exceeded the costs to the Montagne of limiting the hunting rights of individual members of the tribe. The Montagne adopted their private ownership of land system with only limited contact with Europeans. The major force that enabled the adoption of private ownership of land among the Montagne was the sale of furs to Europeans for goods not otherwise easily available.

So, from an economic perspective, collective ownership of land will naturally evolve into private ownership as the externalities of overuse (of the land) increase, generally with increased population, and as the transaction costs of trading privately owned land decrease. Some Native Americans were experiencing this evolutionary process very soon after contact with European culture. But, prior to this contact there is very little evidence, as the next section discusses, suggesting that the process was underway.

Pre-Columbian Era

The pre-Columbian era is defined as that period of time after North America was inhabited by its original settlers to before contact with Europeans. There are no definitive dates to earmark the beginning of this era. Also, the end of the era varied largely from east to west and south to north in North America, along the migration routes of European settlers. Information regarding the habits and practices of Native Americans during this era is derived primarily from archeological and anthropological literature. The era can be roughly divided into two periods of time: pre-equestrian and post-equestrian. The pre-equestrian era is the longest, while the post-equestrian era is arguably the most important as far as ownership of land is concerned.

Pre-Equestrian Era

The archeological and anthropological evidence during the pre-equestrian era strongly suggests that Native Americans treated land as a common resource. For example, Nies (1996) notes that pre-Columbian, Native American tribes traded personal property but never land. Oswalt (2002) observes that boundaries between pre-Columbian, Native American tribes were fuzzy at best, with frequent conflicts between neighboring tribes. Although, according to Smith (1999), pre-Columbian Native Americans had developed a system of private property rights for personal (nonreal) property, Demsetz (1967) points out that they treated land as a common resource. Linda Barrington (1999) reports that pre-Columbian Native Americans had developed specialization of labor in manufacturing, urban population centers, long-distance trade, and a system of taxation, but had not developed the concept of private ownership of land.

Unlike in Europe, population densities in North America were not sufficient to warrant the development of private property rights in land. As long as there is ample land for everyone to share as a common resource, there is no need for the society to develop private property rights in land. For the pre-equestrian era Native Americans, land and the fruits of the land were so abundant that they saw no need to adopt the concept of private ownership of land. Instead, land was considered a common resource, a gift of God, if you will, available to everyone for their enjoyment. Yes, there were conflicts between neighboring tribes over which tribe could enjoy the fruits of the land. But, these conflicts were not sufficient to overcome the transaction costs associated with private ownership of land.

Anderson and LaCombe (1999) report that pre-Columbian Native Americans adopted concepts of property rights to suit their particular needs. For example, among the hunter – gathers, cooperation was a necessary condition for survival. So, some items were treated as personal property but not land. Property rights generally followed what Anderson and LaCombe call the "work-use-ownership" principle. If you did the work to acquire a thing and used it productively, it belonged to you. This principle applied to game, plants, and tools. Cooperative efforts, such as collective hunts, required some means of allocating the fruits of the hunt. Generally, those who participated in the hunt got a share of the fruits of their labor, with larger shares sometimes going to the leaders of the hunt or the owner of equipment used in the hunt.

During the pre-equestrian era, Native American tribes and bands were limited in their range of travel. This limitation in turn limited the size of the territory that any particular tribe or band could control. Tribes would occasionally interact in voluntary trade, and territorial disputes were infrequent. The introduction of the horse drastically changed things.

Post-Equestrian Era

Anderson and LaCombe (1999) point out that after the introduction of the horse in Mexico by the Spanish around 1600, the territories of Native American tribes began to expand and collide. So, long before contact with European settlers, Native Americans were feeling the impact of the European culture as the use of the horse spread northward. The horse also reduced the scale economies in hunting, leading to more numerous, independent bands. According to Anderson and LaCombe, the need for community cooperation declined, and intertribal warfare increased. Moreover, horses were considered personal property, the acquisition of which was a sign of wealth. Nonetheless, even with the reduction in transit costs and increased mobility provided by the horse, Native Americans still regarded land as a common resource. Territories got larger, but the common resource concept of land did not change, primarily because Native Americans did not overhunt their lands. Most tribes and bands would simply migrate as game diminished within their territory.

Roe (1955) observes that acquisition of the horse had a tremendous effect on the lives of Native Americans. Pre-equestrian, Native Americans were seminomadic, cultivating crops and hunting small game. Roe (1955) notes that post-equestrian, Native Americans gave up agriculture for a lifestyle of pillaging and prowling on the plains. Their diets became dominated by buffalo meat, as they used horses more and more effectively in hunting. Although the horse reduced the scale of tribes and bands and fewer people were needed for a successful hunt, Native Americans still regarded land as a common resource. But, conflicts between neighboring tribes and bands increased dramatically, as each attempted to protect and expand their traditional hunting territories.

So, the externalities associated with the collective ownership of land were increasing prior to contact with Europeans, but not enough for the concept of private land ownership to evolve naturally. No agreeable legal system existed to minimize transaction costs, and the population density of Native Americans was not sufficient to generate the level of overhunting needed for a system of private ownership of land to evolve naturally. However, as discussed in the next section, direct contact with European settlers would induce more changes than those attributed to the introduction of the horse.

Post-Columbian Era

As the population of European settlers increased, the externalities associated with treating land as a common resource increased dramatically. A classical "tragedy of the commons" developed as Europeans over-hunted fur-bearing animals on Indian lands. As Demsetz (1967) notes, the externalities associated with this overhunting tipped the balance between the value of internalizing the externalities with the cost of imposing private property rights on hunting lands. But, mutually agreeable private property rights in hunting lands were not easily created, much less enforced. As Umbeck (1981) points out, any agreed-upon set of property rights is unstable, if anyone has less by abiding with the agreement than he/she could take by force. By-and-large, early European settlers had no idea of the size or might of the Native American tribes. So, the European's choose to acquire private property rights in land from Native Americans, especially the fruits of the land, such as fur-bearing game, using treaties and voluntary trade.

Treaty Era

During the initial contacts between European settlers and Native Americans, many conflicts were resolved peacefully with a treaty. Europeans were already very familiar with the use of treaties as a means of resolving conflict between neighboring states. The earliest treaties were between Native American tribes and agents of European governments, especially the French and English in the

north and the Spanish in the southwest. After the creation of the United States, this practice continued with treaties being made between particular tribes and the U.S. Government. Kappler (1904) reports that at least 322 treaties between the United States Government and Native American Tribes were recorded between 1778 and 1886. Records of treaties before 1778 are scarce, largely because none of the parties kept records, and many of these pre-1778 treaties were verbal. Yet, the early treaties worked, because the parties were committed to resolving disputes peacefully. Each side, European settlers and Native Americans, were highly uncertain of the military strength of the other side, and the gains to peaceful coexistence were evident. The Europeans had products never seen before by Native Americans, while the Native Americans had food and, especially, furs for trade. So, conflicts were rare.

As reported by Anderson and McChesney (1999), by about 1850, the number of treaties diminished rapidly, while the number of violent conflicts between European settlers and Native Americans increased dramatically. As European settlers increased in numbers, they became aware that they could usually win in any violent encounter with Native Americans. Moreover, European settlers discovered that they could produce food and trap fur just as well as the Native Americans. So, the incentives for trade diminished. But, as European settlers occupied Native American territories, the Indians fought back. In order to deal with this problem, the United States Government enacted several key acts, each of which had rather dramatic effects on the relationship between Native Americans and their land.

In addition to resolving disputes, terms were often built into treaties to encourage Native Americans to become yeomen farmers, just like most European settlers. Gibson (1987) traces the use of allotments to introduce the concept of private ownership of land to Native Americans by the Massachusetts General Court in 1633. An allotment is a track of land granted to individual Native Americans in severalty as part of a treaty. The purpose of granting allotments is to give Native Americans a taste of the benefits of owning, working, and living off a relatively small (often a quarter-section) parcel of land. Allotments were a common element of many treaties. They were seen as a tool for the civilization of Native Americans. Allotments might have worked their desired magic, but, as discussed below, the way in which they were implemented doomed them to failure.

Also, Listoken (2006) recognizes the role of treaties in establishing the sovereignty of Native Americans. Although the U.S. government never delivered on many provisions of many treaties, federal courts have upheld the right granted to Native Americans in many treaties.

The Indian Removal Act of 1830

The earliest attempt of the U.S. Government to deal with the problem of increasing violent conflicts between European settlers and Native Americans

was the Indian Removal Act of 1830. This Act empowered the president to negotiate for land exchanges with Native Americans and to make payments for improvements on the land. The Act also provided $500,000 to pay for the voluntary relocation of Native Americans into Indian Territory, a large track of land between the Missouri and Red Rivers, west of the Mississippi River. The purpose of the Act was to deal with the increasing conflict between settlers and Native Americans in the eastern United States, by encouraging Native Americans to relocate to less populated land west of the Mississippi River. Unfortunately, the Act was not well implemented by Andrew Jackson and his successor Martin Van Buren.

According to Cave (2003), although Jackson asked for authority to forcibly relocate Native Americans, Congress did not give it to him. Native American lobbyists and sympathizers were able to persuade Congress to defy Jackson's wishes. Yet, Jackson not only used force to relocate Native Americans but also unilaterally abrogated treaties. Moreover, Indian Agents, appointed by the Jackson administration to represent the rights of Native Americans, made a laughing stock of the entire process. To make matters worse, as settlers moved further west, and as gold and other valuable minerals were discovered on Indian lands, the conflicts that the Act was supposed to eliminate reemerged. In short, the Indian Removal Act not only failed to achieve its desired end, but it nearly lead to a constitutional crisis between Congress and President Jackson.

Moreover, the Act did nothing to further the concept of private land ownership in severalty among Native Americans. If anything, the Act and its implementation by the Jackson and Van Buren administrations drove a wedge between Native Americans and the land of their ancestors. The hardships endured by forcibly relocated tribes have become the basis of many dramatic stories. The Cherokee Nation's "trail of tears" saga and the pursuit of Chief Joseph of the Nes Perce Indians by the U.S. Third Army are examples of just two of these dramatic incidents. During the period of this infamous Act, Native Americans held, at best, a collective ownership concept of land, if they held any concept of land ownership at all.

The General Allotment Act of 1887 (Dawes Act)

Pressure to open up the Indian Territory and other tribal lands to settlers cumulated in the General Allotment Act of 1887. This Act, also known as the Dawes Act, authorized the President to survey Indian lands, prepare tribal rolls, and assign allotments in severalty of varying amounts of land (160 acres to each family head, 80 acres to a single person under 18, etc.). The Act authorized the President to take land away from an Indian tribe by granting the individual members of the tribe a set amount of land owned in severalty. The Indian allottees were expected to select their allotment land, subject to approval of government agents, but if they failed to do so, the government agents would do

it for them. Thus, government agents could and did forcibly take land away from a tribe by granting the members of the tribe the prescribed amount of land. Originally, the federal government was to hold each allotment in trust for 25 years, after which the land would be owned by the allottee in fee simple. But, subsequent amendments to the act extended the trusts indefinitely. The Act also gave U.S. citizenship to each allottee. Some tribes (Cherokee, Creek, Seminole, Choctaw, Chickaaw, Osage, Sac and Fox, Miami, and Peroria) successfully lobbied for exemption from the law. Surplus lands, that is, lands remaining after all allotments had been granted, were opened to settlement (i.e. Oklahoma land rush of 1889).

Gibson reports that the Dawes Act effectively made Native Americans wards of the federal government. It reduced Native American land holdings from 147 million acres in 1887 to 55 million acres by 1934. It left behind a legacy of complex legal issues between Indians and non-Indians. But, worst of all, according to Lawson (1991), were the thousands of fractional estates created as a consequence of the law. Factional estates were created over and over again as a result of inheritance and the restrictions on the right of alienation. When the original allottees died, their interest in the land was inherited by their heirs, thus fractionating the ownership interests in the land. But, because the land was held in trust by the U.S. Government, the heirs could not simply sell the land, not even to their tribe, and divide up the proceeds. As the heirs died, additional fractionalization of the ownership rights occurred. Currently, the Department of the Interior (2003) reports that about 18,000 individual Indians own fractional estates with a value of $1 or less, and thousands of individuals each own less than 2% of any particular parcel of land. The fractionalization of allotment lands makes it extremely difficult for Native Americans to pool together their individual interests to the benefit of the tribe or others who might be interested in developing the land. Subsequently, considerable amounts of allotment land sit idle. Eventually, Congress created the Indian Reorganization Act of 1934 in an effort to deal with the problems created by allotment lands.

Unfortunately, the concept of allotment created by the Dawes Act was very different from the concept of allotment used in earlier treaties. The key difference is the restrictions placed on the right of alienation created by the Dawes Act. Because Congress did not trust Native Americans to take good care of their allotted land, they placed the land in trust for the benefit of the allottee. This restriction increased dramatically the transaction costs of trading the land, making these transaction costs considerably more than the benefits of internalizing the externalities associated with treating land as a common resource. Thus, most Native Americans held fast to the common resource concept of land ownership. Tribes saw the act as a devise for forcibly taking away their collectively owned tribal lands, which it was. In exchange, each member of the tribe was entitled to his or her allotment of land, held in trust by the federal government, but otherwise owned in severalty. Unfortunately, the restriction on alienation created by the trusts dramatically reduced the value of allotment land in exchange and basically prevented improvement of the fractional estates.

The Indian Reorganization Act of 1934

The Indian Reorganization Act (IRA) of 1934 dealt with problems created by the allotment process by prohibiting further allotment of Indian lands. It also formally extended indefinitely the periods of trusts and restrictions on the right of alienation. It restored tribal ownership in common of remaining surplus land, with the requirement that this tribal land be held in trust by the federal government (no right of alienation). But, the Act did not apply to any existing reservation land, if a majority of the members of the reservation voted against it. The Act also excluded many tribes, as did the Dawes Act.

Lawson (1991) reports that, although the IRA of 1934 put an end to the allotment process initiated under the Dawes Act, and it reaffirmed the concept of common ownership of Indian lands, it did little to correct the problems of fractional estates. The IRA was enacted after nearly one-quarter million allotments had already been created, representing over 40 million acres of land, and Indian lands had been reduced to 52 million acres from 138 million acres (through sales of surplus lands). Ultimately, the IRA failed to provide for the consolidation of fractional estates. But, without the IRA, the problems of fractional estates would have been far worse, and more and more surplus Indian land would have been sold to non-Indians.

The Indian Claims Commission Act of 1946

In an effort to settle the vast number of treaty violation claims filed by Native American tribes, the Indian Claims Commission Act was signed into law by President Truman on August 13, 1946. This Act provided a forum in which Indian claims based on events that occurred prior to the Act could be adjudicated and placed a statute of limitations on the adjudication of these types of claims. Thompson and Thompson (2001) report that by the time the Commission ended in 1978, the Commission awarded an average of $2.4 million in damages in 341 cases (just over 62% of the claims heard). The most prevalent type of case involved the taking of tribal land without compensation. Although other types of cases were also heard, such as the return of sacred tribal land to the tribe and whether money held by the U.S. Government in trust for a tribe should earn interest. During the life of the Commission, nearly every tribe in the U.S. filed one or more claims with the Commission.

Although the ICC Act was supposed to put an end to all Indian claims arising from events prior to 1946 after the Commission disbanded, Thompson and Thompson report that many tribe still pursued claims against states and even private citizens. But, the ICC Act was indeed unique, in that it provided Indian tribes a forum for hearing their claims, while establishing a statute of limitations on these claims. Today, Indian tribal claims arising from events that occurred between 1776 and 1946 are barred forever from the federal courts.

The Indian Land Consolidation Act of 1983

The Indian Land Consolidation Act of 1983 represents the most recent attempt by the federal government to deal with the problems created by fractional estates. The Act makes it possible for tribes to consolidate fractional interests by purchasing them. The Act also makes it possible for tribes to deal with holdouts who refuse to sell their fractional interests by providing that all the fractional interests be sold with the approval of at least 50% of the owners of these interests. The Act also allows tribes to restrict the inheritability by device or descent of tribal land to prevent further fractionalizing and gave the tribes the right of escheat for fractional interests less than two percent of the entire parcel and incapable of earning more than $100 in any one of 5 years after the death of the owner. As noted by Lawson (1991), in 1987, the U.S. Supreme Court (Hodel v. Irving) ruled that this escheat provision constituted a taking of property without just compensation. Subsequently, the provisions of the act were modified, but no tribe has yet adopted an inheritance code containing the escheat provision.

Slowly, tribes began to acquire fractional estates. But, the Act requires that these lands be held in trust by the U.S. Government or be owned collectively by the tribe. Again, this restriction on the right of alienation has lead to other problems. Tribes have been struggling ever since the enactment of this Act to develop a governing system for the management and control of their collectively owned lands. But, it is extremely difficult for tribes to reach collective agreement regarding the management and use of their lands, because inner tribal conflicts often emerge between the traditional leadership council and newly elected tribal governing bodies. These conflicts become quite intense when fruits of the tribal land are being divided among members of the tribe. Today, one of the most valuable fruits of tribal land is the proceeds from gambling casinos located on tribal land.

Present and Future

Today, the various laws used to manage Native American lands have created a situation in which the interests in land held by Native Americans can take one of three forms: allotted land, tribal land, and fee- simple absolute land. The first two forms of land are held in trust by the U.S. Government for the benefit of Native Americans, either the various owners of the allotted land or the tribe. Fee-simple absolute land is land that is owned by a Native American, but not held in trust by the U.S. Government. This last type of land is no different from any other type of fee-simple land. However, the restrictions on the right of alienation attached to allotted and tribal land makes transactions involving this sort of land extremely delicate. Allotted and tribal land should never be assumed to be the same as ordinary, fee-simple land, especially for appraisal

and/or leasing purposes. Although Native Americans cannot grant fee-simple title of allotted or tribal land to anyone, they can lease it to others, including non-Indians. However, enforcement of the terms of these leases can be very difficult, especially for non-Indians. Typically, the terms of a lease of allotted or tribal land are subject to the laws of the tribe, not the laws of the state in which the land appears to be located. Many tribes today consider themselves to be sovereign nations surrounded by another nation. Indian law governing land is currently in the process of evolving.

The Bureau of Indian Affairs periodically takes an inventory of Indian reservation lands. Exhibit 1 summarizes the amount of reservation land under the management/ownership of BIA in the most recent year (1996) for which the data is available. Most reservation land is in tribal trusts. A significant amount of land is allotted and still highly fractionated. A small portion of the reservation land is owned by the BIA. All these reservation lands are supposed to be managed by the BIA for the benefit of the tribe.

Land uses that best benefit the tribe are determined by a duly elected body of tribal members. Unfortunately, decisions by a duly elected body of tribal members can and do get overthrown by members of the tribe who disagree with the elected body, especially if the stakes are high. For example, a dispute between the traditional tribal leadership and the elected tribal leadership among the Mesquakie (Sac and Fox Nation) Tribe near Tama, Iowa resulted in the temporary closing of the casino located on their land. The stakes (casino revenues) were high, and the traditional tribal leaders did not like the way the elected leaders were spending the casino revenues. The traditional leadership

Exhibit 1 Reservation lands (acres) by region

Region	Tribal trust	BIA owned	Allotted	Totals
Alaska	32	–	1,056,530	1,056,562
Eastern	571,808	225,849	–	797,657
Eastern Oklahoma	78,082	861	567,265	646,208
Great Plains	2,888,420	4,580	3,043,910	5,936,910
Midwest	1,348,723	429	142,455	1,491,607
Navajo	15,476,731	139,581	709,623	16,325,936
Northwest	3,956,493	33,532	874,128	4,864,152
Pacific	405,133	68	62,852	468,052
Rocky Mountain	3,580,748	95,109	2,903,580	6,579,438
Southern Plains	43,387	25	414,280	457,693
Southwest	4,599,100	138	65,339	4,664,576
Western	12,317,926	135,651	272,853	12,726,430
Totals	45,266,583	635,823	10,112,815	56,015,221

Source: Bureau of Indian Affairs – Realty Division – December 31, 1996
Note: The Regions in this table are mutually exclusive areas. A map of these regions can be found the BIA web site. This table shows the most recent data available from the BIA. The Listoken data are taken from a different source. See Listoken p.95, 108 and others for more recent info.

forcibly evicted the elected leadership from the tribal headquarters office and promptly scheduled a new election. The elected leadership scheduled its own, separate election. The Bureau of Indian Affairs closed the Mesquakie Casino until the problem could be resolved. Eventually, the traditional leadership's election results were certified by the Bureau of Indian Affairs and the casino reopened, but the traditional leadership is still pursuing the case in federal courts. Disputes between Indians and non-Indians over allotted and tribal land can be even more complex, involving aspects of old treaties, traditional tribal law, modern tribal law, federal law, and even certain aspects of state law.

The future of allotted and tribal land is not promising. As long as the right of alienation (right to dispose of land) is severed from the land and held by the U.S. Government, Native Americans will have great difficulty in developing their land to its highest-and-best use. But, there will probably be little agreement among Native Americans and between Native Americans and non-Indians regarding what exactly the highest-and-best use of land might be. Native Americans fought long and hard battles to retain their heritage and culture, and they are not likely to give it up simply to develop their lands commercially. When Native American land becomes valuable, such as a casino use or mineral extraction, disputes over these riches erupt. Subsequently, many Native Americans live in poverty, because development of their land is so difficult to achieve. Nonetheless, this poverty does not necessarily mean that these Native Americans are not happy or are not leading meaningful lives. But, it does mean that non-Indians should aspire to develop Native American land with great caution.

Summary

In essence, the purpose of federal laws regarding the relationship between land and Native Americans has come full circle. The Indian Removal Act of 1830 dealt with the increasingly violent confrontations between settlers and Native Americans by relocating, often forcibly, the latter into less densely settled land west of the Mississippi River. But, the Act still allowed Native Americans to retain a common resource ownership concept of land. The Dawes Act constituted a direct assault on the common resource ownership concept embraced by Native Americans. However, this act failed miserably, primarily because it restricted the right of alienation. Native Americans were not able to embrace the concept of private property ownership of land, because the transaction costs of selling their allotted land was so high. The Indian Reorganization Act of 1934 put an end to allotment, but it also extended indefinitely the restrictions on the right of alienation. It also returned surplus lands to the tribes, but, again, without the right of alienation. Finally, the Indian Land Consolidation Act of 1983 made the consolidation of fractional estates easier for tribes to achieve, but, once again, without the right of alienation. Until the right of alienation is restored, the transaction costs of voluntary

transactions in Native American land will be so high that Native Americans will find it very difficult to adopt private property ownership rights in tribal land.

Today, the use of Native American lands by non-Indians is extremely difficult and fraught with dangers. A morass of laws awaits the uninitiated non-Indian who attempts to acquire rights to allotted or tribal land. When the stakes become high, disputes are almost certain to emerge. Not even a partnership with a tribal member can guarantee an enforceable lease contract. Indian law has a long way to go before it can be depended upon to enforce the terms of lease and other contracts involving allotted and tribal land. Meanwhile, the principle of *caveat emptor* prevails. Those who appraise or otherwise assess allotted and tribal land should not treat it as if were the same as other, fee-simple land. Allotted and tribal land is in a class of its own.

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Indigenous Land Claims in Canada: A Retrospective Analysis

Robert A. Simons and Shwetha H. Pai

Abstract Many indigenous people have been deprived of their lands and resources by military domination, unlawful and fraudulent settlements, forcible removal and relocation, and illegal expropriation. Since about 1950, a growing international movement has led to recognizing and protecting the specific rights of indigenous peoples by both international agencies and through national legislatures. This study analyzes the indigenous land claims process in Canada. It covers the evolution of a legal land claims process, focusing on specific claims before the Indian Claims Commission and the comprehensive claims with respect to the common types of claims in Canada, the methods of compensation/restitution, and the effectiveness of the present system. In addition, this study reports on and analyzes outcomes and suggests policy recommendations for other countries that are developing a process for indigenous peoples' land claims.

Introduction

Land is central to the lives of indigenous peoples.[1] They have a distinct spiritual and material relationship with their land and territories. The concept of land embraces the whole territory they use, including forests, rivers, mountains, sea, the surface as well as the sub-surface, and natural resources (Yates 2004). This unique relationship with land often makes indigenous peoples' rights to land vital for their survival and identity.

[1] *Indigenous peoples* are the descendants of the original inhabitants of any land (UN 1992). Indigenous people are people sharing the same language, race, religion, culture and customs, occupying a specific territory long before a foreign State began to rule the land and its inhabitants. This term mainly refers to those communities that underwent colonization and were subjected to the legal and social orders of foreign States (Ceccherini 2005).

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Colonization of indigenous territories has affected indigenous peoples in a number of ways. Most colonizers gained ownership of the indigenous land, territory, and resources through rationalization and military domination (UN 2001). In most countries, like in the case of Australia, the colonizers used the concept of terra nullius[2] to gain control over their lands. "The colonizers considered the indigenous population to be too primitive and their society to be void of any true legal organization, that it seemed too unthinkable to award them any legal rights" (Ceccherini 2005).

However in North America (both the United States and Canada), the colonizers used the system of treaty making to gain control over the territories of the Native Americans. "Treaty making was a feasible method of gaining a foothold on the continent without alarming the natives. Treaties with the Indians, then, brought an air of civility and legitimacy to the white settlers' relations with the Indians and provoked no immediate retaliation by the tribes" (Deloria Jr. 1983).

The indigenous peoples of Canada are referred to as the *First Nations*.[3] According to Section 35.2 of the Charter of Rights and Liberties in Canada, the aboriginal communities consist of Inuit, Indians, and Metis. Before the arrival of the European Colonizers, the First Nations had the exclusive jurisdiction, the supreme and absolute power over their territories, their resources and their lives (Hoggan 1981). In the early 1700s, the French and then the English began to establish settlements along the eastern seaboard of Canada, and as the two nations tried to establish their supremacy, they required support and security from the First Nations. It was for this reason that the earliest treaties[4] of peace and friendship were struck between the English and the First Nations (ISCC 2004).

The Royal Proclamation issued by King George III in 1763, in order to maintain peace during the Indian uprising against the British under the leadership of Chief Pontiac, confirmed the existence of aboriginal title and insisted on treaty making before British settlement. This led to several treaties being signed with the First Nations both before and after the Confederation in order to make way for European settlement and expansion. Once the treaties were signed, there were problems implementing the agreements, which caused treaty First Nations to protest and a series of land claims[5] started (ISCC 2004).

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[2] *Terra nullius* is a Latin expression from the Roman law, which means no man's land or empty land.

[3] A *First Nation* is a legally undefined term that came into common usage in the 1970s to replace the term "Indian band". (www.wikepedia.com).

[4] The department of Indian and Northern Affairs Canada (INAC), defines **treaties** between the Crown and Aboriginal people to be solemn agreements that set out promises, obligations and benefits for both parties – www.inac.gc.ca

[5] Land claims are unresolved grievances between Indian Bands – also called First Nations – and the Government of Canada relating to land and resources.

Although the indigenous peoples in Canada have been struggling to maintain their land and their identity from the beginning of European colonization, the issue of land claims only became prominent in the 1960s. Several factors, like minority issues, environmental concern, international awakening toward the cause of human rights and recognition of specific rights of the indigenous peoples by various international agencies, incidence of indigenous struggle for land rights in neighboring countries like the United States, influenced the native land rights movement in Canada (The Canadian Encyclopedia 2006).

This study analyzes the development and outcomes of the land claims process in Canada. Using a literature review, this study examines the history and background in order to understand the methods of dispossession used by the colonizers, contemporary problems regarding indigenous land rights and international examples of attempts made to resolve indigenous land claims. The study also examines the evolution of the legal process for land claims in Canada. The specific claims before the Indian Specific Claims Commission (ISCC) [6] and the comprehensive claims settled so far are studied to identify the common types of claims in Canada, the methods of compensation/restitution, and the effectiveness of the present system. Finally the outcomes are analyzed, and policy recommendations for other countries are made, which are developing a process for aboriginal land claims.

Literature Review

The Concept of Land Rights

Anthropology studies the diverse systems of ownership, rights of use and transfer, and possession under the term "theories of property." The Western legal theory is based on the concept of individual ownership and *property* is usually thought of in terms of *bundle of rights*, which include the rights to

- control and use of the property
- benefit from or enjoy the property (quiet enjoyment)
- transfer, bequeath or sell the property (disposition), and
- exclude others from the property

When all the above rights are included, this is defined as fee simple ownership. These rights are subject only to taxes, zoning, and other police powers. Additionally, property includes surface rights, air rights, and subsurface rights (Simons 2006).

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[6] The Indian Specific Claims Commission in Canada is also referred to as the Indian Claims Commission (ICC) in some literature, but in this paper Indian Claims Commission (ICC) refers to the claims commission in the USA.

However, fee simple ownership is not the only basis for the ownership and possession of land. Many eastern cultures and tribal cultures throughout the world follow the "communal property system," in which ownership of land belongs to the entire social/political unit, like the tribe, families, bands, and nations. This is a natural outcome from a closely knit subsistence-oriented society, not based on money but instead on mutual cooperation and survival. Attaching monetary value and buying and selling land – which was not considered a tradable commodity by indigenous people – has created an economic environment which was alien to their collective social organization. Over time, tribes and private market forces have come to coexist in many places, and the tension between them is sometimes acute.

In the past, most economists have advocated the private ownership of property as being the best way to generate wealth. For example, Adam Smith's idea that the expectation of profit from "improving one's stock of capital" rests on private property rights, and the belief that property rights encourage the property holders to develop the property, generate wealth, and efficiently allocate resources based on the operation of the market is central to capitalism (http://en.wikipedia.org/wiki/Property 2006). Aristotle advocates private property in his tragedy of the commons, where he mentions that when property is common, problems arise due to differences in labor (ibid.).

Until recently most economists argued that indigenous land rights (most indigenous peoples follow the common property system) lead to inefficient resource allocation because indigenous land rights are thought to be ambiguous and communal and are afforded insufficient protection in legislatures – resulting in tenure insecurity which in turn leads to inferior investment incentives, undersupply of credit (most commonly owned property cannot obtain a mortgage), and constraints on efficiency-enhancing market exchanges. These concepts have led to the general belief that aboriginal title to land is inferior to fee simple title, resulting in the failure of countries to recognize the existence of indigenous use, occupancy, and ownership, and the failure of countries to accord appropriate legal status, juridical capacity, and other legal rights in connection with indigenous peoples' ownership of land.

Aboriginal Land Rights Movements Around the World

Beginning in the second half of the twentieth century, the growing international movement for human rights and the redress of historical injustices to aboriginal populations around the world has led to recognizing and protecting the specific rights of indigenous peoples in many countries by international agencies and national legislatures. This effort led to the adoption of Convention No.169 concerning the Indigenous and Tribal Peoples in Independent Countries in 1989 by the International Labor Organization (ILO). According to Article 2 of the Convention, "the indigenous peoples have been identified as 'peoples' with their

own identity and indigenous peoples have claimed this right, since they do not consider themselves 'populations' or 'communities,' but peoples who have particular ways of life and organizational forms, as well as their own culture, territory and language." Article 14 of the ILO convention imposes an obligation on member nations in the following terms: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized . . . Adequate procedures shall be established within the national legal system to resolve land claims by the people concerned" (www1.umn.edu 2006).

Today several national legislatures have acknowledged the presence of aboriginal communities in their boundaries and have taken steps toward formal recognition of their rights. For example, in the Americas, in 1946, the U.S. government created an Indian Claims Commission and in 1971 legislated the Alaska Native Claims Settlement. Also, in 1980 Denmark granted home rule to Greenland. Most recent Constitutions, regardless of the level of democratic maturity reached by the pertinent country, appear in favor of a formal recognition of both the community and the traditional rights of an ethnic group (Ceccherini 2005). In 1988, the Brazilian Constitution (Article 231) recognized the rights of Indians in relation to the social organizations, customs, languages, beliefs, and traditions and possession of land and resources.

In other parts of the world, Australia passed an Aboriginal Land Rights Act in 1976. In India, the Constitution includes, in addition to fundamental rights, special guarantees for scheduled tribes[7] and provisions for special developmental programs for them. Tribal autonomy and self-government has developed in several areas of tribal concentration like in Madhya Pradesh, Orissa, Rajasthan, Bihar, Assam, and the other north eastern states (Watts 1998). In South Africa, the recent changes in the political environment have led to the formal recognition of the native communities and the introduction of council of traditional leaders (formed by traditional chiefs) competent on all native issues (Ceccherini 2005).

Recent studies suggest various models to show that indigenous tenure may provide equal or higher investment incentives than private rights and may promote modes of rights appropriation that are productive, rather than wasteful (Sjaastad and Bromley 1996). Common property institutions provide a method of capturing scale economies and thereby increasing the efficiency of small-scale peasant proprietorship in competition with large-scale production based on wage labor (Quiggin 1993). All these developments have strengthened the cause of the indigenous peoples, and most nations with significant aboriginal populations are now in the process of developing an effective land claims process.

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[7] As per Article 342 of the Indian Constitution there are some 573 communities recognized by the government as Scheduled Tribes.

History of Land Claims in Canada

Given this literature, we now turn our attention to purely Canadian matters of indigenous land and the claims process. Immediately after the British established their supremacy over the French in the seven years war, Chief Pontiac declared war against the British around the Great Lakes area. In order to maintain peace, King George III issued the *Royal Proclamation* in 1763, which confirmed aboriginal title and insisted on treaty making before settlement. The Proclamation formulated treaty making as a means of extinguishing title (Ervin 1981).

The *Royal Proclamation* established within government a fiduciary, or trust-like, responsibility to protect aboriginal land rights that survives today (ISCC 2004). In the years that followed several treaties were made between the settlers (the British Government and later the Canadian Confederation) and the First Nations in order to open up land for farming, mining, logging, and for settlement.

After Confederation, Canada had to deal with large numbers of settlers in the prairies, which resulted in signing several treaties with the First Nations in the prairies. Canada promised that it would reserve land for First Nations. In return, treaty First Nations surrendered hundreds of thousands of acres of land to Canada. The creation of Indian reserves was central to this treaty making. For First Nations, the promise of land reserved for Indians was crucial to protecting their way of life. For Canada, the surrendered land made development possible. Once the treaties were signed, there were problems implementing the agreements, which caused treaty First Nations to protest and a series of land claims[8] started (ISCC 2004). Exhibit 1 shows the geographic extent of the historical Indian treaties from 1725 to 1923.

There has been a considerable array of Canadian legislation about Native Americans in Canada since the eighteenth century. During this time, however, government policies have aimed at the assimilation of the Native people into the general population at the earliest possible time.

In 1844, the Administration of Indian Affairs was transferred to the Province of Canada and away from the imperial authorities in England. During the 1800s, several Acts were legislated by Canada for example, "An Act for the Better Protection of the Lands and Property of Indians in Lower Canada," "The Management of Indian Property Act," and many others, which gave the power for control and management of the Indian land, territory, and resources into the hands of the Canadian Government. The form of the modern Indian Act can be traced to the "Department of Secretary of State Act," and the latter statute an "Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs." The latter statute introduced the concept of

[8] Land claims are unresolved grievances between Indian Bands – also called First Nations – and the Government of Canada relating to land and resources.



Exhibit 1 Geographic extent of the historical Indian treaties from 1725-1923
Source: www.ainc-inac.gc.ca 2006

local Government to the Indian reserves.[9] The 1876 Indian Act attempted to consolidate all existing legislation. However, the theme throughout the new Act remained that of assimilation and civilizing of the Indians (www.collections.ic.gc.ca 2006).

[9] In Canada, an Indian reserve is specified by the Indian Act as a "tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band." The Act also specifies that land reserved for the use and benefit of a band, which is not vested in the Crown (for example, Wikwemikong Unceded Reserve on Manitoulin Island) is also subject to the Indian Act provisions governing reserves (en.wikipedia.org/wiki/Indian_reserves 2006).

In 1927, an amendment of the Indian Act discouraged land claims by Native Americans, and fines were levied on lawyers who represented the Indians in a claim. This amendment was later revised in 1951. As mentioned earlier in the literature review, the creation of an Indian Claims Commission in the United States influenced the development of the Canadian land claims process. Proposals to establish a body similar to the U.S. Indian Claims Commission in Canada resulted in the drafting of two bills in 1963 and 1965, which proved unsatisfactory to the Indian people and were never enacted. In 1969, the Canadian federal government appointed Lloyd Barber as commissioner of Indian claims to determine and recommend appropriate means of resolving native claims. Early in the 1970s, the government set up a system of research funding for native political and cultural associations to enable them to document and organize their land claims.

In 1973, the federal government announced its claims policy, designating specific and comprehensive claims and an Office of Native Claims was created in 1974 within the Department of Indian and Northern Affairs Canada (INAC), in order to carry out the new policy. This framework is intact, and we report results of these two types of claims in the next section.

It was only in 1982 that the Canadian Constitution was amended to confirm aboriginal rights, including those identified in claims settlements. With the approval in 1982 of the "Constitution Act," and of the "Charter of Rights and Liberties", the prospect of incorporating and blending the aboriginal population within the Canadian legal order was definitely abandoned. Sections 25 and 35 of the charter expressly recognized the existence of the tribes and understood the need to protect the unique character of the Indian communities (Ceccherini 2005).

In 1990, a violent confrontation over a rejected claim at Oka raised public awareness of problems with the federal claims policy. That same year, the Assembly of First Nations and the Indian Commission of Ontario called on the Canadian government to create an "independent and impartial body with authority to ensure [the] expeditious resolution of claims." In response, the federal government established the Indian Specific Claims Commission (ISCC) in 1991. The creation of the ISCC gave First Nations with specific claims rejected by the federal government an alternative to the costly and time-consuming court system.

The ISCC is an independent body with authority to hold public inquiries into claims made by Indian bands or First Nations that have been rejected by the Government of Canada. The Commission also provides mediation at any stage in negotiations, to help First Nations and the government settle claims. The Commission operates under the Inquiries Act and is funded by the federal government. The Commission provides First Nations and the government with an effective alternative to expensive and lengthy court cases. The Commission only reviews specific claims. These arise when a First Nation asserts that the federal government has broken the law by breaching an agreement, a statute, or a treaty. It is important to note here that the

recommendations of the commission are not binding on either the First Nation or on the Canadian government.

In November 2003, the Specific Claims Resolution Act was adopted which would create the Canadian Center for Independent Resolution of First Nations specific claims, and this new center will replace the Indian Specific Claims Commission.

Theory of Valid Claims Under the Canadian System

The 1982 Charter identified two types of aboriginal land rights – *existing rights* and *treaty rights*. Existing rights are those rights that the Native Americans had even before the European Colonization. "They were still valid and in force when the Constitution Act was adopted and Aboriginal communities would probably still possess them, if only they had not been expressly extinguished in consequence of a treaty or of a parliamentary act" (Ceccherini 2005). In the Calder Case 1973, the Supreme Court of Canada found that indigenous rights were found to be specific, not owing to a concession by the Crown, or due to legal recognition, or to their definition within a treaty, but only because in the past aboriginal people had been the sovereign inhabitants of that territory. This opinion was upheld in the Guerin case in 1984, as the Judge stated, "The aboriginal title is a legal right originating from the historical Indian occupation and from the possession of tribal territory" (ibid.).

Treaty rights are those rights that are declared and acknowledged in the treaties drawn up between federal and provincial authorities, on one side, and indigenous communities, on the other (ibid.). Land Claims arise when one of these rights of the native people are violated.

The Canadian Claims Policy announced in 1973 by the federal government identified two types of land claims – specific claims and comprehensive claims. According to INAC comprehensive claims are based on the concept of continuing aboriginal rights and title that has not been dealt with by any treaty or other means. The primary purpose of the comprehensive claims settlement is to resolve the legal ambiguities associated with the common law concept of Aboriginal rights in exchange for a package of clearly defined rights and benefits set out in a settlement agreement/treaty. Most of these claims are in British Columbia where no land surrender treaties were made. Others are in Newfoundland, parts of Atlantic Canada, Quebec, and the Yukon.

Federal policy bases these claims on traditional use and occupancy of the land and requires First Nations to exchange aboriginal rights and title for treaty rights. This model is called the "extinguishment model." Some First Nations object to this requirement because they believe it asks them to extinguish their aboriginal title and, by doing so, to extinguish their aboriginal identity. As a result of this, in recent years, new models like the "modified rights model" and the "non-assertion model" have been developed. Under these models the aboriginal rights are not extinguished but are modified into rights articulated and

defined in the treaty, or the aboriginal group agrees to exercise only those rights articulated and defined in the treaty, respectively (INAC 2003).

Comprehensive claims settlements typically identify a broad range of rights and benefits to be exercised by claimant groups. These frequently include

- Full ownership of specified lands identified by the settlement agreement,
- Guaranteed wildlife harvesting rights,
- Guaranteed participation in environmental protection, land use and planning, water and wildlife management,
- Financial transfer and compensation,
- Provisions for resource revenue sharing,
- Participation in parks and heritage resource management and
- Specific measures to stimulate economic development (http://www.atns.net.au 2006).

To date, sixteen comprehensive claim agreements have been signed; the settlements form modern treaties protected under the Constitution. Settlements typically define First Nation territory, provide cash and may establish resource management and government structures (www.indianclaims.ca 2004). These will be discussed in more detail shortly.

Specific claims arise when a First Nation alleges that the federal government has not honored its treaties, agreements, or legal responsibilities. Most of the outstanding claims across Canada are specific claims. According to federal policy, a valid specific claim exists when a First Nation can prove the government has an "outstanding lawful obligation" by demonstrating:

- the nonfulfillment of a treaty or agreement,
- a breach of an *Indian Act* or other statutory obligation,
- the mishandling of Indian funds or assets,
- an illegal sale or disposition of Indian land,
- failure to compensate a band for reserve land taken or damaged under government authority and/or,
- fraud by federal employees in connection with the purchase or sale of Indian land.

Specific claim settlements typically include cash to compensate for the value of land or resources taken unlawfully, or to purchase land to create a reserve or add to an existing reserve (ibid.).

Legal Process for Indigenous Canadian Land Claims

The process for comprehensive land claims involves three main actors:

1. the Canadian federal government,
2. the provincial/ territorial government, and
3. the aboriginal claimant group.

The policy maker may be the federal government or the provincial government who receives the claims from the stakeholder and has to adopt and implement solutions. This actor also puts forward the public policy that is used as a guideline by all the actors involved in the negotiation. Finally, public boards constitute a fourth type of actor that comes into play solely at the end of the negotiation process. They result from the successful implementation of a land claims settlement. Exhibit 2 shows the five stages involved in the negotiations process.

The claims process begins when the federal government accepts an Aboriginal group's statement of claim and supporting materials. The federal government will accept the claim if the statement confirms that:

1. The Aboriginal group is, and was, an organized society.
2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.
3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.
4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.
5. The group's Aboriginal title and rights to resource use have not been dealt with by treaty.
6. Aboriginal title has not been eliminated by other lawful means (www.ainc-inac.gc.ca 2006).

The solutions brought forward during the proposition stage are then elaborated by the policy maker and the stakeholder to produce an agreement-in-principle and to arrive to a final agreement. This agreement must then be approved by both the population and the policy maker (i.e., Federal government). Finally, the implementation stage sees the establishment of joint land management agencies (i.e., public boards).

The specific claims process starts with a formal submission of a claim by the First Nation. The various steps involved in a specific claim process are shown in Exhibit 3. The Government of Canada then researches the claim to determine whether to accept the claim for negotiation. If the federal government rejects the claim (i.e. when a lawful obligation is not found) the First Nation can approach the Indian Specific Claims Commission to intervene or litigate. If a lawful obligation is found, the negotiations start, which involves creating a general framework and an Agreement in Principle (AIP). Following ratifications, the AIP becomes a settlement agreement. The implementation stage involves transfer of land or cash, whichever is applicable (www.ainc-inac.gc.ca July 2006).

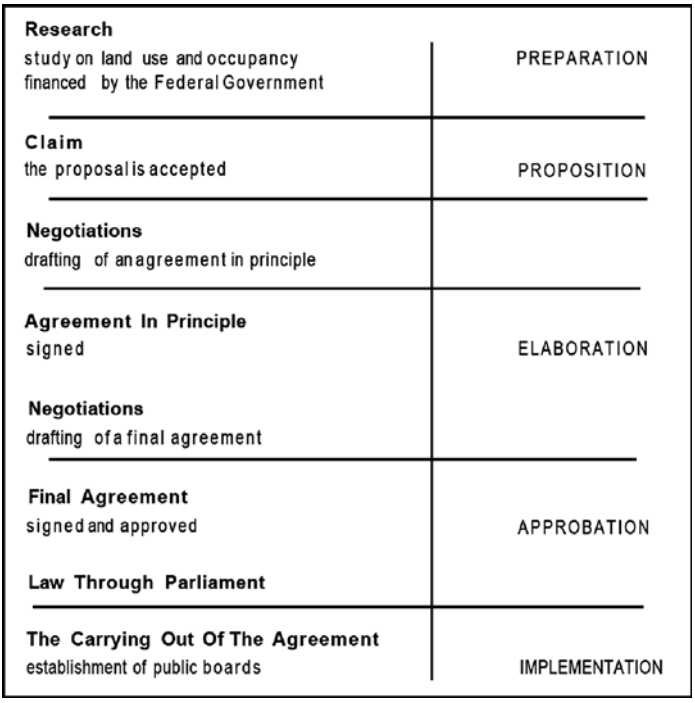


Exhibit 2 The comprehensive land claims policy: negotiation process
Source: Legare 1996

Exhibit 3 Specific claims process

Step 1	Submission of Claim (1,185 cases)
Step 2	Research of Claim (1,185 cases)
Step 3	Acceptance by INAC (at least 220 cases) or rejection of Claim (likely go to ISCC – 112 cases, 62 cases resolved so far)
Step 4	Negotiations (at least 251 cases)
Step 5	Implementation (251 cases)

Source: www.ainc-inac.gc.ca July 2006

Data and Analysis of Claim Outcomes

Data

In order to analyze the comprehensive claims, this study examines the sixteen comprehensive claim settlement agreements signed so far. Exhibit 4 is the map of comprehensive claims. The details of the comprehensive claims are in Appendix 1.

In order to analyze specific claims, this study next examines the 62 concluded cases under the Indian Specific Claims Commission. As of March 31st 2003,

INAC has received 1185 specific claims out of which 251 cases have been settled. For the purpose of this study, we have selected the cases that were initially not accepted by INAC or had problems during the negotiations and hence were taken to the ISCC. Because these cases were not initially accepted by INAC, the outcomes may not be representative of the population of filed claims or of those cases accepted by INAC.

The ISCC website (http://www.indianclaims.ca 2006) gives detailed reports of the specific claims for which the commission has completed its inquiry or mediation. Out of the 112 cases the Commission has accepted since 1991, 62 inquiries/mediations have been completed with reports. We take these 62 completed cases for our study.

Claims Outcomes Analysis

Comprehensive Claims Analysis

Since 1973, sixteen comprehensive land claims agreements have been signed in Canada, and according to INAC's publication "Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences" these agreements cover about 40% of Canada's sovereign territory. Examination of the sixteen claims show that comprehensive claims settlements include ownership and use of land and resources, cash, and other rights such as hunting and harvesting rights, self-government etc. In the past, the aboriginal claimant groups had to surrender their aboriginal rights in exchange for a set of defined treaty rights. But in recent years, new models have been developed where aboriginal rights are not extinguished but are modified into rights articulated and defined in the treaty.

So far, the average per capita land settlement is approximately 26.86 square kilometers. Land title given to the claimant groups is not fee simple title, but there are certain restrictions in terms of the bundle of rights, for example, the right to sell. Although traditionally the aboriginal land tenure systems were communal, in some of the comprehensive claim treaties the aboriginal claimant groups have negotiated the power to develop their own land registry system, although to date none has exercised this authority (INAC 2003). Details about exclusive and nonexclusive use of lands are detailed in the settlement agreements based on the presence of highways, roads, and accesses within the area under settlement. Right-of-way agreements are made for outsiders to access these areas.

The cash component of the settlement is given by the federal government to the aboriginal group through the government that represents it. The land claims process of the aboriginal group is funded by the federal government through loans, which have to be repaid once the cash component is paid to the aboriginal group. The average per capita cash compensation in the settled comprehensive claims is approximately $33,000 Canadian. Each aboriginal group takes a different approach to the capital transfer that comes with the comprehensive land claims settlement.

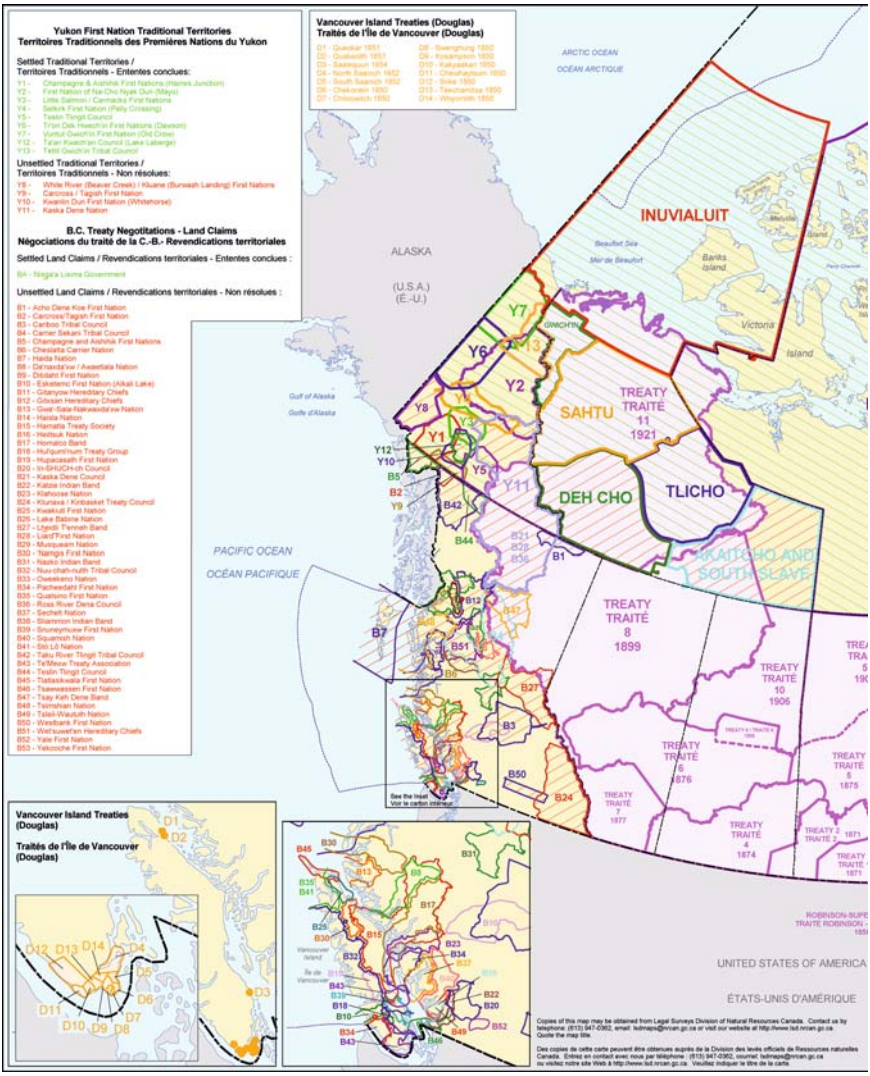


Exhibit 4 Comprehensive claims map
Source: http://www.ainc-inac.gc.ca 2006


Natural Resources Canada
Ressources naturelles Canada
Treaties and Comprehensive Land Claims in Canada
Traités et revendications territoriales globales au Canada
May 2004 Edition / Édition mai 2004
Produced by Legal Surveys Division, Geomatics Canada, Natural Resources Canada.
Préparé par la Division des levés officiels, Géomatique Canada, Ressources naturelles Canada.
© 2004. Her Majesty the Queen in Right of Canada. Natural Resources Canada.
© 2004. Sa Majesté la Reine du chef du Canada, Ressources naturelles Canada.
Scale 1:18 000 000 or one centimetre represents 180 kilometres
Échelle 1: 18 000 000 ou un centimètre représente 180 kilomètres
kilometres 180 0 180 360 540 kilometres
Lambert Conformal Conic Projection, Standard Parrallels 49° N and 77° N
Projection conique conforme de Lambert, parallèles d'échelle conservés à 49° N et 77° N
Note: The lines on this map represent the approximate boundaries of traditional territories described in First Nation Statements of Intent to negotiate treaties which have been submitted to, and accepted. The boundaries are illustrative only and may be revised in the future. Publication of this map does not imply that the First Nations, the Province of BC, or the Government of Canada have agreed to the boundaries shown.
Note: Les lignes sur cette carte représentent les limites approximatives des territoires traditionnels décrits dans la Déclaration d'intention des Premières Nations pour négocier les traités qui ont été soumis et acceptés. Ces limites sont seulement illustratives et peuvent être révisées dans le futur. La publication de cette carte n'implique pas que les Premières Nations, la province de la C.-B., ou le Gouvernement du Canada ont consenti aux limites indiquées.
LEGEND
LÉGENDE
Land Claims Status / Situation actuelle des revendications territoriales
Settled Land Claim Area
Région visée par le règlement de revendication territoriale
Unsettled Land Claim
Revendication territoriale - Non résolue
Historic Treaty
Traité historique
Historic Treaty Adhesion
Adhésion au traité historique
Peace and Friendship Treaty
Traité de paix et d'amitié
Vancouver Island Treaty (Douglas)
Traité de l'île de Vancouver (Douglas)
Provincial, Territorial Boundary
Limite provinciale ou territoriale
International Boundary
Frontière internationale
200 Mile Limit
Limite de 200 mille
Ellesmere Island
Île d'Ellesmere
KALAALLIT NUNAAT
(DENMARK)
Baffin Bay
Mer de Baffin
Somerset Island
Baffin Island
Île de Baffin
Boothia Peninsula
Presqu'île Boothia
Victoria Island
Île Victoria
NUNAVUT SETTLEMENT AREA
RÉGION DU NUNAVUT
LABRADOR INUIT ASSOCIATION
Labrador Sea
Mer du Labrador
NUNAVIK MARINE REGION
RÉGION MARINE DU NUNAVIK
Hudson Bay
Baie d'Hudson
NORTHEASTERN QUEBEC AGREEMENT
CONVENTION DU NORD-EST QUÉBÉCOIS
INNU NATION
ATLANTIC OCEAN
OCÉAN ATLANTIQUE
NUNAVUT SETTLEMENT AREA
RÉGION DU NUNAVUT
EEYOU MARINE REGION
RÉGION MARINE DU EEYOU
JAMES BAY AND NORTHERN QUEBEC AGREEMENT
CONVENTION DE LA BAIE JAMES ET DU NORD QUÉBÉCOIS
INNU
Saint-Pierre et Miquelon (FRANCE)
TREATY
TRAITÉ
9
1929-30
TREATY
TRAITÉ
3
1873
TREATY
TRAITÉ
9
1905
Gulf of St Lawrence
Golfe du Saint Laurent
PEACE AND FRIENDSHIP TREATIES
TRAITÉS DE PAIX ET D'AMITIÉ
(1725-1779)
ALGONQUINS OF EASTERN ONTARIO
ROBINSON-HURON TREATY
TRAITÉ ROBINSON - LAC HURON
1850
MANITOULIN ISLAND TREATY
TRAITÉ DE MANITOULIN ISLAND
1862
UPPER CANADA TREATIES AREA 1
RÉGION NO.1 DES TRAITÉS DU HAUT-CANADA
(1764-1836)
WILLIAMS TREATIES
TRAITÉS DE WILLIAMS
1923
UPPER CANADA TREATIES AREA 2
RÉGION NO. 2 DES TRAITÉS DU HAUT-CANADA
(1764-1836)
Sources:
Department of Natural Resources Canada, Geomatics Canada, GeoAccess Division, 1992. 1:7 500 000 base map and Historic Treaties.
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Références:
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Division des levés officiels, 2003. Limites des revendications territoriales.
Affaires indiennes et du nord, Bureau de négociation du traité fédéral, 2000. Négociations du traité de la C.-B.
Colombie-Britannique, Ministère des affaires autochtones, Section de l'approvisionnement en information, 2000. Négociations du traité de la C.-B.
Secrétariat du Conseil du Trésor du Canada, Division de la gestion des biens immobiliers, 2001. Traités de l'île de Vancouver.

The mining and mineral rights differ from claim to claim. For example, under the Gwich'in Agreement and the Nanavut Land Claims Agreement, the aboriginal groups got resource royalties and mining rights, but under the Yukon Indian agreement the claimants got the ownership of mines and minerals. Similarly, most agreements have given the claimants decision-making powers in terms of land use, water use, and key environmental issues, although the Canadian Environment Assessment Act will continue to apply in the First Nation lands.

Around twenty percent of the agreements include self-government rights. The inherent rights of aboriginal peoples to self-government were set out in the Inherent Rights Policy in 1995 and are recognized under section 35 of the Constitutional Act of 1982. Self-government arrangements could be negotiated as a part of comprehensive land claims or can be negotiated separately, especially for claims that were negotiated before 1995. The main objective of self-government is to enable the First Nations to protect their culture and heritage and to manage their lands, resources, and assets. The structure of these governing bodies is different for different aboriginal groups. The federal government transfers funds to these governing bodies.

Specific Claims Analysis

The First Nations request the ISCC for an inquiry when their claim has been rejected by the minister of INAC or when the minister accepted the claim for negotiations, but both parties were unable to reach an agreement over the compensation. Once the Commission completes the inquiry, it prepares a report with the commissioners' findings and recommendations on the issue. But these recommendations are not binding on either Canada or the First Nation claimant.

Out of the 62 completed claims that have been completed, the federal government's response to the Commission's recommendations is given in Exhibit 5. As shown in this Exhibit, 45% of the claims have been accepted and almost 30% of the cases have been rejected by INAC. This shows that INAC has the upper hand in the decisions and the decisions by the ISCC are not binding and hence need not result in settlement of claims. In terms of the First Nations, taking the claims accepted for negotiations as a win and claims

Exhibit 5 INAC's response to ISCC's recommendations

	Number	Percent
Claims accepted for negotiation by INAC (win for First Nation)	28	45
Claims rejected by INAC (loss to First nation)	18	29
No response received from INAC to the ICC report (win/loss)	05	08
No substantive response from INAC required (loss)	06	10
Other responses (win/loss)	05	08
Total	62	100

Source: www.indianclaims.com 2006

rejected by INAC and the ones where no response was required as losses, 45% of cases have been successfully settled and nearly 40% of the claims have been lost, with the balance of about 15% being as yet unresolved.

Generally all specific claims are settled by cash compensation, as opposed to getting their land back. The First Nations may use this money to buy land in the open market. According to INAC, the First Nations have received $1.7 billion (Canadian) and the ability to acquire nearly 3.5 million acres of land.

Almost 40% of the claims revolve around improper surrender and/or Treaty Land Entitlement. The Indian Act defines "surrender" as an agreed upon transfer of Indian land to the Government of Canada, usually for money. The federal government may then sell or lease the land to private owners. This rule dates back to the Royal Proclamation of 1763, to prevent private owners from fraudulently taking away reserve lands. As a result of this, the federal government has a fiduciary responsibility to protect the First Nations interests.

Surrender claims may arise under two circumstances – one, if there was a technical breach of the Indian Act or if the surrender was not in the best interests of the First Nation – that is, if there was a fiduciary breach of the government's obligation. According to the Indian Act, for the land to be valid, surrender must be approved by a majority of Indian band members eligible to vote at a public meeting called for that purpose (www.indianclaims.ca 2006).

For example, Blood Tribe/Kainaiwa of Alberta – 1889 surrender is an example of a technical breach of the Indian Act. In this case, Canada accepted a surrender of 440 acres of land reserved under Treaty 7 without a public vote or payment in 1889. In April 1998, Canada agreed that it had taken the land in breach of the Indian Act, and it agreed to negotiate compensation. The land could not be returned because it is now privately owned.

The Moosomin First Nation of Saskatchewan – 1909 surrender is an example for the fiduciary breach of the government's obligation. In 1909, Canada took, against the First Nation's express wishes, 15,360 acres of prime agricultural land reserved under Treaty 6, for sale to nonaboriginal farmers. As a result, the community was moved to land that was not suitable for farming, and its livelihood was destroyed. In December 1997, the government agreed it had not acted in the First Nation's best interests and accepted this claim for negotiation of a settlement. In October 2003, Canada and the First Nation signed a settlement agreement for $41 million (Canadian) in compensation (ibid.).

Treaty land entitlement (TLE) claims arise when a First Nation asserts that the Government of Canada did not provide the reserve land promised under treaty. Some First Nations have not received any of the reserve land they were promised; others have not received the correct amount of land. Each of the numbered treaties mentioned the amount of land to be given per family to be set aside for reserves. For example, according to Treaties one, two and five, 160 acres were set aside for a family of five, or 32 acres per person.

Two types of TLE claims are identified – the initial claims and the shortfall claims. Initial claims arise when a First Nation asserts that it has never received the reserve land promised under treaty. Under the specific claims policy, the First Nation must prove to Canada that it has treaty land rights and has never received reserve land under treaty. Shortfall TLE claims arise when a First Nation asserts that the full amount of reserve land promised under treaty was not set aside. If it is found that a First Nation is owed land, Canada accepts the claim for negotiation. A First Nation and Canada must determine who should be counted and at what date so that the correct amount of land to which the First Nation is entitled under treaty may be calculated (www.indianclaims.ca 2006).

Another type of specific claim is related to development projects taken up by the Canadian government, like construction of dams, highways etc. The Qu'Appelle Valley Indian Development Authority's (QVIDA) flooding claims clearly exemplifies this type of claim. Between 1888 and 1961, the federal and provincial governments of Canada financed or built four major dams and 150 smaller dams in the Qu'Appelle river system in Saskatchewan under the Prairie Farm Rehabilitation Act. This led to the flooding and degradation of 14,000 acres of land, including several Indian reserves belonging to First Nations like the Cowesses, Muscowpetung, Pasqua, and Sakimay peoples. Negotiations are under way (some concluded) with mediation/facilitation of the ISCC on a number of issues like damages caused from the time of construction to the present, permission for the federal and provincial government to enter the reserve land to operate water control structures, etc.

Conclusions and Policy Issues

The settlement of comprehensive and specific land claims can have a positive impact on the lives and economy of the citizens of the First Nations in Canada. Even though a settlement does not mean that the First Nations have obtained fee simple ownership to lands, a clear definition of the rights of the aboriginal claimant group and the nonaboriginal people have brought about a better business environment in these areas. Since mineral and resource rights are clearly outlined under each comprehensive claims settlement, there is hope that investments will improve, especially in the area of mineral exploration.

The cash component of the comprehensive claims settlement has given the First Nations an opportunity to diversify their investment options. According to the report submitted in 1995 by ARA Consulting Group to the Federal Treaty Negotiations office in Canada, investments made by the Inuvialuit include two airlines and other transportation companies, and retail and wholesale consumer businesses. The James Bay Cree have created a construction company that has been involved in projects related to the James Bay hydroelectric project. Several tribes have also invested in ecotourism projects.

For specific claims, the First Nations had surrendered the land they had originally inhabited in return for the reservations. Hence, the settlement process has mostly resulted in cash compensation. In Canada, a complete recreation of the original conditions prior to the historic wrongs is not feasible, because the lands are currently occupied by others. Nonetheless, the cash settlement that each First Nation receives provides it with the capacity to buy land from the federal and provincial governments or from the open market for their social and economic well-being.

However, one of the major setbacks in the specific claims issue is that the recommendations of the Indian Specific Claims Commission are not binding on both parties, hence the need for an independent body for claims resolution. The Canadian Center for Independent Resolution of First Nation Specific Claims is a result of this need, and this body will help make final binding decisions on the validity of specific claims that have been rejected by Canada.

The introduction of self-government in the settlement areas has further strengthened the aboriginal groups by providing them an opportunity to manage and administer their land, resources, and assets. Socially, the settlement process and negotiations have brought about awareness among both aboriginal non aboriginal populations about each others' lifestyle and culture.

From its assimilative policies to the recognition of indigenous land rights and recently to the provision of self-government in the settlement areas, Canada has come a long way in terms of indigenous land claims process. The success or failure of these settlement processes largely depend on the implementation of these agreements and can only be brought about by cooperative efforts of both aboriginal and nonaboriginal groups in a postsettlement environment. In this way, Canada can serve as a successful model of a fair and comprehensive process for other nations heading down the difficult path of reconciling indigenous land claims.

Appendix 1 Comprehensive Claims Outcomes

No.	Case	First nation	Province	Area claimed in km^2	Population	Settlement date	Came into effect	Settlement land (in Sq.Km)	Settlement money (Canadian $)	Self government	Mineral rights (land in sq.km**)
1	James Bay and Northern Quebec Agreement	Inuit, Cree	Quebec	1,165,286	20,746	1975	1977	165286 sq.km + 1 million sq.km shared by both tribes	225 mn	yes	
2	Northeastern Quebec Agreement	Naskapi	Quebec	Same as that claimed by the Cree in case1	660	1978		Integrated into the above agreement	9 mn		
3	Inuvialuit Agreement	Inuvialuit	N.W.T	435,000	2,500	1984	1984	91,000	152 mn + 10 mn Economic developemnt fund + 7.5 mn for social development		13,000
4	Gwichin Agreement	Gwichin (Dene & Metis)	N.W.T	57,000	2,300	1992	1992	17,818	75 mn		4,299
5	Nanavut Land Claims Agreement	Inuit	Nanavut	1,900,000	19,000	1993		351,000	1.17 bn		37,000
6	Sahtu Dene and Metis Agreement	Sahtu (Dene and Metis)	N.W.T	280,278	2,400	1993	1994	41,437	75 mn		1,813
7	Nisgaa Final Agreement	Nisgaa	B.C.	2,000	6,000		2000	2,000	190 mn	yes	2,000
8	Council for Yukon Indian Agreements*	Yukon Indians (includes more than 8 First Nations) Rae-Edzo, Rae	Yukon	whole of yukon Territory	8,000	1993		41,595	242.67 mn		25,900
9	Tlicho Agreement	Lakes, Wha Ti & Wekweti	N.W.T		3,500	2003	2005	39,000	90 mn	yes	39,000
TOTAL					65,106			1,749,136	2,171,170,000		123,012
AVERAGE								26.86 sq.km/capita	$33,348/capita		1.88 sq.km/capita

*The council for Yukon Indian Agreements First Nations include: Vuntut Gwichin, Nacho Nyak Dun, Teslin Tlingit Council, Champagne and Ashihik, Little Salmo/Carmacks, Selkirk, Trondek Hwechin and Ta'an Kwach'an Council.

** the area of land is included in the total settlement land

Appendix 2: Specific Claims Outcomes

No.	Name of the first nation	Province	Type or title of claim	ICC's recommendations to Canada	Canada's response	Type of settlement	Date of response
1	Alexis	AB	Trans Alta Utilities rights of way	Recommended claim be accepted for negotiation	No response		
2	Athabasca Chipewyan	AB	W.A.C. Bennett Dam and damage to IR 201	Recommended claim be accepted for negotiation	Rejected		2001
3	Athabasca Denesuline	SK	Aboriginal and Treaty harvesting rights north 60th parallel	Recommended government acknowledge treaty rights	Rejected		1994
4	Bigstone Cree Nation	AB	Treaty land entitlement	Accepted with assistance of Commission	Accepted	Negotiation	1998
5	Blood Tribe/Kainaiwa	AB	Akers surrender	Inquiry	Accepted	Money	1998
6	Buffalo River,	SK	Primrose Lake Air Weapons Range – loss of commercial and treaty harvesting rights	Part of claim recommended for negotiation	Rejected		2002
7	Canoe Lake,	SK	Primrose Lake Air Weapons Range – breach of treaty and fiduciary obligations	Recommended claim be accepted for negotiation	Settled	Money	1997
8	Carry the Kettle,	SK	Cypress Hills	Pursuant to supplementary mandate recommended Government recognize the nation's historical connection to the cypress hills and restore to the Assibione people their connection to the territory	Rejected		2001
9	Canupawakpa Dakota,	MB	Turtle Mountain Surrender	Recommended Canada and the First Nations work together to acquire and properly designate the burial sites	None		
10	Chippewas of Kettle and Stony Point	ON	1927 surrender	Recommended claim be accepted for negotiation	None		
11	Chippewa Tri-Council	ON	Coldwater-Narrows reservation surrender	Accepted with assistance of Commission	Accepted		2002
12	Chippewa Tri-Council,	ON	Collins Treaty	Settled with assistance of Commission	Settled	Money	1998
13	Chippewas of the Thames	ON	Clench defalcation claim	Accepted with assistance of Commission	Accepted	Money	2001
14	Chippewas of the Thames	ON	Muncey land claim	Settled with assistance of Commission	Settled	Money	1995
15	Cold Lake	AB	Primrose Lake Air Weapons Range – breach of treaty and fiduciary obligations	Recommended claim be accepted for negotiation	Settled	Money	2002
16	Cowessess	SK	QVIDA flooding claim	Recommended claim be accepted for negotiation	Accepted		1998
17	Cowessess	SK	1907 surrender	Recommended the portion of IR 73 Surrendered in 1907 be accepted for negotiation	Rejected		2002
18	Duncan's	AB	1928 surrender	Recommended the portion of IR 151E Surrendered in 1928 be accepted for negotiation	Rejected		2001

Appendix 2: (continued)

No.	Name of the first nation	Province	Type or title of claim	ICC's recommendations to Canada	Canada's response	Type of settlement	Date of response
19	Eel River Bar	NB	Eel River Dam	Recommended claim not to be accepted for negotiation	None required		
20	Esketemc	BC	IR 15, 17 and 18	Recommended that the disallowance or reduction of IR 15, 17, 18 be accepted for negotiation	None		
21	Fishing Lake,	SK	1907 surrender	Settled with assistance of Commission	Settled	Money	2001
22	Flying Dust,	SK	Primrose Lake Air Weapons Range – loss of commercial and treaty harvesting rights	Part of claim recommended for negotiation	Rejected		2002
23	Fort McKay,	AB	Treaty land entitlement	Recommended that Government owed outstanding entitlement of 3815 acres to First Nation	Accepted		1998
24	Friends of the Michel Society	AB	1958 enfranchisement	No lawful obligation found, but recommended that government grant special standing to submit specific claims	Rejected		2002
25	Gamblers	MB	Treaty land entitlement	Outstanding treaty land entitlement, if any, should be calculated based on an 1877 date of first survey	Accepted		1998
26	Homalco	BC	Aupe IR 6 and 6A – statutory or fiduciary obligation to obtain 80 acres of land from province of BC	Part of claim recommended for negotiation	Rejected		1997
27	Joseph Bighead,	SK	Primrose Lake Air Weapons Range – loss of commercial and treaty harvesting rights	Recommended claim not to be accepted for negotiation	None required		
28	Kahkewistahaw	SK	Treaty land entitlement	Recommended claim not to be accepted for negotiation	None required		
29	Kahkewistahaw	SK	1907 surrender	Settled with assistance of Commission	Settled	Money	2002
30	Kawacatoose	SK	Treaty land entitlement	Recommended that government owed a shortfall of 8,576 acres to Band, subject to confirming research	Settled	Money	2000
31	Key	SK	1909 surrender	Recommended claim not to be accepted for negotiation	None required		
32	Lac La Ronge,	SK	Treaty land entitlement	Recommended claim not to be accepted for negotiation	None required		
33	Lax Kw'alaams,	BC	Demand for absolute surrender as precondition to settlement	Recommended that government exclude aboriginal rights from scope of surrender clause	Rejected		2001

Appendix 2: (continued)

No.	Name of the first nation	Province	Type or title of claim	ICC's recommendations to Canada	Canada's response	Type of settlement	Date of response
34	Long Plain,	MB	Loss of use of treaty entitlement land	Recommended claim be accepted for negotiation	Rejected		2000
35	Lucky Man,	SK	Treaty land entitlement	Recommended further research to establish the proper TLE population	Accepted		1997
36	Mamaleleqala Qwe'Qwa'Sot'Enox,	BC	McKenna-McBride Applications	Recommended claim be accepted for negotiation	Rejected		1999
37	Micmacs of Gesgapegiag	QC	Pre-Confederation claim to 500-acre island	No substantivere commendations made because government agreed to reconsider merits of claim	None required		
38	Mikisew Cree,	AB	Economic entitlements under Treaty 8	Accepted with assistance of Commission	Accepted	Negotiation	1996
39	Mississaugas of the New Credit,	ON	Toronto Purchase	Accepted with assistance of Commission	Accepted	Negotiation	2002
40	Mistawasis	SK	1911, 1917 and 1919 surrenders	Accepted with assistance of Commission	Settled	Money	2001
41	Moose Deer Point,	ON	Pottawatomi rights	Recommended additional research	Rejected		2001
42	Moosomin	SK	1909 surrender	Settled with assistance of Commission	Settled	Money	2003
43	Muscowpetung	SK	QVIDA flooding claim	Recommended claim be accepted for negotiation	Accepted	Negotiation	1998
44	Nak'azdli,	BC	Aht-Len-Jees IR 5 and Ditchburn-Clark Commission	Accepted with assistance of Commission	Accepted	Negotiation	1996
45	'Namgis	BC	Cormorant Island	Recommended claim be accepted for negotiation	Rejected		2001
46	'Namgis	BC	McKenna-McBride applications	Recommended part of claim be accepted for negotiation	Rejected		1999
47	Nekaneet	SK	Entitlement to treaty benefits claim	Accepted with assistance of Commission	Accepted	Negotiation	1998
48	Ochapowace	SK	QVIDA flooding claim	Recommended claim be accepted for negotiation	Accepted	Negotiation	1998
49	Pasqua	SK	QVIDA flooding claim	Recommended claim be accepted for negotiation	Accepted	Negotiation	1998
50	Peepeekisis	SK	File Hills Colony	Recommended claim be accepted for negotiation	None		
51	Peguis,	MB	Treaty land entitlement	Accepted with assistance of Commission	Accepted	Negotiation	1998
52	Roseau River Anishinabe,	MB	Medical aid	Recommended claim be accepted for negotiation	Rejected		2003
53	Roseau River Anishinabe,	MB	Treaty land entitlement	Settled with assistance of Commission	Settled	Money	1996
54	Sakimay	SK	QVIDA flooding claim	Recommended claim be accepted for negotiation	Accepted	Negotiation	1998
55	Standing Buffalo,	SK	QVIDA flooding claim	Settled with assistance of Commission	Settled	Money	2003
56	Sturgeon Lake,	SK	Agricultural lease	Accepted with assistance of Commission	Settled	Money	1998

Appendix 2: (continued)

No.	Name of the first nation	Province	Type or title of claim	ICC's recommendations to Canada	Canada's response	Type of settlement	Date of response
57	Sumas	BC	IR 6 railway right of way	Recommended claim be accepted for negotiation	Rejected		1995
58	Sumas	BC	1919 surrender of IR 7	Recommended joint research to assess fair market value of surrendered land	Accepted		1998
59	Thunderchild	SK	1908 reserve land surrender	Settled with assistance of Commission	Settled	Money	2003
60	Walpole Island,	ON	Boblo Island	Recommended First Nation resubmit its claim under the Comprehensive Claims Policy	None required		
61	Waterhen Lake,	SK	Primrose Lake Air Weapons Range - loss of commercial and treaty harvesting rights	Recommended part of claim be accepted for negotiation	Rejected		2002
62	Young Chipewyan	SK	Unlawful surrender claim	Recommended claim not to be accepted for negotiation and further research be undertaken regarding surrender proceeds	None required		

Source: Indian Claims Commission Annual Report (2004)

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The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value

Garrick Small and John Sheehan

Abstract The notion of property is fundamentally different between modern culture and indigenous people. In practice, modernity posits property as a set of material rights that are notionally comparable to other material values. Indigenous people perceive property only partially in these terms and place greater emphasis on origins and obligations of property within an understanding of community that is alien to modern culture.

If property is recognized to consist of both material and non-material values, then it cannot be adequately valued in commercial terms alone. The Australian experience in assessing compensation for the extinguishment of indigenous ownership has been less than satisfactory with few resolutions and many of those negotiated in secret. Conclusions from this experience provide insights into the nature of the dilemma posed by attempting to render indigenous interests in land into modern commercial terms.

The recognition of the metaphysical foundation of the respective systems of property goes some distance toward understanding the difficulties involved in the valuation of indigenous interests. The solution probably lies outside the attempt to transfer ownership when the real need is merely use.

Small (2003) proposed a schema for understanding property across cultures and societies by suggesting that property institutions in all cultures were artifacts of legal systems that were in turn derived from culture and ethics. Culture and ethics were argued to rest on the culture's dominant anthropology, and this was grounded ultimately on the culture's dominant theory of existence. The purpose of this paper is to explore the application of this cultural theory of property to the question of compensation and valuation. This paper will begin with the application of the theory to modern Western property and its valuation and then attempt the same on indigenous interests in land. From this contrast, implications for valuation and compensation will be developed.

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Western Cultural Foundations and Property Value

Johnson (1995) outlined the extent to which modern Western thought depends upon an entirely materialist theory of existence. He demonstrated the way that theories in physics and cosmology, like the *Big Bang,* are necessary to the support of our culture and ethics. If the material world was wholly generated by spontaneous material causes, then the understanding of the human person as an entirely material, and ultimately self-interested entity, necessarily follows. Indeed, any understanding of humanity that tries to argue beyond the material realm can be shown to be indefensible within the methodology of modern thought. This is the methodological premise of all the modern social sciences. Most have taken their current forms since the Enlightenment and generally pay little deference to motivations such as charity, unless these are ultimately linked in some way to self-interest. David Hume (1777) articulated this ultimately self-centred approach to social thought in his moral sentiment theory. Hume argued that there was no basis to ethics beyond the sentiments, or affective inclinations, of moral actors. In positing this ethical system, Hume eliminated the necessity of all human social obligations, save those that the individual felt inclined to adopt through sentiments of attraction or disapprobation.

Applying Hume's social thought to economics and property, notions of justice become irrelevant and ethical commercial behavior reduces to that which is acceptable to the parties involved. Adam Smith was greatly influenced by Hume, and his little read *Theory of Moral Sentiments* (Smith 1759) is essentially a restatement of Hume's position and forms the ethical foundation to the *Wealth of Nations* (Smith 1778*)*. Under this ethical paradigm, Reeve (1986) demonstrated that Smith's theory of property was no more than that institution of possession that was upheld by state sanction. Enlightenment England in Smith's time adopted a property institution that was stripped of any obligation to the community – counter to the earlier European traditions that always connected private ownership to obligations to the community. Thomas Aquinas is representative of the earlier tradition that held that property should be held in private but with common use (1981, p. 1471, II-II, Q66). This Earlier dual theory of property was first articulated by Aristotle and finds resonances in the traditions of many non-Western peoples.

Much of Smith and Hume's position on ethics, especially as applied to property and commerce survives in present Western practice, but its radical individualism has been tempered. John Stuart Mill's (d. 1873) ethical system of utilitarianism exists on an entirely material anthropology and despite claiming to achieve a social optimum, it does so by summing entirely individual aims (Mill 1859). Applied to property and commerce, Mill's utilitarianism reduces all values to material quantities that the economic actor is assumed to be able to equate through utility equivalences. Money, being the economic measure of utility, therefore, becomes the measure of all values possible to humans.

Economic thought is entirely consistent with this approach, adopting its own peculiar anthropology, *homo economicus* (economic man). Economics posits humans as entirely material, self-interested and rational. John Stuart Mill adopted this anthropology and imbedded it into his utilitarian ethics and political economy (Mill 1848, 1859). If the human person is material and self-interested, then it follows that the object of property is to order distribution of the material benefits of property amongst individuals who are naturally inclined to pursue the maximum personal utility from the resources available. Nothing further is either necessary or possible within this approach and personal ethics within it are argued from the promise of greater personal utility from the fair treatment of others. When Mill considered human action, he had no place or need for normative ethics or spirituality, and human sentiments such as altruism and charity were irrelevant. Utilitarianism, as the ethical foundation to modern economics, is indifferent to social relationships such as family bonds or philanthropy, except where these are subjectively satisfying to the moral actor.

The valuation of property implicitly reflects these fundamentals. All formal values in Western modernity are expressed in material terms. These ultimately reduce to monetary values within the assumptions of utilitarianism. *Homo economicus* has the ability to understand the utility of material goods and rank them using money equivalents. The only exception to this is the elusive head of compensation for solatium,[1] which remains a reluctant deference to personal sentiment within the otherwise clinical business of statutory compensation. While people may subjectively enjoy a view, or prize a site of family significance, it can only be expressed socially in Western culture when quantified in material, dollar terms. In most circumstances, property has value because of its highest and best material use. This use is necessarily material and most fundamentally expressed as the capacity of property to attract rent. Property ownership is considered to consist of a bundle of rights, each of which has value according to this material/commercial approach.

Sheehan and Small (2002) have noted that indigenous ownership has necessitated the assuaging of notions of rent and market value and have shown that this broad relationship is different for indigenous peoples. Classical economists describe this relationship as the rent and price; however, from a property theory perspective it is more accurately described as a causal link between the market value of property and the rent to be paid to gain access to that property.

There has been some testing undertaken of the relationship of the causal link between rent and market value by Small and Oluwoye (1999), and more recently in respect of auction and tender behavior by Small (2002). The results in that literature confirm the view that in a perfect market, rents are the driver for market value (prices).

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[1] Solatium is the compensation made for immaterial loss associated with a loss of property rights.

Property in Classical Economics

Adam Smith (d. 1790) treated landed property extensively and concluded that land behaved monopolistically, that is to say, despite a multiplicity of vendors and purchasers, property markets cannot behave as perfect markets. This monopolistic argument can be traced to the underlying land asset (pure land factor) which has no cost of production. Prices in a perfect market are competed down to near the normal cost of production, which leaves land value unexplained. Smith also provided an important insight when he concluded "that every improvement in the circumstances of the society tends either directly or indirectly to raise the real rent of land, to increase the real wealth of the landlord" (Smith 1778, p. 228). Smith's conclusion explained why there is appreciation of land values in developing communities. That property values are grounded in this manner is a fact little appreciated by the broad real estate investing public.

Smith insisted that land rents gather up these social improvements and they are capitalized into land values. This accounts for capital gains in landed property. Ricardo developed Smith's argument somewhat further in his law of rent. It is generally noted by economists that Ricardo's work is remembered in this area for his focus on rent and not price, because price (market value) mechanistically follows rent (Fusfeld 1999, pp. 37–55). This is especially evident in property booms where capital values leave their rent-determined fundamentals only to return to them during the bust phase that is sometimes insightfully referred to as the market *correction* phase. By contrast, improvements on the property, such as buildings, tend to depreciate (Ball and Wood 1995).

Such mechanistic explanations, however, do not hold true for indigenous ownership, and the following sections of this chapter explain how indigenous notions of property worth ascribed under the auspices of property theory broadened concepts of existing Anglo-Australian property valuation law and practice.

Indigenous Culture and Property

Indigenous people do not view land as individual property *per se* but rather as a part of an ethical/spiritual/legal matrix of rights, obligations, and community relationships. Ezigbalike (1994) is representative of authors who have described the way that indigenous people tend to identify their relationship with the land with their spirituality. Other authors have shown this to be a widespread characteristic of diverse indigenous cultures (Boyd 1995; Coulanges 1890; Rakai 1995; Small 1997). Rather than basing land ownership merely on conventional[2] institutions of possession, indigenous peoples tend to relate it to

[2] Conventional here refers to arbitrary as opposed to natural.

beliefs regarding origins. A common theme that runs through many indigenous cultures is the belief in some supernatural process, usually in the form of a supernatural being (or beings) that created the world and the people. To this is added the seldom-contested ethical principle that a thing naturally belongs to the person who made it (this was the basis for John Locke's (1693) celebrated theory of property), and this natural root of ownership becomes the basis for subsequent ownership through transfer.

As natural owners, indigenous people believe that these creative beings transmitted the land to the people as part of a broad spectrum of relationships with them, which includes customs, laws, and cultural beliefs. In some cases the land is pure gift, as in the Murray Islands. In others, it is hereditary, as in Tonga (Savae 1994). In a few, the same generative event produced both the land and the people, creating a family bond, making the land almost a brother to the people (Yunupingu 1996). In others, the people were created out of the land, making it almost literally their mother.

In all cases, the people are defined culturally by the genesis event, as well as either being given the land from its creator and natural owner or linked to it by family bonds. Part of the cultural definition of the people is their system of laws and customs. Custom is, therefore, intimately linked to property and a betrayal of custom or property implies rejection of ties to the tribe. A common theme in indigenous law is the inalienability of the tribe's lands.

While few Western people may believe in Malo the octopus, or the Rainbow Serpent, the logical implications for land rights that follow from these beliefs must be respected as forming a far stronger claim on land ownership for those who do. Indigenous people generally hold similar concepts of their communal identity and its implications. The people, or tribe, are usually understood by them to be composed of all members – past, present, and future – and land rights belong equally to all of them. This means that the currently living members of the tribe represent only a tiny portion of the total membership, all of whom have equal ownership rights to the tribe's property. Since sale to foreigners can only compensate the tribe's people currently living, any alienation necessarily means disadvantaging a major portion of the tribe. It means disenfranchising ancestors and progeny of cultural and material rights without compensation commensurate with their loss.

The history of compensation for the dispossession of indigenous peoples is melancholy, and prior to the decision in *Mabo & Ors. v Queensland (No 2)* (1992) 175 CLR 1[3] indigenous ownership was not recognized under Anglo-Australian law. Since 1992 the issue of compensation for the extinguishment or impairment of indigenous ownership has been proscribed to only those incidents of ownership, which are rooted in land within the legal construct

[3] This case rejected the previously held legal belief that the land in Australia was not owned (terra nullius) prior to the English act of taking possession. It held that the indigenous people of Australia were in fact valid land owners, and in some cases that ownership persists to the present day.

known as native ownership. It is important to recognize that indigenous ownership, as currently recognized in Australian law (and referred to there as *native title*), is an artifact of Anglo-Australian property law that does not necessarily equate to indigenous ownership as understood by indigenous Australians.

Aspects of indigenous ownership, especially those that are sourced in metaphysics,[4] are given only perfunctory recognition, and attempts at valuation of these incidents has been not only vulgar but arguably profane. The historic predilection of property and valuation law and practice for physical determinism has revealed the shortcomings of these disciplines when conceiving compensation for indigenous ownership. Since 1992, sporadic claims for compensation have been filed with Australian Courts, and it is open to conclude that the reluctance of these disciplines to garner a meaningful understanding of indigenous ownership has soberly exercised the minds of potential claimants. A search of the records of the Federal Court of Australia and the National Native Title Tribunal reveal the following claims for compensation that have been lodged formally (Exhibit 1):

Exhibit 1 Native title compensation applications

Date filed	Applicant	Fed court file no.	Tribunal file no.	Area (sq km)	Location	State/ territory	Status
21/02/94	Yorta Yorta Clans	VG6001/98	VPA94/1	23470.639	Murray River	Vic/NSW	Active
24/03/94	Wik Peoples	QG6213/98	QPA94/1	27426.929	Cape York	Qld	Finalised/ Withdrawn
09/03/95	Larrakia Compensation	DG6009/98	DPA95/1	1.708	Palmerston	NT	Active
20/11/95	Suplejack Station	DG6001/98	DPA95/2	3834.988	Supplejack Station	NT	Discontinued
09/05/96	Birri Gubba People		QPA96/1	0.220	Mackay	Qld	Finalised/ Withdrawn
05/09/96	Djungan People	QG6215/98	QPA96/2	10.227	Dimbulah	Qld	Active
06/12/96	Cullen Bay/ Bayview Haven	DG6016/98	DPA96/1	1.279	Cullen Bay/ Bayview Haven Darwin	NT	
18/12/96	Pearl Connelly	QG6216/98	QPA96/3	24.868	Ernest Heny Mine	Qld	Active
12/06/97	Johnny Jango	G6023/98	DPA97/1	103.319	Yulara	NT	Active
08/10/97	Muthi Muthi People #2	NG6164/98	NPA97/1	17839.993	Balranald	NSW	Active
09/10/97	Barkandji (Paakantyi) People#9	NG6165/98	NPA97/2	130353.768	South West NSW	NSW	Active
13/10/97	Barandji (Paakantyi) People#10	NG6166/98	NPA97/3	0.521	Dareton	NSW	Active
13/10/97	Barkandji (Paakantyi) People#11	NG6167/98	NPA97/4	146.789	Lake Victoria	NSW	Finalised/Full Approved Determination - 16 Feb 04

[4] Metaphysics refers here to its classical meaning as the study of what is fit to be or less formally the study of the nature and implication of various modes of being.

Exhibit 1 (continued)

Date filed	Applicant	Fed court file no.	Tribunal file no.	Area (sq km)	Location	State/ territory	Status
16/10/97	Barkandji (Paakantyi) People#12	NG6168/98	NPA97/5	217.915	Nr Wentworth	NSW	Active
10/11/97	Muthi Muthi People#3	G6172/98	NPC97/1	42.519	Balranald	NSW	Active
10/11/97	Barkandji Compensation#5	NG6173/98	NPC97/2	N/A	Nr Pooncarie	NSW	Finalised/ Discontinued
24/11/97	Barkandji Compensation#7	NG6174/98	NPC97/3	N/A	Wentworth		Discontinued
24/11/97	Barkandji (Paakantyi) People#13	NG6169/98	NPA97/6	0.592	West of Lake Mungo	NSW	Active
05/12/97	Barkandji (Paakantyi) People#14	NG6171/98	NPA97/8	26272.878	Wentworth	NSW	Active
05/12/97	Muthi Muthi People#4	NG170/98	NPA97/7	21699.208	Balranald	NSW	Active
17/04/98	Yirra Bandoo 1	DG6038/98	DPA98/1	1.279	Cullen Bay/ Bayview Haven	NT	Active
14/05/98	Dangalaba 12	DG6039/98	DPA98/2	1.279	Cullen Bay/ Bayview Haven	NT	Active
08/07/98	Yuibera People	QG6228/98	QPA98/1	0.220	Mackay	Qld	Active
08/07/98	Stephen Seiver	NG6179/98	NPE98/1	N/A	Hunter Valley	NSW	Finalised/ Discontinued
08/07/98	Stephen Seiver	NG6178/98	NPD98/1	N/A	Warringah	NSW	Finalised/ Discontinued
08/07/98	Stephen Seiver	NG6177/98	NPC98/1	N/A	Hunter Valley	NSW	Finalised/ Discontinued
08/07/98	Stephen Seiver	NG6175/98	NPA98/1	N/A	Hunter Valley	NSW	Finalised/ Discontinued
08/07/98	Stephen Seiver	NG6176/98	NPB98/1	N/A	Hunter Valley	NSW	Finalised/ Discontinued
13/08/98	Bodney Family	WG6289/98	WPA98/1	1.349	Birdswood Island, Perth	WA	Active
29/09/98	Bodney 2	WG6290/98	WPA98/2	4.052	Kings Park, Perth	WA	Active
29/09/98	Bodney 3	WG6291/98	WPA98/3	7.025	Rebold Parks	WA	Active
31/08/99	Molong People	N6014/99	NPA99/1	N/A	Central West	NSW	Finalised/ Discontinued

Source: Constructed by Sheehan from National Native Title Tribunal, and Geo-Spatial Unit of Tribunal, 30 September 2004.

These 32 claims for compensation total 251,463.66 sq. kilometers, representing a miniscule 0.00327% of the total 7,682 million sq. kilometers comprising the Australian continent. It is generally Crown land that indigenous people are permitted to occupy, but they hold no rights to the land. Five of the claims listed above appear to cover the same area of land. However, this is not unexpected given that indigenous ownership can be inter alia an expression of the filial relationship between individuals. Furthermore, there is a whole raft of compensation claims which are ancillary to native ownership claims, a notable example being *Ward v Western Australia (1998) 159 ALR 483*, which fostered subsequent related compensation claims by the *Miriuwung Gajerrong* peoples of the East Kimberley region of Western Australia. There are also unreported

claims for compensation between indigenous peoples and the government for compulsory acquisition arising from specific public works in many parts of Australia.

Furthermore, it is notable that indigenous peoples, in Australia, New Zealand, Canada and elsewhere, have entered into confidential negotiations for compensation when dealing with proponents for natural resources exploitation within Indigenous lands.[5] Some of these agreements have been registered as Indigenous Land Use Agreements (ILUAs) with the National Native Title Tribunal, under amendments made in 1998 to the *Native Title Act 1993* (Cth.). However, in almost all ILUAs compensation details remain confidential. Importantly, the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner noted in 1998 that in the agreement process:

> ...such negotiations will take place with a fundamental imbalance of bargaining power. With the non-native ownership interest having already been validated, some parties may approach such negotiations as a matter of benevolence or favor, rather than motivated by a real need to resolve the issues. A failure to resolve the issues will simply transfer the matter to the Federal Court for determination, where it is more likely that the Court will not order non-monetary forms of compensation (particularly if such compensation imposes obligations on unwilling third parties). (Acting Aboriginal and Torres Strait Islander Social Justice Commissioner 1998)

Implications for Valuation

The relationship between indigenous people and their land, regardless of their genesis beliefs, is always based on non-material, non-commercial foundations and its primary significance is usually cultural. While it is a convenient aside that the tribe's land provides the raw materials for their material welfare, it is not central to their ownership and only constitutes a part of it. Often, indigenous people are not concerned about exclusive occupancy, despite being fiercely jealous of having the land recognized as their property. There is something beyond occupation and use rights that constitutes a core value in indigenous ownership. This means that the alienation of rights pertaining to land cannot be fully evaluated using material/commercial equivalencies.

If the transfer of land rights away from indigenous people is to be compensated, either by a fair price in the market, or just terms of compensation for public acquisition, the value of the interest alienated should be matched in metaphysically equivalent terms, which means in terms of metaphysical category and accidental quantity. [6] Metaphysical categories are not an issue for

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[5] For example, see *Alice Springs News* (1996) "Deal on sacred trees: Goods, services, cash – custodians negotiate" (February 26) 1.

[6] In philosophical terms, the dimensions (size, number, mass, etc.) of the specific qualities of a thing are referred to as *accidental qualities*, since they are not necessarily specified for the thing to be what it is. Each category has a specific nature, but within it variations of degree (accident) may occur.

Western commerce, so long as the assumptions of material utilitarianism are adopted. Ackrill (1997) is amongst recent authors who have revived interest in metaphysical categories as first articulated by Aristotle. The notion of the categories is that they are sets of fundamentally different entities in existence. Since they are fundamentally different, they cannot be directly compared or equated. The experiences of sight and sound are categorically distinct, and comparisons between the two are merely poetic. Within the notion of value, as broadly understood, lie many distinct metaphysical categories. For example, the value of eyesight is incomparable to the value of love.

In social relationships, it is often necessary to undertake exchanges between categories, but this is not the same as establishing equivalence. If a person is willing to be blinded for the love of another, we cannot conclude that eyesight is equivalent to love. In the case of compensation for the loss of external material things, our culture relies on the assumption that everything that is desirable is reducible to a materially conceived estimate of utility, and these may be translated into money terms. Meikle (1995) is among the philosophers and economists who are currently critical of this position, despite it remaining as the formal foundation of economics. He cited authors who demonstrated its failures but concluded that it remained as a necessary basis for the modern discipline. This is not to say that in some cases commercial utility cannot be understood and compensated – a property investor who loses a rental stream through the loss of a property right can be compensated with reasonable precision using a category of wealth equivalent to the one lost. This is the area where valuers are on solid ground. Rather, there exists a class of situations, where commercial equivalence is problematic, but it is not adequately appreciated by us.

Compensation for the loss of a limb, or an eye are common instances where the commercial equivalence is less straightforward. At one level, arms and legs are merely instruments for the support and productive activity for the organism, and the loss of their function may be replaced at a known cost. On this level, body parts can be valued reliably. However, few would argue that the loss of an arm is not more than the loss of the wages that could be earned using that arm. Its loss represents the loss of social confidence and possibilities – more esoterically it means the loss of part of one's humanity and self-image. These do not have commercial equivalences, though their value to the person may be considerably greater. The incomparability of these types of values is evident in the fact that a market in arms, legs, or kidneys is inconceivable within our culture, where a vendor would willingly surrender these things for commercial reward. There may be people in the world who would willingly pay a king's ransom for a kidney, but the possibility of live donors selling their kidneys, even for the prices obtained in compensation cases, is unconscionable. If fair market value requires willing, but not eager buyers and sellers, it is evident that there cannot be a fair market value where willing, but not eager, vendors are humanly impossible.

The betrayal of one's country, or one's kin, represents a case that is more explicit and extreme. Judas's thirty pieces of silver could never be augmented to the point where history would judge his actions to be merely commercial. It would not be likely, either, that a greater sum would ever reverse his self-condemnation – had he obtained 300, 3,000, or 30,000 silver pieces he probably would have been no less likely to commit suicide. Traitors are courted by a country's enemies but then usually despised and mistrusted by their new masters. It is no accident that a person who has no social conscience in business is often described by the common idiom as one who would "sell his own grandmother." This expression conveys our lingering tendency to uphold the dignity of women, especially mothers, as valued beyond surrender in a world where everything is said to have its price. Like the traitor, such a person is to be mistrusted and subject to the severest social sanctions. They have abrogated an aspect of their humanity and are typically considered unfit to be a wholly reliable member of society. Kant was commenting on this type of behavior when he concluded:

> . . . a human being regarded as a person... is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. (Kant 1785, pp. 434–35)

A person who would sell his own grandmother is one who treats persons about him as objects to be used for his own self-interest. He makes an unacceptable exchange between two distinct categories of value. Kant was making an ethical argument, and it demonstrates the ethical dimension to some aspects of pricing. There are some categories of value that are not considered appropriate for commercial equivalence. For indigenous people, their connection to their land falls within such a category.

Implications for Land Affected by Indigenous Ownership

The recognition in Australia, since 1992, of "new" and "not-so-new" property rights, such as indigenous ownership, water and biota, have raised hitherto unexplored valuation challenges. Definition, fixity and certainty are hallmarks of land and mineral property rights, and are fundamental characteristics of a Western understanding of a property right. The task of transforming these "new" rights into practical legal property rights, capable of valuation, remains problematic.

This is not to say that these "new" rights do not have worth, for some such as water and biota have already been recognized as having immense commercial value in the market place irrespective of whether they are legal property rights. Their economic value derives from their value for human production and use.

Other rights, such as indigenous ownership, present a unique set of valuation issues. Failure to resolve these issues will present due diligence problems, if public funds are to be expended in the payment of compensation arising from compulsory expropriation. There is a need for greater certainty as to the rights and interests asserted by traditional owners, if due diligence tests are to be met. They derive only indirectly from use value, but more immediately from the fact that the use values required are owned by a separate community that is reluctant to alienate them.

An insight into the reluctance of indigenous communities to alienate their property rights can be gleaned from an examination of the psychological power of custom and tradition.

While exploring the psychological dimension of human values Peter O'Connor (2000) found important psychological insights in Celtic traditional practices that persist as important nonmaterial values in our own culture. Similarly it is noted that in the popular song entitled *Green Fields of France* by the Irish singing group, the Fureys, lamenting the death in 1916 in the Great War of a 19-year-old Irish soldier Willie McBride, when addressing his gravestone ask "did they beat the drum slowly?" This reference to giving respect to those who have recently died and about to be interred is based upon the Celtic tradition that the ritual commemorating the death of an individual must not be hurried.

O'Connor believes that:

> . . . [a]ncient mythology is invaluable for understanding the issues, feelings and conflicts we've repressed either as individuals or a culture – death, the transitory nature of life, the sacredness of the land. Myth is in fact the distilled essence of human experience expressed in metaphor, which survives much better in the oral tradition. Without the restrictions of the written word, myths can free the imagination from the modern preoccupation with evidence. (O'Connor 2001)

This Celtic tradition provides but one strikingly analogous example of the deep spirituality that indigenous peoples have with the land (Yunupingu 1996). Indeed, within Australian customary ownership, one of the "new" property rights introduces spiritual and cultural attachment as one incident of the "bundle of rights" that may be asserted by traditional owners of a specific native ownership. Not surprisingly, the valuation of such an incident is disconcerting for the valuation profession, and as Myers notes:

> [s]ome authors advocate that indigenous people have a spiritual or sentimental attachment to the land, unlike non-native westerners, and therefore, spiritual values cannot be ignored when valuing native lands for compensation purposes. Some authors further expand the cultural and spiritual aspects of indigenous lands. (Myers and Shah 2004, p. 1)

Myers and Shah reflect the fact that there is considerable controversy within the property profession regarding the existence and significance of the spiritual and sentimental attachment to land held by indigenous people. For those who reject their influence in the treatment of land property, the indigenous interest easily reduces to a set of use rights that are identifiable and quantifiable in

material terms – money. For those authors who recognize the force of the metaphysical foundation of indigenous relationships with land, Myers correctly recognized:

> [v]aluing indigenous land has been described as 'a special field of real property appraisal that frustrates many of those who accept such assignments' (Myers 2002, p. 4).

This fact follows primarily from the error of attempting to understand indigenous ownership using modern Western categories, especially through the lens of valuation theory, without recognizing the cultural imbeddedness of that theory. Valuation theory is built on the general framework of land law, which in turn rests on Western metaphysical foundations that assume that no non-material categories of value exist (Small 2003). While the valuation profession displays an understandable desire for comfortable incremental development of valuation case law and practice to accommodate these extra-modern aspects of ownership, failure to adequately incorporate the deeper issues will necessarily undermine the integrity or the result.

It is an easy mistake to seek quick solutions from within existing property and valuation law and practice rather than to accept that the acknowledgement of indigenous interests in land forces recognition of a dimension of property that has been largely forgotten by the West, somewhere in its transition into modernity. If indigenous ownership is understood to be fundamentally different from the Western title, some conclusions regarding the value of indigenous ownership may be reached.

Most important is that while usage of indigenous land may have a discernable rental value, it may not necessarily capitalize into a fair market price for alienation. This is because indigenous people see their relationship to the land as more than a commercial interest, even if they traditionally rely on their land for material support. In this respect, indigenous land is more like a body part than a conventional external discretionary possession. Part of a body part's value may be expressed in terms of material utility, such as a pianist's fingers, but few would deny that one's fingers are not worth more to a person than their potential contribution to paid work. This means that there also exists a separate, metaphysically distinct, category of value for which a fair market value cannot be established.

This separate aspect of indigenous ownership comes from the foundations of indigenous culture and is opaque to Western minds, at least while they are applying Western commercial and legal paradigms to the question. The non-commercial aspect of indigenous ownership does not necessarily pertain to particular use rights, as understood by Western valuers, but rather with the more fundamental conception of ownership qua ownership (Exhibit 2).

Property value in the Western understanding is made up almost exclusively of use rights, as illustrated by the emphasis on "highest and best use" when considering land value. All use rights can be reduced to either a rent for occupying land without damaging it, or royalties in payment for what is extracted from the land when it is changed through use. Since these payments

Exhibit 2 The nature of ownership and use rights to property

	Particular rights	Commercial value	Necessary for western use	Possible for customary owners to alienate	Comments
Use rights	Exclusive occupation	Yes	Yes	Yes	May be transferred to tenants
	Right to develop	Yes	Yes	Yes	May be transferred to tenants
	Right to extract raw materials	Yes	Yes	Yes	May be transferred to tenants
	Security or use for economic life of improvements	Yes	Yes	Yes	May be transferred to tenants in lease terms.
Ownership rights	Right to rent and royalties	Yes	No	No	
	Rights to capital gain	Yes	No	No	
	Right to Alienate or retain	Yes	No	No	
	Right to bequeath	No	No	No	No commercial value for the owner
	Recognised as true owner	No	No	No	
	Right to veto land uses	No	No	No	Only negative commercial value for user

accrue to the owner, they are the foundation of the property's commercial value in sale. In Exhibit 2, a selection of key rights of use and ownership are listed with their significance for commercial value.

Generally, the commercial value of land, largely contained within the first three ownership rights, can be seen to be derived from the ultimate right of the owner to use. Each component of the freehold ownership bundle of rights may be analyzed in this way. The non-commercial rights are critical in the indigenous ownership debate because they are fundamental to indigenous people, yet they are formally valueless to Western people.

Recognition of the value of non-commercial rights raises issues of the appropriateness of established valuation practice, which has its origin in centuries of case law throughout the common law world, grounded on a materialist metaphysic. Indeed, other professions, such as town planning, are also struggling to understand how to interact with some property rights, such as customary ownership. There is a misconception that these non-commercial rights can be understood, influenced and even regulated in a manner similar to land and mineral property rights.

Myers and Shah (2004) are representative of recent authors, who have attempted to interpret indigenous interests in terms of the Western paradigm. By attempting to interpret the value of indigenous land using a Western cultural perspective under the guise of Western legal and property thought, several fundamental misunderstandings result. Although methodologically the valuation of indigenous ownership land is sound from the perspective of understanding the current practices regarding compensation value, this does little to address the more fundamental question of whether these decisions represent

an adequate respect for the cultural costs to the indigenous land owners or a resolution of the intercultural tensions created over land ownership. For two centuries there was relatively consistent legal treatment of Australian aboriginal claims for compensation for their land. This was done under the Western adoption of the belief that Australia was settled *terra nullius* (i.e. empty land), but analyzing these legal facts does little to address the underlying intercultural problem that was finally recognized to some degree in the Mabo case. In particular, Myers & Shah highlight the following methodological problems:

1) The interpretation of indigenous interests in land as a set of use rights misses the fundamental issue in the indigenous understanding of ownership.
2) The valuation of indigenous interests on the basis of use rights ignores the fundamental and categorically distinct cultural value of land to indigenous peoples and is impossible to render equivalence in commercial terms.
3) The use of Western judgments of value creates the illusion of methodological integrity, while compounding the historical errors in the intercultural misunderstanding of indigenous culture. It does injustice to the indigenous people's understanding of their relationship to the land.
4) The reduction of indigenous ownership to a set of use rights ignores Western antecedents concerning non-commercial values in Western culture, especially those that have survived into the present.

This approach equates indigenous ownership to somewhat more familiar Anglo-Australian tendril interests that may be less than freehold ownership. The approach compensates indigenous people for the material value of their relationship with land,while totally ignoring the fundamental cultural understanding that gave rise to the relationship in the first place.

A more important underlying point may be taken from Exhibit 2. Explicit Western needs for land focuses on use rights, whether private or public, and these may be transferred from the indigenous owners without violating their customary laws in most cases. Western society needs land for urban, tourist, extractive or rural purposes. All these needs may be achieved via leasehold ownerships. The use of leases to make indigenous owned land available to foreigners, or even individual indigenous people, is widespread across the Pacific and Africa. There is also no shortage of examples in western societies across all property markets of leasehold situations in the private sector where apparently permanent land uses are carried out on land leased from owners who have no involvement in them. This is partly because no human land use is necessarily perpetual, despite appearances. This fact of nature also applies to public infrastructure, such as roads and even water supply systems. In all cases, there may come a time when the hotel or office, road or dam will no longer be needed, even if that time is beyond current anticipation. In all cases, leases could be configured that would transfer use rights, possibly for extremely long periods of time, that would satisfy explicit Western land needs without violating indigenous traditions.

The commercial reality for many Western entrepreneurs is that the greater income from property often comes predominantly from its increase in value through capital gain rather than rental due to its physical economic use (Harrison 1983). While leases sometimes allow these gains to fall into the pockets of tenants for the duration of the lease, such as in statutory leasehold estates found in places such as the Australian Capital Territory or rural Queensland, ultimately they return to the landowners. To the extent that indigenous people understand that their obligations to their culture prohibit voluntary alienation of ownership, they cannot alienate this right, which ultimately reverts to the owner. This appears to be the implicit core issue that motivates many Western parties intent on appropriating indigenous lands, even though it usually remains explicitly unstated.

Conclusion

Indigenous ownership is rooted in the beliefs held by indigenous people regarding their origin and the origin of their land. If their beliefs are respected, then their relationship to their land follows deductively. If a dominant value of Anglo-Australian culture is tolerance and respect for the beliefs and practices of various cultures, then it must accept indigenous ownership based on the methodological premises of the indigenous peoples themselves.

By contrast, Western property ownership is methodologically incomplete, based only on state-sanctioned possession and the contentious claim that the Anglo-Australian property institution is economically superior. The former argument exemplifies the fallacy of common practice, while the latter relies on the dubious ethical claim that the end justifies the means.

Valuation of indigenous interests by equating them to a set of material use rights and assessing their market value is flawed, because it dilutes the indigenous understanding of people's relationship to the land to the Western position. In so doing, it either ignores the very basis of indigenous ownership, or attempts to place commercial value on a relationship metaphysically incompatible with physical materialist valuation. In this respect, valuation of indigenous interests is analogous to forcing indigenous people to price and alienate something that is as precious and as necessary to their self-identity as their own kin. It is no surprise that those who accept compensation on these grounds are extremely self-conscious of making public their acts, which are arguably equivalent to cultural treason.

Before speaking about the valuation of indigenous ownership, one must first resolve several more pressing issues. The first is the matter of what is politically possible. It has taken Australian aboriginals two centuries to achieve limited recognition of their relationship to the land and they remain politically weak. By contrast, in many parts of the Pacific and Africa, indigenous people have retained the political power to direct the course of property. A second and

independent consideration is the matter of how necessary is the sale of customary land, even for pressing needs. This revolves around opinions regarding the necessity of Western-style developments and the formulation of relationships to the land that facilitate material utilization of land without alienation of the indigenous owners. Leasehold arrangements appear to offer this possibility. A final issue is the apparent connection between indigenous ownership and sub-optimal land use. Western landowners do tend to push harder to realize highest and best utilization of property. Decisions will be required regarding the balance between utilization efficiency and cultural costs.

Overall, it could be that the destruction of the relationship between indigenous people and their land is far less necessary than it first appears, though there is still a considerable amount of work to be done in designing appropriate practical strategies to manage the intersection of the two perspectives on what land means and how it should be used. Leasehold appears to hold the key in this respect, though it needs careful design. Leasehold has been widely used in Western property markets with great success, and its shortcomings in applications over native-owned land appear to be associated with the structure of the contracts more that the lease relationship itself. The great attraction of a lease is that it permits the transfer of exactly those material rights that are required for Western economic utilization without stripping native owners of their underlying right to call the land theirs. The valuation issues in this type of relationship are considerably more approachable. In this way, a careful attention to the metaphysical underpinnings of property offers an effective way around the Gordian knot of valuing the invaluable interest of customary land ownership.

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A Just Integration of Western and Customary Land Rights in Australia

Garrick Small

Abstract The Wik people of north eastern Australia have successfully argued for recognition of their customary ownership claims over land under state leasehold title. Their success initiated a reaction from the tenants that was grounded more on the fear of losing extra-legal benefits customarily attached to state leasehold title than concern over the rights of indigenous people. To untangle Western extra-legal customs regarding property rights and the question of indigenous rights, a strategy for amortizing the Western extra-legal interests is suggested. Amortizing the Western extra-legal interest is in the interests of the Western community regardless of indigenous customary ownership claims. The methodology adopted is grounded on deductions from the implications of the notion of ownership and a respect for natural justice.

Valuation of the interests to the tenants, indigenous owners, and the Western community is considered conceptually along with some practical issues in resolution. Each of these may be inferred from their natures. If the occupier is subject to market rentals, then the market will price the tenant's contribution, regardless of the land ownership. It is suggested that the net indigenous customary interest can be related to the traditional value of the land as a source of material support. This would account for only part of the current market rental. The remainder can be explained as largely flowing from the contribution of the Western community and infrastructure. To recoup this for the community that created it, a special land tax over indigenous customary titled land is suggested. This would leave indigenous customary owners with the difference between rental income and land tax. Such an arrangement could eliminate indigenous people from welfare dependency and return to them a degree of self-determination.

Control of land use is an important aspect of ownership and one sorely missed by indigenous customary owners. The inclusion of indigenous peoples in the planning process with a right of veto, either formally or through their

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position as leasers, has the capacity to overcome this problem, without the need for them to become the occupiers on the land in the Western sense.

Introduction

Following the successful recognition of the existence of indigenous customary ownership to land in Australia in *Mabo & Ors v Queensland (No 2) (1992) 175 CLR 1*, the Wik people of northern Queensland mounted a claim for recognition of their customary lands. The Mabo case opened the possibility for recognition of customary rights where the customary people had maintained a continuous connection to the land, and their rights had not been extinguished by valid acts of the Australian government, especially the granting of freehold title. Much of the Wik people's land had been granted as pastoral leases, and they successfully argued in *Wik Peoples-v-Queensland (1996)* 187 *CLR* 1 (*Wik)* that since leases were terminating personal interests over limited specific land rights, there would be at least partial survival of the underlying customary interest. The *Native Title Act 1993* (Cth.) was amended, following the case, in order to better facilitate the recognition and processing of customary ownership claims. Tyronn Venn has studied the Wik people and their aspirations for self-sufficiency and has recognized the potential for a viable forestry industry within the parameters of customary culture and commercial needs (Venn, 2004). Beyond this, recognition of customary ownership has the capacity to provide other potential incomes for the tribe on the basis of mineral royalties, pastoral rents, and tourism opportunities, in particular, the possibility of indigenous people taking over leases to nonindigenous people, as happened in New Zealand and elsewhere (Boyd, 1995; Kingi, 2004).

The purpose of this chapter is to explore the consequences of the emerging relationship between the Wik people, as the newly recognized land owners, and the pastoral leaseholder who hold valid, though limited lease rights to the land. It will do this by examining the circumstances of the pastoral leaseholders, their legal rights, and expectations in contrast to the underlying reality of ownership, which has been recognized as belonging to the Wik people. The conclusions will be drawn as general principles aimed at providing an economics of customary/Western property integration that may be applied to other cases.

Pastoral Leaseholders

Pastoral leaseholders have a combination of statutory rights and extra-legal customary expectations over the land they occupy. The concept of (state) pastoral leasehold provides tenants with temporary rights to those aspects of the land that are necessary for the efficient use of the land for explicitly

delineated purposes. These are statutory rights the limits of which are set out in the terms of the lease agreement.

There have also arisen extra-legal *customary* expectations attached to leasehold tenure that have been translated into prices paid for the leasehold interests. These consist of those privileges, beyond the limits of the lease, which leaseholders have enjoyed by custom (note that the use of the term "customary" in this section refers to Western extra-legal customs, as opposed to indigenous extra-legal customs as used in the rest of the chapter). They originate as a result of the custom of the state charging rents that are below market levels, and from the community confidence that has arisen that leases will be perpetually renewed, that is, they have arisen from practices and perceptions in the treatment of state leases at variance to the explicit legal parameters of the rights conveyed in the lease itself. Frank Brennan noted that in the case of the Australian Capital Territory (ACT), rents on state leasehold land in the city of Canberra had fallen so far below market that they were even below the level of local government rates in other Australian cities, making a farce of the legal rental relationship in that city (Brennan, 1971). As such, they constitute a problem that merits remedy regardless of the indigenous land rights issue.

The practice of setting rents below market levels has left leaseholders with an additional increment of income, that is, the difference between the underlying market rent and the actual rent charged by the state. This increment is a profit rent or "rental gap." It has created an interest in the land that has been capitalized as part of the sale prices that are charged for the transfer of state leases. Despite having no statutory basis, these prices have become a part of the Western extra-legal customary practice. Their magnitude provides the dynamic for the claim by pastoral leaseholders for protection from the possibility of losing their leasehold interests.

Related to this are the implications of an expectation of perpetual renewal of leasehold tenures. When tenants perform capital improvements, normal commercial practice is to either amortize the improvement over the period of the lease or have some compensatory provisions built into the reversion. In line with the overall supportive relationship between the state and pastoralists there has developed a belief that renewal would be automatic. This has led pastoralists to believe that their capital investments were secure and need not be amortized. Recognition of indigenous customary ownership disturbs confidence in this belief.

Given that tenants have a natural interest in these improvements, they would appear to have a reasonable claim on their value. A part of this claim is the recognition that the tenants are responsible for the provision of these improvements, and a part is the recognition that tenants have maintained the underlying capital value of the property. The recognition of this latter aspect is important because it forms an incentive for tenants to maintain best practice until the termination of leases, rather than seek exploitive use at the end of tenancy to the detriment of the property.

Combining these two aspects of the private value of pastoral leaseholds leads to a summation that is very close to the value in exchange of these properties as shown in Exhibit 1. The question that must be addressed is how to deal with the extra-legal customary Western component in the event of some future structural change in the system of leasehold.

The extra-legal part of the value is a profit rent derived from the rental gap that appears to be the result of a fault in state policy with respect to a fair setting of rental. It has effectively transferred some of the community's property rights into private hands gratis. This is an implicit privilege that has been extended to tenants. The privilege is one that has gradually and inconspicuously developed as actual rentals charged fell behind a true market level. This gradual process would have been initially experienced as super-normal profits. Super-normal profit is unstable and has tended to give rise to the following compensating mechanisms illustrated in Exhibit 2: Three are of interest in this context as follows:

(1) Competition. Theory suggests that prices for farm produce should be bid down as a result of the surplus profits. However, because pastoral leaseholders do not influence the market sufficiently to influence prices, price movements have not been significantly bid down by this group, and it is well recognized that price falls are better explained by global influences.
(2) The effect of competition has rather been in terms of competition for leaseholds, which has pushed up resale prices on the basis of continuing profit rents. The super-normal profits tend to be capitalized as part of the sale price of the leasehold interest. In this way, the exiting leaseholders have taken out the super-normal returns, leaving the incoming tenants with only normal returns. This explains why many pastoralists believe that they have effectively purchased the freehold value of their farms. Their purchase price implicitly cost them the equivalent of the capitalized value of the profit rents that the earlier tenants enjoyed as super-normal profits. Their incomes have been reduced to marginal levels by the prices that they were prepared to pay to acquire their leaseholds. This makes correction all the more difficult because the beneficiaries of the anomaly are often the previous generation of leaseholders.

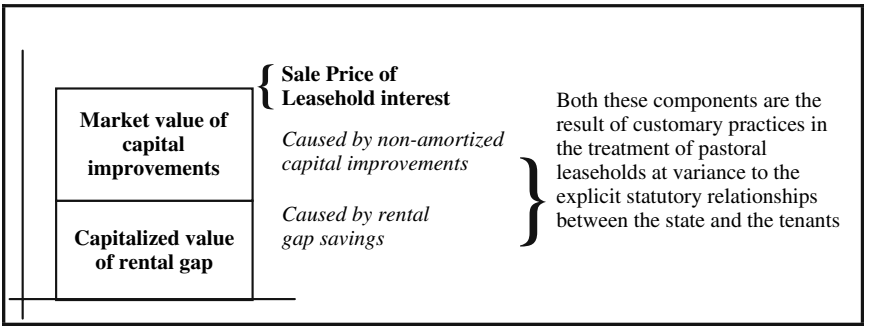


Exhibit 1 Construction of the sale price of leasehold interests

(3) Excess leaseholder income translates into elevated effective demand for goods and services required in connection with running the properties. Elevated demand stimulates higher prices, thereby taking a share of the farmers' super-normal profits. These elevated prices can be for a diverse range of things including higher costs for capital equipment, higher interest rates, higher charges by the suppliers of the operating needs, higher transport, and various agents and service providers. These create a multiplier effect through rural communities that dilutes leasehold super-profits, spreading them across a broad range of secondary businesses. Politically, when the state allows state leasehold rents to fall, it surrenders potential income but stimulates entire rural economies. Since the falls in rents have often been due to their nominal level remaining fixed despite general inflation, the loss of potential revenue to the state is often disguised.

As long as rents were maintained below market levels, pastoralists were able to face these escalated charges. Because they have become the accepted norms of rural commerce, and have most probably themselves been subject to profit erosion in turn from their suppliers, these cost structures may be considered relatively permanent. Although they have developed as a flow-on from the rental gap, their existence may be considered to have resulted in an apparent market rent that is actually below the implicit true market rent, which may have been realizable in the absence of this effect.

Outgoing tenants benefit doubly from the rental gap, once in terms of annual super-normal profits and again on sale, where they effectively took the future rental gap capitalized into the transfer price from the incoming tenants. Despite leaving incoming tenants in an inferior position, they did not act in bad faith, because they would not have analyzed the origin of their strong returns, and in any event they sold their leasehold interest in a free market situation to willing purchasers. The transfers did however cement into place dependency on the continuation of the extra-legal custom of the state charging below market on its leaseholds, contrary to the actual lease relationship.

Although the former tenants had no statutory right to the margin between actual and market rental, the extra-legal customary enjoyment was understood to be ongoing by the market for leasehold properties. Current tenants who have purchased leaseholds have in fact paid for something that the vendors did not own-a portion of the rental rights that belonged to the community. It is essentially unintended commerce in misappropriated goods.

A Strategy for Correcting Pastoral Leases

The problem has arisen gradually over a period of decades with some being awarded as early as in the 1920s. Over this time, the benefits that justly belong to the state have been progressively taken by a combination of capital gains to outgoing tenants and excess profits to suppliers. This suggests that it may not be

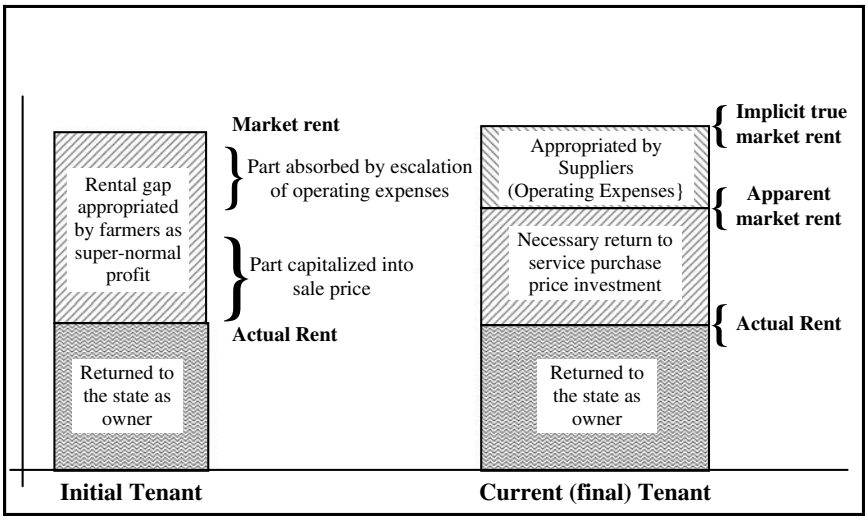


Exhibit 2 Absorption of rent as capital growth in leasehold interest value and escalation of operating expenses

possible to effect a complete correction, and any correction should be introduced gradually. However, because the problem is one that is implicitly denying the community income that justly belongs to it, it deserves correction regardless of the current attention turned on it as a result of indigenous customary rights issues.

A second reason for attending to this problem relates to inter-generational equity, again unrelated to indigenous customary rights. As described, the practice of setting submarket rents only benefits those tenants who happen to be occupying the land at the time that the rent falls below market. This is because those tenants extract from future occupiers the capitalized benefit, thereby leaving future users no better off than if rents had been left at true market levels. Purchasers of leaseholds have taken a risky financial position by accepting the continuation of the extra-legal practices.

Several strategies could be considered in order to implement a transition from the present extra-legal custom of below-market rents to true rents. Their success would rely as much on political realities as economic considerations. They include the following:

(1) Grant life tenures to current leaseholders at current rents but with adjustment to market in the event of death or sale. This could result in difficulties for the families of some tenants as they may be penalized, if they have only recently purchased a leasehold and the leaseholder dies. It is also complicated in the case of corporate ownership.
(2) Provide extended lease terms on all existing leases during which some explicit programme of adjustment to market would be followed. This could be in the form of a straight line depreciation of the profit rent through

Exhibit 3 Losses in current value from straight line depreciation schedules introduced at various times into the future using a discount rate of 12%pa

Start year	Adjustment period			
	1	10	20	30
10	32.2%	20.4%	13.5%	9.7%
20	10.4%	6.6%	4.3%	3.1%
30	3.3%	2.1%	1.4%	1.0%
40	1.1%	0.7%	0.4%	0.3%
50	0.3%	0.2%	0.1%	0.1%

an annual increase in the actual rent until it meets the market. The period could be set over several decades.

(3) Implement a general programme of adjustment with a deferred commencement, such as 20 more years at the current relative rental levels, followed by an adjustment schedule similar to (2) above. This would spread the correction over about two generations.

Exhibit 3 examines various possibilities using a 12% discount rate. In the case where the adjustment begins in 30 years and runs over a decade, the effect on current leasehold values is a very modest 2.1%. Likewise if rents were adjusted to market in a single adjustment in forty years' time, the current impact would be only a drop in value today of 1.1%. In either case the current impacts are negligible.

The practical implication of such an adjustment will be the eventual return to the community, or the indigenous customary owners, of the rental that has been allowed to drift into private hands. By using a sufficient time frame the negative impact on current leaseholders will be negligible. While there may even be grounds for compensating current leaseholders for the loss, its magnitude is likely to be so slight as to be below the practical precision of property valuation. In any case, compensation in the order of 2–3% of the value of the capitalized rental gap may not be beyond the realms of what a government may be willing to offer in compensation to leaseholders.

In practice, the reversal of the extra-legal expectations of capital gains will be the most significant cost experienced by leaseholder, but they have never had legal rights to these capital gains. Furthermore, careful analysis of the origin of capital gains for state leasehold properties reveals that they are actually the result of the escalation of the rental gap, that is, the exacerbation of the problem.

Introduction of Compensation for Residual Value of Capital Improvements

Concurrent with this programme, it would be just to set provisions for the valuation and compensation of tenants for the residual value of capital improvements. This would operate by paying out tenants for the difference

between the value of the property as it stands at the conclusion of the lease and its unimproved value. Once the rental anomaly has been removed, this price would simultaneously become the sale price of the property if the state chooses to offer it to other tenants. Apart from compensating tenants for improvements made on the expectation of virtual perpetual tenancy, it would also provide an incentive to maintain best practice management till the end of tenancy, hence maximizing the outgoing value of the property.

If rents were at market levels and tenants compensated for residual capital improvements, then at the termination of leases outgoing tenants would be economically indifferent to moving off the land as opposed to renewing their leases. This would appear to be the ideal situation for the end of a lease, regardless of the impact of indigenous title claims. Ironically, indigenous people are not keen to perpetuate this flaw in long Western leases. In parts of the Pacific, such as Fiji, attempts have been made to ensure compensation of outgoing tenants is built into the fabic of the leasehold system over customary land. It is, therefore, not the issue of indigenous ownership that has produced the opposition of leaseholders but the threat to the customary strategy for overcoming a flaw in long Western leases.

The real difficulty is the fact that much of the privilege has now been absorbed by others, especially former leaseholders. However, a progressive adjustment programme would bring the adjustments within the normal depreciation range of other personal assets.

The Nature of Indigenous Title

Indigenous people believe that they are the owners of the subject land within their own legal system, which they usually understand to be directly derived from their cultural and spiritual systems**.** This means that unlike the extra-legal Western customary expectation of economic privilege, indigenous customary ownership is legal ownership, albeit within a legal system foreign to Western law. It prompts an investigation into the meaning of "ownership" as understood within the two cultures. In Western analysis, land ownership is understood to mean a bundle of rights, which may be distributed between more than one party (Reeve, 1986; Sheehan and Small, 2004). Western ownership means permanent control over the majority of the rights pertaining to land, especially the right to derive income and rent from the land. The actual bundle of rights varies between states and over time. Several rights, such as the rights to specific minerals, and the right to decide what activities or improvements may be carried out on the land, are often retained by the state and may change as a result of statute.

Although they insist on ownership, indigenous people often do not insist on exclusive occupation as practiced by Western peoples. This relationship between ownership and occupation is one of the areas of misunderstanding between indigenous and Western peoples. The argument for *terra nullius* was

premised on the absence of ownership in Western terms: exclusive and intensive occupancy (Hocking and Stern, 1998). Aboriginal people understand ownership in terms that are more correctly understood as metaphysical. Ownership, or relationship to the land, is a part of what aboriginal people understand the land and people *are*.

In the West, this type of metaphysical understanding was eclipsed by the phenomenalism that followed from David Hume's (1777) empiricism, the beginnings of modern Western philosophy. Western people put aside an interest in *what things were* in the eighteenth century in preference to *how they appeared*. This is why *terra nullius* could be claimed – the land did not *appear* to be occupied, at least in the manner familiar to Europeans; this is despite the fact that the land *was* owned by peoples, who just did not happen to *use* it in the same way as the Western visitors.

This subtle distinction is very important. It is also important because Western peoples have not entirely lost their metaphysical understanding of ownership, despite their avowed distaste for formal metaphysics. Today there is a growing recognition of the need to accept metaphysics in the social sciences (Boland, 1997), our contact with indigenous peoples is but one of the more explicit promptings. The first step in this regard is to recognize the place of metaphysics in the Western understanding of ownership.

To understand this in Western terms, consider the case where a person drops his or her car keys and the keys are picked up by someone else. The fact that the keys were in another person's pocket would not be considered as proof that they had changed ownership; this is despite the *appearance* of ownership to the contrary. This would be further upheld if the finder of the keys tried to assert ownership of the car that belonged to the keys. This is despite the fact that both keys and the car were spatially and temporally separated from the true owner and the car was totally unoccupied and unused when the finder of the keys approached it.

Although motor cars have elaborate and explicit legal procedures protecting ownership, many items of value do not;, yet occupation (active possession) is not considered proof of ownership. Obviously, possession and use, the apparent phenomena of ownership, have no bearing on the actual existence of particular ownership. A more relevant example is the case of rental, where occupation and use are transferred to a person recognized as not being the owner, even though they will appear to be the owner for practical purposes for some years.

Because they do not identify ownership with occupation, in many cases indigenous people have been able to allow Western people to occupy land that the indigenous owners have never ceased to consider theirs. In Australia, this probably facilitated the original occupation of the land by Western settlers, because the indigenous customary owners did not realize that such occupation was being understood by the Western newcomers as ownership. This confusion would have been aided, as many Westerners continued to allow indigenous owners to have access to their land for traditional purposes.

Indigenous people believe that their ownership of the land cannot be sold (Ezigbalike, 1994). Their understanding of their relationship with the land is such that the land cannot be separated from the tribe without violating fundamental tribal beliefs. This is not to say that it cannot be done, but when it is done it constitutes a betrayal of tribal values. Payment for such a betrayal could be compared to a bribe in Western understanding more accurately than a just payment in exchange for title to some possession (Small and Sheehan, 2005).

Indigenous people rely on the land as their principal source of material support. Traditionally, indigenous people viewed the land as the source of their material needs, and these were realized by the fairly simple application of labor. Anthropology reveals that hunter – gather peoples are amongst the "most leisured people on earth" due to the relatively small daily requirement of labor required to support their lives (Robinson, 1987). The land was understood to be their principal material resource and was believed to belong equally to future and past members of the tribe (Small, 1997).

Western people have been tempted to construct their understanding of the nature of indigenous title by summing the apparent occupation and use practiced by indigenous customary owners. The result has led some to conclude that indigenous title is in most cases best understood as a form of easement, or set of easements, over a subject parcel of land (Myers and Shah, 2004).

This is fundamentally erroneous as indigenous customary ownership precedes any Western law or title. Within the logic of indigenous customary ownership, usually ascribing ownership to some act of the gods, the only conclusion that can be drawn is that indigenous customary ownership is absolute, even if historically the utilization by indigenous people has been limited. To reverse this total ownership and award only those rights that have been positively exploited is like having an audit done of one's use of one's possessions, with a view to limiting recognition of ownership only to those possessions that are actively and exclusively utilized. Some people have clothes they may only wear infrequently or parts of their back yard that they rarely visit, but would be offended if absence of positive utilization were taken to mean that they did not own them. It is even more apparent with things of great value, which are often placed well out of use but still considered possessions.

Most offensive to indigenous customary owners is the prospect of recognition of customary title being no more than a vague limit, or blight, on Western title. This view reverses the understanding of ownership, reducing the indigenous customary interest to a subsidiary and unpleasant complication to Western ownership.

The last significant characteristic of indigenous customary owned land is that its productivity has been enhanced by the advent of European settlement. Whereas, before European settlement indigenous people required very large tracts of land to support a relatively small number of people, western settlement has greatly enhanced the productivity of the land. This is not simply the result of superior farming technologies but is also the result of the location of rural production within Western society.

Markets for rural production are such that persons using land are able to develop considerably greater incomes from land that would have been possible in the absence of Western culture. Consider the hypothetical possibility of indigenous people equipped with Western farming technologies and producing any Western rural produce in the absence of transport, and marketing infrastructure and even the remote city markets, which are the destinations for most rural products. Obviously, most of the production would be in vain. Be it apples or wool, the value of rural production is in a very large measure the result of the modern Western society itself. This means that claims on the value of land must be moderated by the fact that a considerable contributor to value is Western community, hence, the rights of indigenous people to compensation must exclude those components of value that come from Western society.

An Examination of Western Tenure, Private Rights to Land and State Rights to Land

It has been argued that the relationship between living indigenous owners and their land is best understood as a form of life interest tenure with reversion to the entire membership of the clan or tribe, whether living, dead, or yet to be born (Small, 1997). As the owners consist mainly of people not currently alive, the majority of the owners can be neither consulted to give permission for sale nor share in any payment for sale. It does mean that the currently living owners do have a real interest that constitutes a limited, though definite and secure, personal real property right. It is instructive to examine the differences between the essentials of this tenure and Western freehold. Freehold tenure has two distinctions from state leasehold. The first is that it does not incur a rent due to the community, and secondly, it is perpetual.

Despite the perception that freehold does not entail rent, most states effectively charge partial rents in the form of land taxes or local government rates. These are not perceived as rents, despite being derived from land values (or in some cases developed property values, for which this only applies only to the land component) which are themselves capitalized rents. The point here is that the state may levy rents, even if they are disguised under these tax-like titles.

A second misconception is that freehold, or even state leasehold, tenures convey the right to use the land in whatever way the owner deems most beneficial. Owners do not have this right. Decisions about the actual use of specific parcels are usually controlled by the community by way of planning instruments at various levels of government and by the need for development approval from local government.

If freehold does not grant all rights to a private party, then those retained by the state may still be held by the indigenous customary land owners. This has implications for the relationship between indigenous customary owners and state regulators. At present, statures controlling land and water use, such as the

Water Management Amendment (Water Property Rights Compensation) Bill 2006 (NSW) provide exemptions for indigenous people pursuing customary practices. This implies an implicit superiority of the state over indigenous people in the management of their land and water resources which contradicts the logic of indigenous customary ownership as prior. Given the outcome of the Mabo case (Hepburn, 2005), and the notions of allodial and radical titles to land being the titles available to the indigenous customary owners and the state respectively, it seems that the customary owners have the older and more fundamental title to land use decision rights, tempered only by the validity of planning legislation as a form of valid sovereign act.

If planning legislation did indeed extinguish the indigenous customary owners' right to decide land use, an important aspect of customary title, as understood by indigenous people, has been lost. It appears that a recurrent claim by indigenous people is not for direct use of the land, but, for say, possibly a right of veto, over Western uses of indigenous customary owned land. What is being claimed here is akin to a planning right, possibly not dissimilar to state planning rights.

Just Allocation of the Product from Land

A major background issue is the allocation of the product from occupying the land. Western occupants may argue that they have contributed to the productivity of the land and hence deserve compensation, while some indigenous people appear to believe that because they can establish their customary title, the full value of the land is theirs. These extreme views can be informed by reference to the fundamentals of productivity.

In Australia, the Mabo case recognized indigenous people as holding the prime title to land, even when this fundamental title has been lost as a result of various factors arising from Western sovereignty. The material purpose in owning their land was to provide a basis for the realization of their material needs. Indigenous people generally required access to large amounts of land to survive when following their customary living practices.

European entry into Australia has had an impact on the productivity that has raised it considerably beyond its level under indigenous occupation. The extent of the indigenous interest in the material product of the land would appear to be proportioned to the land's material productivity before European occupation. This means that while land ownership, in the quasi-metaphysical sense required by indigenous people, is clearly the right of the indigenous inhabitants, the product from occupation of the land has a more complex ownership.

The changes to the productivity of the land that accrue to the effects of European settlement originate not with the indigenous owners, but with the Europeans. Hence, that part should in fairness be the possession of the

Europeans who originated it, leaving the indigenous customary owners with the product that the land was capable of yielding prior to European occupation.

Calculation of the indigenous product, conceived in this way, is difficult in view of the fact that the two forms of occupation are more or less mutually exclusive. Western occupation has forced out much of what formed the natural resources harvested by indigenous people – native fauna have been culled as pests and native flora eliminated as weeds.

A more fruitful way of evaluating the balance is to focus on the material purpose of the land in indigenous societies. It provided, with a relatively minor addition of labor, all that the community needed materially (Robinson, 1987). Using the material needs of the indigenous customary owners engaged in a traditional lifestyle as a guide, the share of the modern material product that could be justly claimed by the indigenous customary owners can be reasonably computed. The excess would appear to accrue to the impact of European occupation.

A similar deconstruction can be made of the European component. Two major divisions may be made between the causes of the enhanced productivity accruing to European occupation. The first is superior technology and management, and the second is the significance of the presence of European society itself. The two should not be confused.

Firstly, intensive management and advanced farming technologies have increased the product from the land considerably, especially with respect to traditional uses. Clearing, improved pasture, fertilization and water have all contributed to carrying capacities and productivity far in excess of natural land, but they are not in themselves the whole cause of the increase in productivity resulting from European settlement.

Secondly, European society and infrastructure have raised the effectiveness of rural production. If the indigenous owners were able to use western farming management and technology, they would face several difficulties in the absence of the infrastructure of the Western society. Supplies of fuels, fertilizers, and other materials may be extremely difficult. Likewise, with no centers of urban population, there would be no markets, and hence little point in the possible massive production. Finally, Western farming is efficient because of an intricate matrix of public and private infrastructure and services that are available to farms.

Even the most remote property benefits as a result of its connection to Western society. These connections are now largely taken for granted, but they make the difference between a given tract of land being tolerable and profitable or not.

A solution to the indigenous customary ownership problem in Australia should include some mechanism for returning to these three groups, customary owners, tenants and Western society, equitable shares in the total product from the land, proportionate to their contribution. Exhibit 4 demonstrates this tripartite interest. It can be seen that the component accruing to the occupiers

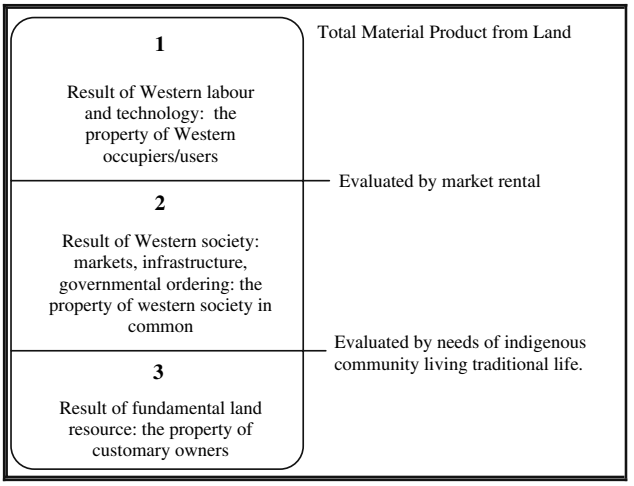


Exhibit 4 Dissection of the origins of the contributions to the product from the land

of the land is the difference between the total product and the market rental. In pure Western rent theory, this is not contentious.

It has been argued that the component accruing to the indigenous customary owners (shown as item (3) in Exhibit 4) can be deduced from their material needs when pursuing a traditional lifestyle. This leaves the component accruing to Western society as the remainder, once the other two interests have been subtracted.

If such a distribution were made, it would implicitly mean that the users would be paying market rent and that the rent would be distributed between the two communities in proportion to their essential tenure and input to the wealth production effort. This is a just and reasonable outcome and it is within reach in the present indigenous customary ownership debate.

It may be argued that Australian indigenous people are already deriving their basic material support from the Western community through various welfare payments. Perhaps as a society, the Western occupants are already supplying indigenous people with the material welfare due to them in an implicit compensation for taking their land. If this is so then some portion of the implicit land debt which morally burdens Western peoples in Australia is already being paid, and hence additional payments to indigenous peoples may be unjust, if the total level of transfer to indigenous people exceeds what is reasonably due to them.

Any return of indigenous customary owned land should therefore carry with it some balancing offset in direct state welfare payments. This issue cannot be fully developed without a detailed study of needs and the levels of welfare that currently exist. However, there is an important factor that should not be ignored, and that is the fact that the current arrangement, even if it does provide

an adequate gross level of material welfare (which is debateable), carries with it several serious *social* distortions.

Welfare payments are made at the discretion of the government, leaving indigenous people with little self-determination. Welfare payments are divorced from the land, its management, and the sense of control that is due to genuine owners. Experience on Bathurst Island with the Tiwi people (Scott-Clark and Levy, 2006) is evidence of the way welfare payments can cause a variety of cultural difficulties for the communities into which they are injected. The Tiwis were effectively self-sufficient until 1972 when welfare payments began. The result was a disruption of the internal authority and distribution structures that characterized the people and have disrupted traditional order. The result has been a massive social decline.

For these reasons, it would seem more appropriate for indigenous groups to be positioned so that their community's material livelihood was tied more directly to their land by enabling them to directly benefit from some proportion of the market rental of their land. The exact proportion would be set with the consideration of the needs of the indigenous group as affected by their number, and an accepted level of material needs, recognizing that in most cases their needs must compare not simply to those existing before contact with the west but in some proportion to the adjacent western society.

The proportion of the market rent that was considered just remuneration to the indigenous owners may be greater than that computed purely by analysis of the productivities of the specific sites before and after western occupation because land recognized as having surviving indigenous customary ownership represents only a small portion of the total once owned by indigenous people. This apparent excess would be an implicit compensation for those other properties from which income has been lost through extinguishment. Because the state is receiving incomes from those other properties, there will be an overall balance.

To balance the three interests, lessees should be charged, at least eventually at a fair market rent independent of indigenous customary title claims. This rent could go to the indigenous owners who would operate as a collective of some form and be directed by some form of customary administration composed of persons recognized as indigenous leaders. Already representative groups have been created in the form of aboriginal land councils and other tribal representative groups. Paying land rent to groups representing the tribe will enable those groups a level of self-determination in organizing effective leadership. This, in turn, gives indigenous people the opportunity to manage their income in a manner more consistent with traditional leadership. From this rental income, the state could levy a land tax that would represent the contribution of Western community in the productivity of the land. This would collect for the community the contribution shown as (2) in Exhibit 4. Careful guidelines would have to be established for such a tax and it would be novel in that it would be based on collecting the excess over that needed by the indigenous customary owners for a reasonable standard of living.

Proposed Land Taxation Over Customary Title Land

The state land tax that is being proposed would itself have more of the nature of a rent. Rents tend to be set so as to collect that product from the use of land that is excess to the needs (marginal profit and wages usually) of those who are engaged in the actual production. For this reason, such a tax is not as novel as it first appears, but in fact is identically what the state has always been supposed to collect from state leasehold land, only with the indigenous owners introduced between the occupiers and the state.

Given that the (Western) tenants will be paying market rents regardless of whether they are leasing indigenous customarily owned or state-owned land, they will become indifferent to the ownership. Where the land is recognized as owned by indigenous people it has been argued that the indigenous owners have a right to sufficient income for an adequate standard of living, however that is understood. The excess rent received above this level has been argued to result not from the land as it was owned by its indigenous customary owners but as a result of the existence of Western society (supplying markets, infrastructure, etc.) and hence justly the property of the Western community. Although this margin above need is politically considered as a tax, its construction more accurately resembles a rent. By setting it by reference to production and needs, it will have the capacity to respond to a range of social needs and contingencies.

Inclusion of Indigenous Customary Owners in Land Use Planning

In all forms, western tenure is subject to varying degrees of state control. While state control of land use may be most evident in state leasehold, it is no less important in the form of planning controls in urban freehold. The latter has a substantial influence on land value.

Indigenous owners are seeking a level of input into the control of Western land use. Their reasons for wanting this are very similar to those underlying Western state control. They have a highly developed sense of responsibility for maintaining the land, similar to what in Western parlance is currently popular as sustainability. The current shift toward environmental concern is founded on preserving our land for future generations; indigenous peoples have always operated according to this ethic, which is still only an awkward novelty in Western societies. On this basis alone, it would appear reasonable to include them in the planning process.

The current relationship between indigenous people and state regulators is in terms of the legal force of planning controls over indigenous customary land use. This is the antithesis of the relationship that would proceed from the recognition that indigenous customary ownership is allodial and prior to Western law. If customary ownership is recognized in the way that it is understood

by Australian indigenous people, Western people only have those rights, in terms of possession and use, that are permitted by the indigenous owners.

The issue pivots on the balance of rights distributed between the indigenous customary owners, with their legal system, and the state, with its western legal system with respect to the authority to order the use of land. It does appear that there is at least some overlap between these two with respect to state control over indigenous customary owners using the land, such as where traditional use poses a threat to national interest, but these would also appear to constitute only a tiny proportion of the restrictions routinely imposed by the state on Western land users.

Of greater importance is the inter-relationship between the state and indigenous customary owners in the ordering of land use by Western occupiers of land. This may be paralleled to tenants in private leasehold who are restricted both by state laws and also by the restrictions within their leases. This analogy seems especially relevant. It respects both the sovereign rights of the state and the land rights of the indigenous owners. It would appear to be the appropriate model for the administration of state pastoral leasehold land. This interpretation also appears to be consistent with the very nature of planning control, as a necessarily restrictive influence on land use: both the state and indigenous owners have interests that are only protected when each has the power of veto over proposed Western land uses.

There are no substantial instances of Western planners offering indigenous people participation in the development of planning controls, especially a right of veto over new land uses. While this may be argued to be consistent with the limitations of customary rights currently afforded by indigenous people, it is conceptually problematic.

If it is accepted that ownership in both Western and indigenous understandings does not depend on exclusive possession and use, and that indigenous customary ownership does exist as real ownership, then the right of veto on the proposed activities of the Western occupiers cannot be disputed, without implicitly rejecting the reality of ownership. This leads back to the erroneous suggestion that indigenous customary ownership is more like an easement, subsidiary to actual ownership.

Exhibit 5 illustrates the rational structure for the relationships between the players engaged in ownership, planning, and use. The model permits joint participation by the state and indigenous owners in the development of planning controls, based on both parties holding a right of veto over any particular Western land use. Obviously, the details of the joint relationship will need careful development, especially with respect to mechanisms for resolution of conflict where either the state or the indigenous customary owners consciously hold the belief that a particular land use should proceed contrary to the veto of the other party.

It would be possible to admit indigenous people into the planning process very quickly, since planning deals predominantly with future land

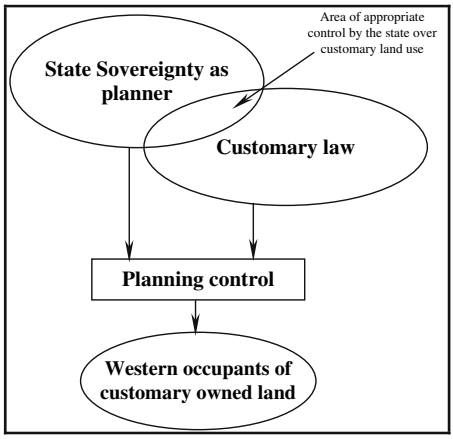


Exhibit 5 Schema for just allocation of land use control rights between the State and customary owners

uses. This would constitute a prompt recognition of their relationship with the land, without any economic impact on Western property owners.

A Suggested Integrated Tenure Structure

The foregoing demonstrates that a just outcome is possible, which will respect the rights and needs of all parties. Its implementation would constitute a tempering of the expectations of many Western property holders, suggesting that it would be best phased in over a time frame of some decades. Despite the protracted introduction, a high proportion of the symbolic recognitions could be made very quickly. These would include inclusion of indigenous people in the Western planning process and formal recognition of ownership contingent on respect for existing leases, albeit with transitional rental and taxation provisions. A schedule for integration could be as follows.

Regularization of Existing Leases

The first step toward a just resolution does not directly involve indigenous people at all but rather the regularization of existing leases in terms of the extra-legal customary expectations that have grown in Western society. This would entail three processes:

(a) A schedule for the progressive increase of the rentals on state leaseholds to market levels. As discussed, this could be done so as to amortize the interest at depreciation rates comparable with other long- term personal assets (no more than 3%pa). This materially aligns state leasehold property with its legal definition and gently amortizes the extra-legal expectation of privilege against the community.

(b) The introduction of clauses for the compensation of leaseholders for the closing market value of capital improvements at the end of the lease. This compensation could be tied to the actual resale of the leasehold at the end of the lease term. This would respect tenants' capital investment and better management of the assets, while regularizing the extra-legal expectation of perpetual lease renewal.
(c) A formalization of the rights practically involved in the leases. These may need to be sensitive to the realities of land use that have been adopted by lessees, apparently in good faith. In some cases, they will need to be broader than the original lease. In all cases, they will need to explicitly exclude any rights that were not conveyed in the original leases that impede the customary rights and practices of the indigenous owners, especially as the latter usually involve little interruption to Western land use.

Introduction of the Indigenous Owners as the Leasers

The second step would consist of the formal transfer of title from the Crown to the indigenous customary owners. This would transfer to the indigenous owners the existing leases, with the obligation that they be upheld at least until the completion of their (possibly extended) term and include compensation for nonamortized capital improvements, as outlined in (1b) above.

They would become the beneficiaries of the rental income but would not be able to immediately raise it beyond what is agreed in (1a) above. Exhibit 6 shows how the introduction of the indigenous owners between the state and the occupiers, coupled with a land tax, would achieve an equitable outcome for all parties:

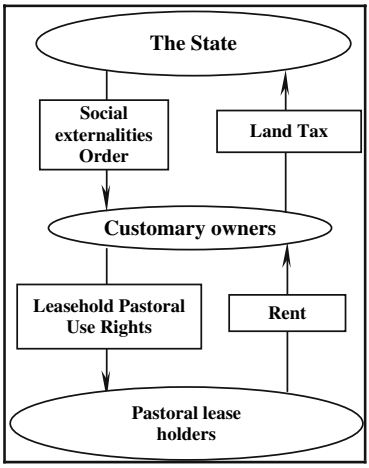


Exhibit 6 Location of customary owners between State and Western tenants in terms of control and income

Phasing Out of Welfare and Introduction of State Customary Land Tax (SCLT)

Recognition of indigenous customary ownership would enable indigenous owners to once again have the opportunity of some level of material self-determination. They would have an income, albeit at a corporate level, and like other citizens would be expected to play a part in the funding of the state. It has been argued that part of the product from the land actually accrues to the existence and order of Western society.

The SCLT would resemble a rent and would collect that part of the market rent in excess of the needs of the indigenous customary owners. While this may be the source of some objection, on the basis that it leaves indigenous customary owners vulnerable to the taxation decisions of the state, such an objection ignores the realities. All Australians are engaged in such tensions between the taxing inclinations of various levels of government. More importantly, indigenous people are currently subject to the greater insecurity of having to rely on welfare payments from the state. The move to having an actual income flowing from recognized corporate real assets would have to be more conducive to a sense of independence and security, even if such an income were subject to a level of taxation.

Conversely, there is a good case for exempting indigenous people from income tax accruing to their land income. The reason for this is that the traditional culture is based on communal (corporate) income, not individual income. The practice of paying welfare to individual indigenous people has caused many recognized problems, and the levying of tax on an individual basis similarly misunderstands traditional indigenous society. Because recognition of customary ownership is closely related to the pursuit of traditional indigenous culture, and a respect for its laws and customs, it is appropriate that the interface with Western public funding (taxation) likewise respect and integrate into that customary culture.

This would mean that for indigenous people, the income that they would enjoy from their land would come after the SCLT; it would be exempt from income tax and the personal complications that income taxation involves. Indigenous people would still be subject to income taxation on incomes earned either through wages or other commerce in the western economy. Income from indigenous customary property may require some special articulation with income taxation on additional income so as to make the additional income subject to an equitable level of taxation. It would be inappropriate to award the same tax thresholds to indigenous people who are receiving tax exempt income from customary property. This could be easily resolved by adding the person's share of indigenous customary income to his or her other taxable income, computing a tax rate but then deducting the tax payable on the customary income from the total amount of income taxation payable.

The magnitude of the income that would accrue to the indigenous customary owners may not initially be sufficient to support them, especially considering the limited extent of recognized customary title over state pastoral leaseholds

and the low rents that appear to be currently charged. For this reason the phasing out of state welfare payments would have to be contingent on the level of material independence actually achieved by various indigenous communities at any particular time. The guiding factor is the maintenance of the overall level of material support to each indigenous community.

It may be appropriate to consider a preliminary transition of state welfare support payments from individual recipients to tribal groups, at least where such groups follow identifiably traditional life styles. Such a transition itself is surrounded by complex issues regarding respect for indigenous customary culture, structure, and law. The challenge for Western people and administrators is to overcome inter-cultural misunderstandings in the provision of welfare. However, such a transition in welfare provision is not central to the issues currently being investigated and is not held up in this work as a fundamental component of dealing with the land issue.

Summary and Conclusion

Much of the heat in the popular debate over the recognition of indigenous customary ownership has been generated over an issue that is not directly connected with the rights of indigenous people. The real concern is over the likely loss of a privilege that has progressively accrued to pastoral leaseholders over a long period of time. This extra-legal privilege amounts to a benefit in favor of a selected few who have been permitted to pay less for a benefit from the state than was contracted and is therefore best understood as a privilege held at the expense of the remainder of the community. The privilege has been perceived as permanent and has allowed outgoing leaseholders to charge prices for their leasehold interests that implicitly include the expectation of the privilege continuing. This privilege deserves regularization, regardless of the claims of indigenous Australians.

When combined with a strategy for amortizing this privilege and the introduction of a State Customary Land Tax, the insertion of customary owners between the state and the Western leaseholders has the capacity to overcome all the difficulties of the various parties and return an equitable outcome that would not compromise the use of the land. It would also return to indigenous owners the high level of material self-determination that has been denied to them for so long. Exhibit 7 summarises the outcome and the way that it respect the rights of all affected parties.

Summary of Policy Recommendations

(1) That rents payable on all pastoral leaseholds be returned to fair market levels through a programme that amortizes the extra-legal interest at a rate of no more than 3%pa.

(2) That the indigenous customary owners of state pastoral leasehold land be permitted to take over the leases to their land, subject to the revised provisions necessary for the execution of the amortization in (1) above. In particular that indigenous customary ownership be recognized as the more fundamental title than leasehold tenure, from which the leasehold tenure is referenced.
(3) That indigenous customary owners be included in the land use control process, either at the statutory level in the case of disputed indigenous

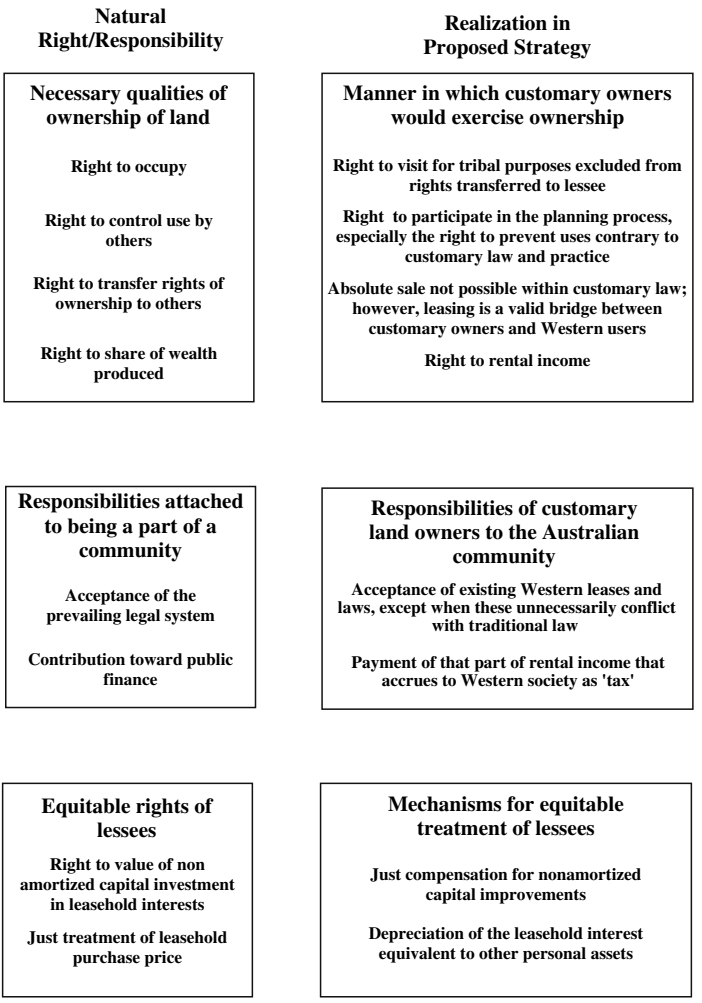


Exhibit 7 Comparison of the natural rights and responsibilities of the parties and their realization in the proposed solution strategy

customary ownership, or as landlords in the case of recognized indigenous customary ownership.

(4) That a land tax be levied over indigenous customary owned land, which would be the only tax paid by indigenous people who have no other income. Such a tax should be levied on the indigenous people as a group and proportioned to the productivity of the land and the needs of the indigenous people themselves.

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Valuation of Yoruba Sacred Shrines, Monuments, and Groves for Compensation

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Abstract A sacred site is a place, which is considered holy and is partially or wholly reserved for magico – religious or ceremonial functions. Because of this, compensation valuation upon compulsory acquisition of these places is a complex and specialised one requiring the interpretation of law and our past cultural heritage. Consequently, the chapter, adopting a survey technique and simple descriptive statistics, examines sacred places, the provisions of the enabling compensation laws, the valuation process and the attendant problems in the assessment of compensation that fully equalled the pecuniary detriments faced by owners upon acquisition of these sites in the Yorubaland. This chapter reveals the conflicting provisions in the compensation enactments and the threat of the extinction of the role of traditional worshippers or priests, which is an outcome of the assessment of compensation of the places in the study area. In addition, based on empirical evidence of recent transactions on sacred places in the country the chapter concludes that compensation can hardly be adequate for sacred sites because of their social and cultural importance functions, although a review of the compensation laws, as well as training of curators of shrines and sacred places, may be necessary to ensure reliability of compensation valuation in the Yorubaland portion of Nigeria.

Introduction

Sacred shrines and groves are places where our ancestors lived and through which they communicate with us in various ways (Carmichael et al., 1994). They are inhabited by the gods or by spirits of ancestors who animate everything found on and in the earth and they must always be taken into account. The groves, shrines and squares are set apart and dedicated to the worship of either a deity, a war hero or as a burial of the nobles, with trees, rocks or water, surrounding a shrine or an altar. They form an important component

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of the environment and are associated with the Yoruba belief system. This belief system revolves around the supreme *Olodumare*, the creator of mankind.

The Yoruba people are among the largest and earliest organised tribal groups in Nigeria. They occupy the region south of the river Niger, an area bounded by other cultural groups, namely, the Hausa, Fulani and Nupe to the North, the Bini to the east and southeast and the peoples of the Republic of Benin to the west. At present, the main Yoruba area coincides with the boundaries of the six southern Nigerian states of Lagos, Ogun, Ondo, Ekiti, Oyo and Osun and in the north, the Ilorin and Kabba provinces in Kwara and Kogi states, respectively (See Exhibit 1).

An investigation of the literature shows that these sacred sites now serve as places of recreation, tourism, leisure, education, cultural and religious activities depending on the perspectives of their investigators (Falade, 1985; Obayemi,

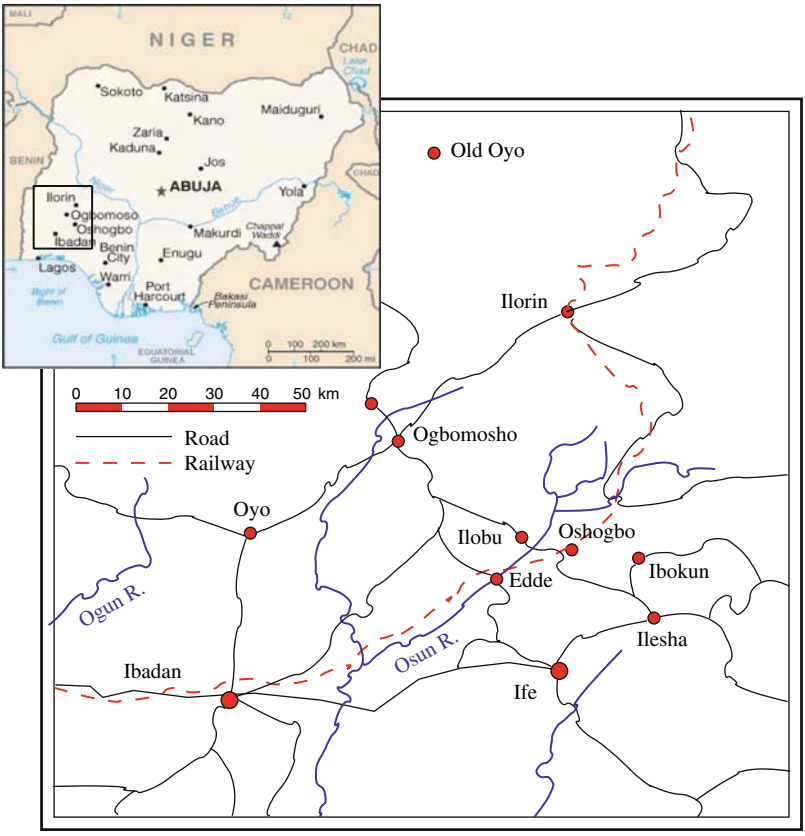


Exhibit 1 Location of Yoruba

1987). In addition, they reveal past lives of people and architectural styles of buildings of yesteryear (Willet, 1967; Murray, 1967, Fabunmi, 1969; Carmichael et al., 1994; Omisore, 2002). Historical sites contribute in different positive ways to social interaction in a contemporary setting and also help preserve the cultural heritage of the people (Gleason, 1977; Omisore, 2002). Nevertheless, the majority of local studies emphasise the promotion of the religious and cultural values of these sites (Frobenius, 1968; Hambly, 1933; Ojo, 1969; Omisore, 2002). The attitude of customary owners of these sites is coloured by a belief that a person could be summoned by his ancestors to appear before them in the world of spirits if he/she did not take good care of them. For our people, land embodies the spirit of the Earth deity, a revered mother who blesses land with her bountiful gifts. Land is also the burial place of the ancestors, those invisible father figures are mystified by shrines and groves, who bequeathed their land to "a vast family" which includes the dead, the living, and the unborn.

The Yorubas are, therefore, deeply concerned about the threats and actualities of intrusion into their sacred sites, and of their destruction, whether they be "living sites" in contemporary use, or sites that are no longer used, but remain improvement symbols of a distant past. One major threat is from commercial developments such as the construction of roads and bridges, hospitals, shopping centres, housing and industries. Sites are also threatened by tourism, an increasing source of valuable currency, but potentially damaging to sites in both physical and spiritual terms. (Carmichael et. al., 1994.; Omisore, 2002).

Even though no sale is contemplated, many situations may require an appraisal: for example, allocation of purchase price to a depreciation base in a merger or trade, establishment of value for ad valorem tax assessment, taking by a public body in an eminent domain proceeding, or determining adequacy of security for a mortgage. Falade (1981) noted that an important aspect of the Yoruba belief system is that in the past it helped conserve the natural landscape rather than destroy it. However, this conservative attitude has been lost in the 20th Century materialism and rapid urban development.

One of the more vexing issues arising from above is how compensation valuation in respect of these sites when compulsorily acquired (i.e., using police powers of the state) could be assessed. The essence of compensation is to restore the owner(s) of the expropriated or condemned sites to their status quo ante, that is, the position they were in before the acquisition, as if nothing had happened. Several questions arise out of the foregoing situation: By any commonly accepted definition of "value" do these assets have a compensation value in any event? Is the compensation value adequate in view of the statutory enactment? What are the problems confronting compensation valuation practice for such assets in the study area? The essence of this chapter is to address some of these questions, in order to improve compensation valuation theory and practice for sacred sites in Nigeria.

The Concept of Sacred Places

The English word "sacredness" is derived from Latin. It implies restrictions and prohibitions on human behaviour – if something is sacred then certain rules must be observed in relation to it, and this generally means that something that is said to be sacred, whether it be an object or site (or person), must be placed apart from everyday things or places, so that its special significance can be recognised, and rules regarding it obeyed (Hubert, 1994).

A sacred site is a place which is considered holy, and is partially or wholly reserved for magico – religious or ceremonial functions. Because of this, it is both venerated and revered, and according to custom is kept free from contamination by sin and evil. The site is not necessarily a building but is a powerful place or location, an area or feature believed to be a residence of god. Such sites are places of worship, homes of the revered or mystified ancestors who live or are summonable there, awaiting consultation by their living subjects or children (Mumah, 1994).

Sacred sites vary in size from very small places covering a few square metres to large areas covering several hectares of land. They are usually characterised by the presence of artifacts and features that are unique to them; they may be in the open air, or in rockshelters, caves, groves and forests. In some places, the best known sacred sites are those which were occupied in ancient times by chiefs or kings and are found where their actual shrines or tombs are located. These are considered the most appropriate places to go in order to be in touch with the ancestors, in order to receive their blessing. Ancient places are also sacred because they were the everyday living places of these chiefs or kings, who are considered to be the representatives on earth of the supreme power, coming after God and the ancestors (Radimilahy, 1994). These special places belong not only to the lineage heads but also to the entire lineage and may also be attended by affinal relatives. Others are associated with sub-chiefdoms. Some sacred places also belong to individuals with extraordinary gifts (healer-diviners, twins and mothers of twins).

Germane to the above, places recognised as sacred can be made more identifiable by the erection of permanent monument building. The introduction of a monument into the "natural" environment can signify that the human institutions that created the monument are taking on the permanence of nature: architecture and nature ideally united as one (Oechslin, 1984), as exemplified in the use of nature's resources in the monument. As Bradley (1984) has shown, monuments become a permanent fixture and they influence subsequent activity. Furthermore, in many cases, sacred sites have frightening tales about them, in order to scare off those who would want to destroy or defile them. But, in the archaeological record, sacred sites may initially be identified as burial sites, ceremonial sites or butchery sites. It is on the basis of such clues that other attributes that are typical of sacred sites can be identified, isolated and studied (Mutoro, 1994).

Ultimately, against the foregoing background, proper treatment of sacred places in compensation valuation will be a matter of respect. Respect, as defined by Harjo (1992), a Native American poet and activist, is the recognition of the inherent right of others to be here. Unlike many others in the world, the Yorubas have respect for the earth, not only for humans, but also for plants, animals, rocks, burials, and other sacred places. It is this reverence for the earth (Berry, 1988) that is embodied in concepts of sacred geography (Lovelock, 1988), and there is now a growing realisation among scholars that sacred sites are indeed very special places (e.g. Swan, 1990). These special places in the study area, with the exception of Mosques and Churches, are considered below.

Land Ownership in Nigeria

Before the advent of the British Government in 1861, Nigerians operated a customary land tenure system which was indigenous to the people. Like all other customs, the customary land tenure system varied from place to place and was accepted as "a mirror of accepted usage" (Owoniyin V Omotosho (1961) 1 All NLR 304). The system continued after the arrival of the British Government. Although there were statutory erosions into customary land here and there, the system was allowed to maintain its essential character (Lewis V Bankole (1908) 1 NLR 81). However, notwithstanding that ownership of land is a revolutionary legal concept, tradition or customary favours corporate ownership of land as judicially recognised in Amodu Tijani V Secretary of Southern Provinces (1921) 2AC399: It underlies the statement that land belongs to countless hosts. There is probably no more convenient and authoritative point on the subject of ownership than the following observation of Viscount Haldane in the above case. According to the latter:

> The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual {(1921) 2AC399 at 41 supra}

There are three important points worth noting in this passage: the introduction of the term "ownership" of land, the classification of ownership into communal, village and family, and the denial of the notion of individual ownership. However, it has been observed that land or property acquired by an individual either through inheritance or gift, or by purchase, is his/her separate property (James, 1973; Oretuyi, 1991).

The community usually embraces a combination of kindred village groups. The village is made up of kin-groups of extended families, and the family, the smallest social unit, is the basis of political organisation and the real unit of land holding (Amankwah, 1989). In addition, land could be owned by a corporation sole or stool referred to as chieftaincy land. Chief Justice Dean says:

> The conception of the stool that is and has always been accepted in the courts in this colony is that it is an entity which never dies, a corporation sole like the crown, and that while the occupants may come and go, the stool goes on forever {Quarm V Yankah (1930) 1 WACA80 at 83}

While we may recognise from the foregoing that land ownership and, by implication shrines ownership, could be vested in the community, family, individual and chieftaincy, the distinction between chieftaincy and chieftaincy family land is blurred and could become problematic for correct judicial interpretation (James, 1973).

Under the English land law, the doctrine of estate subsists. The term estate indicates an interest in land of some particular duration. English land law has always been based on the two fundamental principles of divided rights or ownership and the separation of what is owned from the physical substance of the land itself. The ultimate owner of the land in England is the Crown; "subjects" own estates in land held from the Crown. The historical reasons for this position go back to the 11th century. Briefly, William the conqueror declared all land forfeited to him when he invaded and conquered England in 1066. He drew no distinction between conquest of a country and acquisition of the land of that country. To reward his supporters, he handed out land to them but consistent with the notion that conquest and land ownership were inseparable his supporters did not get ownership of the land; they held their land from him in the form of an estate – an abstract tenure concept (McAuslan, 2002).

In 1978, the Land Use Act was promulgated by the Federal Military Government. It approaches land issues through three strategies: the investment of proprietary rights in land in the state; the granting of user rights in land to individuals; and the use of an administrative system rather than the market system in the allocation of rights in land (Uchendu, 1980; Ouedraogo, 1999; Aluko, 2006). What could be inferred may be that under the Land Use Act, 1978 ownership of shrines/land is now vested in the state.

However, Aluko (2006) argues that if the state is the land owner it would not have been necessary to insert Section 28 of the Act which gives the Governor the power of eminent domain (to revocate or compulsorily acquire land). In addition, some sections of the Act such as Sections 4, 29(5) and 48 suggests a continuance of the customary land tenure system along with the operation of the Land Use Act, 1978. A very weighty authority to support this assertion is the case of Madam Safuratu Salami and Ors V Sunmonu Eniola Oke (1987) 4 NWLR part 63, page 1 at 12–15. In that case, where the customary tenants refused to pay Ishakole (tribute or ground rent) and denied their landlord's title in favour of the state, it was held by the Supreme Court of Nigeria that land can still continue to be owned under customary land tenure, although, subject to the provisions of the Land Use Act, 1978. The import of the judgement is that land or shrines can continue to be owned by the stool, community, family and individual in the country. Therefore, any of these identified owners has a right to compensation when his/her shrines are compulsorily acquired by the government. Besides, as evident in the literature (See, for example, Mumah, 1994;

Sheehan, 2002; and, Cotula et al., 2004) sacred sites may be classified as follows. The first are those sites in homes or under the care of traditional rulers and lineage heads. Another class of sacred sites is formed by those belonging to members of cults or secret societies. Although they do not offer sacrifices, the cult houses are reserved houses, hence they are considered here as sacred places. These cult houses are organised so that even initiated members have to undergo further initiation and pay fees in kind before they are allowed to move to certain parts of the house. Also, another group of sacred sites consists of those belonging to individuals with special healing powers (native doctors) and those with special sites belonging to this class may include special termite mounds where some diseases like infertility, madness and bedwetting by adults are said to be cured, and domestic shrines for twins. The rulers and people empowered to offer sacrifices have various rites to perform in order to reinforce the power and authority of the ancestors and gods. But the offerings vary from one area to another. Some of these sites are now tourist attraction centres under the management of their owners in conjunction with either the local or state or federal government or international agency (Omisore et al. 2005).

Study Area

Geographically, Yorubaland lies within the warm and humid tropical climatic belt, between latitude 6°0'N and 9°0'N north of the equator. Here, both the temperature and relative humidity are consistently high with two seasons; wet (May–October) and dry (November–April).

Today, the Yoruba world extends to the New World (e.g., the Western hemisphere); in North America, Cuba and Brazil, where the religious practice of Orishas (Idols) and the cults of Egungun (Masquerade) epitomise the spiritual survival of the culture in spite of the brutality of Western European slavery and plantation institutions (Aradeon, 1996). Historical sources indicate that the Yorubas migrated from the near East, Northern Egypt and Nubia in the 7th and 10th centuries (Johnson, 1921; Lucas, 1948). The first of a series of migration waves was led by Oduduwa, which resulted in the founding of Ife (Biobaku, 1971), the study area for this chapter.

Among the Yorubas in diaspora certain individuals who have distinguished themselves in history have been deified and thus become gods. These include Oduduwa (progenitor of Yoruba race), Orunmila (god of divination), Ogun (god of iron) and other gods that worked with them. Others consist of those persons that distinguished themselves in history such as Moremi, Oluorogbo, Sango, Oya, Lafogido, Wunmonje, amongst others. All these individuals have become deified and continue to be worshipped by Yoruba people today. There is something extraordinary about the variety and nature of these gods and in the popular Yoruba saying, they number 401 (Beier, 1975). There are two levels of worship of Yoruba gods: the clan god for the individual families and the gods of the entire Yoruba society. This hierarchical concept of religious worship is

what Frobenius (1968) called the Yoruba philosophy of life, mature by the knowledge of gods and so architecturally constructed to support and uphold the individual and the community (Frobenius, 1968).

Ile-Ife, the study area for this chapter, is the historic, cultural and geographic centre of the Yoruba people. It lies in the southeastern part of Osun State in Nigeria. It is about 200 km (124 miles) from Lagos which doubles as the nation's major seaport and principal commercial centre. The Obafemi Awolowo University (formerly University of Ife) is located 5 km (3 miles) northwest of the town, on the outskirts of the city on the Ife-Ibadan road. According to Yoruba mythology and legend, Ife is the cradle of mankind and Oduduwa is the creator of existence. "Odu to da iwa", which means "the great one who creates existence", was sent by Ajalorun (God Almighty) (Biobaku, 1971). This myth not only enshrines Ife as the holy city and centre of the world, but makes the Yorubas the pivot of that world (Aradeon, 1996).

In Ile-Ife, there are at least 189 shrines, groves and monuments, as identified in a study by Omisore (2002). The breakdown include about 84 historic buildings, 63 shrines, 20 monuments, 10 groves, 6 museums and 6 squares in the study area. According to the same study these historic buildings, shrines, groves and monuments are spread over the 7 zones in Ile-Ife namely Iraye, Iremo, Ilare, Moore, Ilode, Okerewe and Enuwa.

Historical evidence on the evolution of the study area and the sites highlights the names of several individuals. There is no doubt that Oduduwua was the progenitor of the Yoruba race (or are the Yoruba a tribe). Indeed, from the Oduduwa to the present day Ile-Ife several kings have reigned. Most of these kings have been deified and worshipped. Prominent among these kings are Obatala, Oranmiyan, Obalufon, Osangangan and Obamakin. These deified kings constitute the first set of shrines, groves and monuments and are represented by monoliths, stones and sculptures. Others are those sites that emerged due to the political, social, religious and cultural beliefs of the people in the study area at different times in history. Also, notable examples of the existing sacred sites and squares in Ile – Ife today are: Orunmila, Iledi, Orisa Ikire, Ooni Orisa Oko and Enuwa Square. There are other gods not represented by squares and these are generally accommodated in insignificant temples at roadsides or within residential compounds. However, both Oduduwa and Oranmiyan groves are enclosed by mud walls of about 2.5 m (8.2 feet) in height with only one main gate. From the main entrance the path leads to the functional areas: the shrines and temples. While the temples contain the altars of the varying deities, others are in the open air and denoted by stone monoliths, columns and free standing trees that are held sacred (see, for example, Exhibit 2–8 for a vivid description of some of the sites in Ile-Ife).

It is worth noting, however, as evident in the study conducted by Omisore (2002) that the sites are of religious, cultural, ancestral, historical, employment and political importance in the city as confirmed in the literature. Some royal dynasties in Yorubaland derived their origin or existence from the warlords that are now being deified and worshipped. For example, the ranking indicates that



Exhibit 2 Obatala shrine
Location:Itapa street
Short history: Obatala is a brother to Oduduwa. The Ooni of Ife usually comes to the shrine as part of the crowning ceremony. The crown would first be placed on Obatala's head before putting it on the Ooni's head



Exhibit 3 Okemogun shrine
Location:Enuwa sqaure
Description: The shrine is represented by the two stone monoliths. At the shrines are two Odan trees right and left hand side
Short history: Ogun was one of the Oduduwa's children. He was the patron of blacksmiths. He was a pathfinder, that is, one who with a matchet in hand who paved way for others to find their way to Ile-Ife in Yoruba traditional history. Olojo festival is celebrated to worship the Ogun. Ogun festival is celebrated in all Yoruba towns. The Chief priest in charge is Osogun



Exhibit 4 Yemoo grove
Location: Moore street
Short history: Yemoo was a powerful queen who believed in artwork. She used broken pots as artworks to pave her place and walkways in some parts of the ancient city of Iife



Exhibit 5 Oranmiyan staff
Location: Oranmiyan street
Short history:
Oranmiyan was one of the sons of Oduduwa who lived between 1200 and 1300 AD. Oranmiyan was a great warrior whose name instilled fear in the hearts of all who crossed his path. Oranmiyan is believed to have founded the present day Benin. His sword has been acclaimed by oral historian to be this 3.0 meters staff

119 (63%) of the sites have religious significance while 97 sites (51%) are of cultural importance to the people. Eighty (42%) of the sites in the study area were observed to be of ancestral origin and significance. Being tourist attraction and revenue generating centres, some of the sites have employment and political



Exhibit 6 Orunmila shrine
Location: Oketase, Ilare street
Short history: "Orunmila, baba ifa" is the divination of Yoruba race. He is regarded as a supernatural and omniscient being. Orunmila is often consulted when his worshippers are faced with any kind of problems and is reputed to provide right solutions. It is of historic and cultural importance

Exhibit 7 Oduduwa afewonro
Location: Enuwa square
Description: The site of Ile Oduduwa is three acres of land located at Igbo Idio along Oduduwa Street. Both the grove and shrine are located at this site. The grove is divided into a number of courtyards, while a dome with a chain marks the shrine. The shrine is called Orisanla, and entry into it is forbidden for all . The place is believed to be where Oduduwa landed when he descended from heaven. The Chief priest of this shrine and grove is Obadio.
Short history: This is the statue of Oduduwa believed to be the progenitor of the Yoruba race. The statue is made of metal and painted white. It is placed at the centre of the Enuwa garden. The statue is recognised all over the world where descendants of Yoruba live in the diaspora





Exhibit 8 The statute of Osun goddess
Location:Osogbo
Short history: Osun – Osogbo sacred grove, otherwise known as the goddess of river Osun, is believed to symbolise the water of life, which saved the inhabitants of ancient Osogbo town from hunger, pestilence and tribal wars many centuries ago. Osun – Osogbo sacred grove is also regarded as a goddess of fertility. The statute at the riverside is the representation of the goddess standing on the golden fish, the totemic messenger. It is an emblem of the goddess with open hands inviting all and sundry, an indication that she is a goddess of care, protection, cure and mother to all

significance to the people of Ile-Ife. It is also apposite here to cite Osun – Osogbo sacred grove, a significant cultural site included on UNESCO World Heritage List, though outside Ile – Ife but within the Yoruba land. It is located in Osogbo, capital of Osun State in Nigeria, within the same state with Ile – Ife. The sacred grove is about 75 hectares (about 180 acres) in area with numerous species of plants and animals which are regarded as physical manifestation of

powers of the goddess called "Osun". An annual festival that attracts thousands of tourists from local, national and international to the site is usually organised in honour of goddess of river Osun. The river is believed to symbolise the water of life, which saved the inhabitants of ancient Oshogbo town from hunger, pestilence and tribal wars many centuries ago. Osun – Osogbo sacred grove is also regarded as a goddess of fertility.

The statute at the riverside is the representation of the goddess standing on the golden fish, the totemic messenger. It is an emblem of the goddess with open hands inviting all and sundry, an indication that she is a goddess of care, protection, cure and mother to all. Other features at the site are Olomo shrine, Osun shrine, King's court, an inner courtyard amongst others (Omisore et al., 2005) Exhibit 8.

The uniqueness of these sites coupled with the fact that they are being currently threatened by commercial developments and tourism pose serious challenges to estate surveyors and valuers in the assessment of their compensation when they are acquired or alienated for public purposes.

Rationale for Compulsory Acquisition

In Nigeria, as, perhaps, in other Commonwealth countries, land administration, compulsory acquisition and compensation procedures originated from the United Kingdom.

Taking of property for public purposes was also known in classical times. The Annals of Tacitus tells us that the Roman government exercised this power to acquire the materials with which it built and repaired aqueducts. The Greeks also knew public takings. A dispute between Athens and Eleusis was settled by providing for arbitration of the value of certain properties sought to be acquired by the Athenians, "with three valuers on either side" (Searles, 1974). This power of compulsory acquisition, as it is accepted in Nigeria, is referred to as "eminent domain" in America, "resumption" in Australia, and in the English context, the comparable concept is "compulsory purchase", the powers for which, although now derived from parliament, originated from the feudal concept of "freehold" tenure, being land "held" by the Crown. The power of compulsory acquisition and compensation is currently guaranteed under the provision of both the Land Use Act, 1978, the applicable land law in the country including the 1999 Constitution of the Federal Republic of Nigeria.

In the literature several reasons can be adduced for the "taking" or "compulsory acquisition" of lands by the government (West, 1976; Denman, 1978; Fernando, 1984).

- The inherent need of the state to provide its citizens with land for provision of social services like roads, water, electricity, housing, amongst others.
- The state, as the trustee of land for the people, is duty bound to protect and preserve the individual rights of the citizenry over land, (Section 1 of the Land Use Act, 1978).

- The need for the government to interfere, through natural prerogative rights, to balance the conflicting interests of both the community, public and private rights in land.

But, the usual objectives in countries, where compulsory acquisitions had taken place include the following: redistribution of land in an equitable manner; political and price stabilisation through land control; social justice; physical planning; redistribution of income, wealth and opportunities; and, recapture of social-created gains for the benefit of the community (Denman, 1978; Dunkerley, 1983; Ismail, 1988 and Aluko, 2002).

Specifically, in Nigeria, the Land Use Act, 1978 was promulgated on the 29th of March, 1978 and compulsorily expropriated the family, communal, stool and individual rights, hitherto, in land, although without compensation. The land was subsequently vested in the state to address the following issues (Kanu, 1978; Fabiyi, 1990; Aluko, 1999, 2002).

- The removal of bitter controversies, resulting at times in loss of lives and limbs which land was known to be generating;
- The streamlining, unifying and simplification of the management and ownership of land in the country;
- Dealing with the uncontrolled speculation in urban and rural land;
- Assisting the citizenry, irrespective of his social status, to realise his ambition and aspiration of owning the place where he and his family will live a secure and peaceful life; and,
- Enabling the government to bring under control the use to which land can be put in all parts of the country and thus facilitates planning and zoning programmes for particular users.

In summary, land can be compulsorily acquired under the Land Use Act, 1978 for public purpose(s), which is not defined under the Act, but, left at the discretion of the state Governor on behalf of the state.

Authorisation of Compulsory Acquisition

The relevant laws governing compulsory acquisition of shrines, groves and sacred places or other lands in Nigeria before the promulgation of the Land Use Act, 1978 on the eve of 29th March, 1978 include the following:

– Public Lands Acquisition Act (Cap 167) of the Laws of Nigeria
– State Lands (Compensation) Decree 38 of 1968
– Public Lands Acquisition (Miscellaneous Provisions) Decree 33 of 1976
– The relevant Town and Country Planning laws of 1947 repealed by Urban and Regional Planning Decree No. 88 of 1992
– Case Laws; and Mineral Oil Act repealed in 1968, exactly 10 years before the Land Use Act
– Section 40(1) and 44(1) of the 1979 and 1999 Constitutions. respectively.

The power to acquire land compulsorily in the country is derived, currently, principally from the Land Use Act, 1978. The other ancillary enactments/statutes above except the Oil Pipeline Act Cap 338 and the Petroleum Act Cap 380 of 1990, respectively, had been repealed. For example, Section 28(1) of the Land Use Act, 1978 provides that the Governor of a State can lawfully revoke a right of occupancy for overriding public interest. A right of occupancy can be either statutory or customary depending on whether it is granted by either the state or local government. In the case of statutory right of occupancy an "overriding public interest" means:

(a) the alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder;
(b) the requirement of land by the Government of the State or by a Local Government in the state, in either case for public purposes within the state, or the requirement of the land by the Government of the Federation for public purposes of the Federation;
(c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.

In the case of customary right of occupancy, an overriding public interest means (a)–(c) above in addition to the requirement of the land for the extraction of building materials.

Section 28, subsections 4–7 contains other grounds for revocation of right of occupancy, by the State Governor. For instance, the Governor may revoke a statutory right occupancy on the ground that there is a breach of "any of the provisions which a certificate of occupancy is by Section 10 deemed to contain". In most cases, the foregoing involves the making of what is called "A compulsory Acquisition Order" in the form of a Gazetted executive instrument.

Nature and Assessment of Compensation

Compensation following the compulsory acquisition of groves, monuments, shrines and sacred places falls to be calculated within the framework of rules in the enabling law authorising such acquisition in any country. It implies a full and complete equivalent (usually monetary) for the loss sustained by the owner whose land has been taken or damaged. Compensation has ancestral origin; for example, in Biblical times, King Ahab of Samaria, who sought the vineyard of Naboth, offered Naboth as his choice of compensation either a better vineyard (under the substitution or replacement theory of damages) or the vineyard's worth in money (under the indemnification theory). Naboth asserted a right of refusal, which has never existed in law and paid for his refusal with his life (Searles, 1974).

In line with the above, the 1999 Constitution of the Federal Republic of Nigeria, by Section 44(1), which is an equivalent provision under Section 40 of the repealed 1979 Constitution, states that

> No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things –
>
> (a) requires the prompt payment of compensation therefore; and,
> (b) it gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

This provision contradicts the one of the 1963 Republican Constitution where the phrase "payment of adequate compensation" has been substituted with "prompt payment of compensation" in the 1979 and 1999 Constitutions. But, in *Horn v Sunderland Corporation (1941) 2 KB 26* Scott L.J. said of the purpose of compensation:

> What it gives to the owner compelled to sell is compensation – the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the pubic interest, but on the other hand no greater.

It is imperative from the above to accept that there are two known concepts of compensation. First, the underlying market value of the expropriated land as a measure of compensation, the objective of which seems to provide the claimant with the financial equivalent of his or her loss. This is in line with the submission of Denyer-Green (1982) which likened this concept to "pretium" (Latin). In the latter, compensation is not seen as having any social purpose but rather providing the expropriatee money worth what he could have obtained in the market place, and with which he can presumably buy an equivalent property.

The second concept is known as "Compensatio" (Latin), the purpose of which is to provide an institutional response to the claimant. That is, some indemnification of the loss sustained as a result of the compulsory requisition; but not necessarily to equal harm by way of a financial equivalent as emphasised by the first concept. It is argued that payment of compensation on the basis of full market value would severely strain the financial strength of the State, and, is usually inflated and not always justified in terms of productivity. In addition, it is noted that in some developing countries including Nigeria, "open market value" is a fictional or hypothetical construct as there may not be well-organised property markets. More importantly, the concept of open market value in compensation loses validity since the government in protecting and preserving the rights of citizenry over land must, at the same time, carry out schemes on parts of the land for the general benefits of the community (including claimant) (Fernando, 1984).

It should be noted that, whatever concept is adopted, the process of compensation (from the Latin word compendere = weigh together) is a counterbalancing process, and through the ages, the courts have held generally, in the case of expropriation of property, that just compensation should be paid to the

deprived owners (Nkado V Obiano (1997) 5 NWLR (pt503) 31; Idundun V Okumagba (2002); Ajiboye V Ishola (2006) 39 WRN1). Some authors have argued that since indigenous people have a spiritual or sentimental attachment to the shrines/land, unlike non-native westerners, spiritual values cannot be ignored when valuing native lands or sacred sites for there to be just compensation (Bannerman, 1993; Whipple, 1997; Boydell and small, 2001; and Myers, 2002). Ratcliff (1965) classifies such value (spiritual or sentimental) as "intrinsic value" which has a "mystical quality" that is independent of market conditions. It is predicted that there is some value being inheres in a particular real estate commodity. Therefore, the basis of the assessment of compensation, and the heads of compensation under each of the relevant laws in the country are examined below. This will enable us to evaluate the adequacy of the compensation provisions in terms of the concept of value to the indigenous people.

The Land Use Act, 1978

On 29th March 1978, the Land Use Act was promulgated by the then military Government as the main land law governing ownership of land in the country. It approaches this through three strategies: the investment of proprietary rights in land in the state; the granting of user rights in land to individuals; and the use of an administrative system rather than the market system in the allocation of land rights.

The compensation payable under this Act can be either in cash or in kind. For instance, Section 29(4) of the Act allows for the following heads of compensation:

(a) Land, for an amount equal to the rent if any, paid by the occupier during the year in which the right of occupancy is revoked;
(b) Building, installation or improvements thereon, for the amount of replacement cost of the building, installation or improvement, that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer, less any depreciation, together with interest at the bank rate for delayed payment of compensation;
(c) Improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer;
(d) Compensation for crops and other farm products will be calculated according to prescribed method by the appropriate officer who is usually the Chief Lands Officer and Federal Land Officer in case of the state and federal governments respectively.

Section 29(5) of the Act partially recognises compensation for severance, but, did not give its assessment adequate treatment.

And, by Section 29(3) of the same Act, if the holder or occupier entitled to compensation in respect of sacred places under Section 29 is a community, the Governor of each State in the Federation may direct that any compensation payable to it shall be paid:

a) to the community or
b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law, or
c) into some fund specified by the Governor of each state for the purpose of being utilised or applied for the benefit of the community.

The Act further stipulates, under Section 31, that where compensation for land acquired before the operative date of the Land Use Act, 1978 had not been paid, then, such compensation shall be based on the provisions of The Public Lands Acquisition (Miscellaneous Provisions) Decree No. 33 of 1976. The operative date of the Decree was July 1, 1976. It repealed Decree No. 38 of 1968 and other sections of the Public Lands Acquisition Cap 167 in respect of compensation. Part III of the Decree states (in respect of state land) that:

(a) the assessment of compensation shall henceforth be based on current replacement cost of buildings, installations or structures on the land, depreciated for age and obsolescence as the case may be together with interest at bank rate in the year in which the land was resumed.
(b) Value of crops, unexhausted improvements and cost of reclamation should also be added where applicable,
(c) The rent paid during the year of resumption shall be refunded.

Where, however, the land acquired is owned by an individual, the heads of compensation remain the same as described above, except for the value of land as directed in the Decree. Maximum value of land as payable in the Decree 1976 under Section 2 which divides the federation into zones in respect of land acquired in each zone are as indicated in Exhibit 9 below:

The alternative method of compensation under the Land Use Act, 1978, that is, in kind, is by resettlement in lieu of compensation (Section 33(1) of the Land Use Act, 1978). And, by Section 33(3) where a person accepts a resettlement pursuant to the provisions of the Act, his right to compensation shall be deemed

Exhibit 9 Land values by zone

	Zone	Maximum compensation Per Hectare (₦)
1.	A – Metropolitan lagos (i.e. the former federal territory)	7,500.00 ($145/ acre)
	B – (i) Lagos state other than metropolitan Lagos (ii) State capitals (iii) Industrial and commercial urban centres	3,750.00 ($73/acre)
	C – Other urban and semi-urban centres	1,500.00 ($29/acre)
	D – All other areas	1,250.00 ($24/acre)
2.	Cases not included in 1A-D...	Compensation shall be in accordance with the local customs and land tenure law applicable in the state.

to have been duly satisfied, and no further compensation shall be payable to such person. But, where the value of any alternative accommodation is higher than the compensation payable under the Act, the parties concerned may by agreement require that the excess in value in relation to the property concerned shall be treated as a loan which the person affected shall refund or repay to the Government in the prescribed manner. Nevertheless, the Act is silent on what will happen where the cost of alternative accommodation is lower than the compensation payable as determined by the appropriate officer or the Land Use and Allocation Committee set up under the Act.

By Section 30 of the Land Use Act, 1978, where there arises any dispute as to the amount of compensation calculated in accordance with the provisions of Section 29 of the Act or resettlement under the Act as explained above, such dispute shall be referred to the appropriate Land Use and Allocation Committee set up under Section 2 of the same Act. And, by Section 47 of the Act, the decision of the committee shall be final, even, notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federal Republic of Nigeria.

The Oil Pipeline Act Cap 338 of 1990a

The Act provides in Section 6(3) that the holder of a permit to survey under Section 5 of the same Act shall take all reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, and shall make compensation to the owners or occupiers for any damage done and not made good.

Part IV of the Act (Sections 19–23) deals with compensation. Section 19 stipulates the court having jurisdiction to entertain disputes as to compensation. Section 20 deals with the basis of assessment of compensation and provides that the court shall award such compensation as it considers just in respect of any damage done to any buildings, crops, or profitable trees and for disturbance if any. Section 20(4) provides that no compensation shall be awarded in respect of unoccupied land as defined in the Land Use Act, 1978, except to the extent and in circumstances specified in the Act.

The Petroleum Act Cap 350 of 1990

This deals mainly with compensation for oil spillage. Section 36, first schedule of the Act, provides that the holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.

The provisions of this law and other laws on compulsory acquisition and oil spillage prescribe the payment of fair and adequate compensation to countervail the loss suffered by one party as a consequence of the acts and negligence of another party.

This value can be divided between social and economic value. But, it has been asserted earlier in this chapter that indigenous people ascribed spiritual or mystical value to land and sacred places, monuments and groves. Therefore, value in use rather than market value through the adoption of cost or contractor's approach may be useful in the assessment of compensation.

From the foregoing, the primacy of the cost method of valuation is evident over other method vis-à-vis market comparison, accounts or profit, investment or income capitalisation or residual techniques, in the assessment of compensation. Although, perhaps, under the guise of fair or just compensation, as contained in the Acts 338 and 350 of 1990, any of the other methods could become applicable or under Section 29 (5) of the Land Use Act, 1978 if severance were properly treated.

Whichever method is applicable, it is, in reality, difficult to arrive at a fair or just compensation for non-market components such as sacred land. For instance every society develops a "folk image" for capturing social reality. In the Yoruba folk image, shrines, groves, monuments and other sacred places are more than a "piece of earth" – they embody mystical qualities. Ile-Ife, alone, being the cradle of the world, houses 401 deities that are worshipped throughout the year but for one day reserved as holiday and known only to the worshippers. Even in absolute terms, the land is considered irreplaceable for no one piece of land is like any other. This notion has material repercussions in assessing the equity of basing compensation upon compulsory acquisition using simple open market values when exact replacement is impossible. It is maintained that there is no cost involved in the creation of land nor in the long run is it used up; there are thus "original and indestructible powers of the soil". In view of the above, in assessing the replacement cost of the unexhausted improvements as contained in the Land Use Act, 1978, apart from the historic buildings usually at the sacred sites – usually made with mud and palm fronds – or monolith structures on ground, the valuer stands a chance of confirming transfer by transplant of the sacred places, shrines, monuments and groves. Sacred places, in almost every case, demand offerings, and these are similar not only in terms of their functions – mainly appeasement, supplication and thanksgiving – but also in the nature of the materials and objects that are used.

We must also add to these the cost, including labour involved for such festivity as may be required for an efficacious transplantation. One agrees that it is highly important that those elders, who are priests, in the community are consulted to state and confirm the requisite offerings and materials (Odu, 1983). But, due to advancement of Christianity, Islam and Western civilisation as a result of education, it may be difficult to get the right

people – priests or elders – to give details of sacrifice required for transplantation. It is, therefore, in most cases shrouded in mystery.

Where transplantation is feasible and allowed, the costs of removing and transferring the sacred site to another will be included as part of the compensation payable to the claimant (s), but, where otherwise, it may be difficult to arrive at reasonable compensation since these sites perform social security function, and the consequences may be grave when acquired.

The materials required in transplantation may involve the use of kolanuts, palm oil, rolls of white cloth, goat, hen, etc., and in some cases, human beings, although modernity/civilisation has limited human sacrifice in communities in Yoruba land. The labour also consists of the costs of transportation to and from the new alternative sites including payment of hired local drummers, priests, relevant traditional chiefs, and family or communal elders in the community are usually consulted on the foregoing. This is necessary so that elders or priests are not summoned by their ancestors to appear in the world of spirit and give account of their stewardship on land matters. Hence, in addition to the value or depreciated replacement cost of the buildings or improvements at the sacred site, the valuer must consider the cost of appeasement sacrifice, removal and re-establishment sacrifice, restoration sacrifice, supplication and thanksgiving, as well as cost of communal festivities. Besides, the age of a shrine/site, the population of keepers of shrine or the site and the urbanity or modernity determines the relevance and value of sacrifice required in a compensation claim.

The foregoing valuation of special-use or sacred purpose property types often has been a subject of controversy. Where no market exists, the replacement approach may be appropriate. But, in the circumstances, where some of the sites or shrines act as tourist attraction centres or leisure places, suggesting that a reasonably active demand does exist for continued use, then the sites would be classified more appropriately as limited-market. Perhaps, under this situation, the profit approach to value where relevant turnover sales data and costs are available will be relevant in assessing the compensation for these sites. Just compensation for these sites would depend on their trading potentials; and if the cost approach is adopted, in defiance of a profit approach, for it to be appropriately positioned, it must be subject to test of adequate potential profitability. In this circumstance, the profit approach will be relevant toward assessing the value of such property or site for rating and compensation purposes, particularly, if valuers are to capture the effect of modernity and urbanity on these sites in their valuation assignment. Nonetheless, successful adoption of profit approach depends to a very large extent on the availability of financial accounts prepared by a qualified accountant, as well as accurate disclosure of relevant sales data or information in the accounts. This is usually difficult in the case of numerous small-scale businesses in the country. At times, several financial accounts are prepared to meet different objectives, specifically, in most cases, to evade or avoid taxes, and smaller ones hardly able to meet the cost of preparing the financial statement

by chartered accountants. Reliance on such accounts for compensation valuation may, therefore, lead to inaccurate results.

Where, however, necessary adjustments are made by valuers to data input for the profit approach, the annual value obtainable for these sites/shrines can be capitalised with appropriate rate of interest or return on similar properties to determine their capital values for compensation using the investment or income capitalisation method of valuation. Perhaps, analysis of turnovers on similar sites or social preference rate or rate on gilt-edged securities may be taken as capitalisation rate. This method may be very useful in assessing the investment worth or value in use of those sites to their owners, that is, the value of an economic good to its owner-user which is based on the productivity (privacies in income, utility or amenity form) of the economic good to a specific individual; subjective value. It may not necessarily represent market value for compensation, more so, that these sites or shrines perform a social security function to our people, which cannot be replicated in the open market. A chief traditional priest in Ile-Ife once vowed that the acquisition and transplanting of shrines or sacred places is an illusion, and if ever contemplated or done, the whole world would be submerged below sea level (Chief Fabunmi, 2003). In view of this statement, how can there be an adequate compensation for these sites? But, in most cases of compulsory acquisition or expropriation, the courts have generally held that just compensation should be paid to the deprived owners (Nkado V Obiano (1997) 5 NWLR (pt503) 31; Idundun V Okumagba (2002); Ajiboye V Ishola (2006) 39 WRN1).

Analysis of Transactions on Sacred Places in Nigeria

Data on recent transactions on sacred places that take place in Nigeria (Delta and Akwa Ibom states) between 2005 and 2006 were considered and analysed in this section. For each sacred place acquired in these states, the compensation paid was obtained alongside the location of the property (city). Exhibit 10 shows the descriptive statistics for the data. Detecting whether compensations

Exhibit 10 Mean values for data from transactions on sacred places

	Full sample	Delta state	Akwa Ibom state
Compensation paid (N)	156, 667	246, 000	44,000
	(147, 064)	(147, 750)	(36, 469)
Open market value (N)	215, 667	342, 000	57, 400
	(204, 751)	(203, 887)	(46, 193)
Premium relative to open market value (%)	–33.79	–40.49	–36.33
	(13.02)	(12.73)	(14.45)
Compensation minus open market value (N)	–59, 000	–96, 000	–13, 400
	(59, 225)	(59, 414)	(9, 889)
Number of sample	10	5	5

Note: Values in parentheses are standard deviations.

paid are systematically higher or lower than the price that would result in a non-compensation situation requires an estimate of the price each property would bring in an alternative market situation. One proxy of such estimates that was utilised in this study is the open market value of similar sites without the attributes of shrines and groves obtained from local property agents in the respective areas.

Based on the data provided in Exhibit 10, compensations paid in respect of the sacred places for the full sample are 33.79% less than the open market value of similar sites without the attributes on average. Perhaps, this may be due to the fear usually associated with living in sacred sites and cohabiting with departed heroes or ancestors who are now spirits. It is also not uncommon with the rates prescribed by the enabling compensation statute which are usually at variance to the market determined value. Dividing the full sample into geographic sub-samples reveals that the premium from open market value ranges from a high of 40.49% for properties in Delta state to 36.33% for properties located in Akwa Ibom state. This result suggests that compensations paid are consistently below the open market value of similar sites, though the magnitude of the differences varies across sub-samples. Consequently a paired *t*-test was conducted for systematic differences between compensations paid and open market values. To test the null hypothesis of no difference between compensations paid and open market values, the following t statistic was used:

$$t = \frac{x}{s/\sqrt{n}}$$

Where x and s represent the mean and standard deviation, respectively, of the difference between compensations paid and open market values, and n is the number of pairs considered. The statistic is distributed as student's t with n-1 degrees of freedom, and the results are shown in Exhibit 11.

The results of the above exhibit indicate that the mean differences between compensations paid and open market value for the full sample and all sub-samples are significantly different than zero, suggesting that compensation data examined in this study are systematically lower that prices observed in non-compensation transactions.

Exhibit 11 Results from means tests applied to compensation data to detect significance of premiums within sub-samples

	Full sample	Delta state	Akwa Ibom state
Compensations premium relative to open market values (%)	33.79	40.49	36.33
t-statistic for difference from zero	3.15*	3.61*	3.03*

* Significant at the 2.5% level or higher.

Conclusions

This chapter has focused on compensation valuation for sacred sites in the Yoruba areas in Nigeria. This is a very important and unique area of valuation as compensation has to be paid to dispossessed owners; and, these places, also, act as centres for political, magico – religious and ceremonial functions. More importantly, native peoples throughout the world are becoming increasingly vocal about the interpretation of their cultural heritage, and in the management of their sites and artefacts, which represent that heritage (Layton, 1989a,b). The word compensation almost of itself carried the corollary that the loss to the seller (claimant) must be completely made up to him, on the grounds that unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice.

However, the realm of ritual and symbolic analysis of past beliefs and practices in the assessment of compensation for sacred shrines, monuments and groves is a notoriously difficult one. The increasing wave of Christianity and Islam as well as long years of changing colonial presence in the country, and subsequent modernisation, has discredited not only these sacred sites, but also accounts for the extinction of the traditional worshippers or priests. Yet, it is not possible to believe that such past cultures were not part of the ancient and even present world, least of all amongst the peoples of a complex society such as the Yoruba. Attempts to penetrate the symbolisms of the past cultures in compensation valuation may, therefore, be either through the training of curators or proper inventory of these sacred places including the materials and objects that are used as offerings in appeasement, supplication and thanksgiving.

Also, a rather relevant point but serious omission in the Land Use Act, 1978, a major enabling law on compensation practice in the country, is on the matter of the rights to disturbance compensation by the dispossessed. It is inequitable to dispossess an owner, under compensate him for just the cost of the sites, and as well require that he assumes the other losses attributable to the compulsory acquisition. The adoption of the cost of unexhausted improvements as compensation for these sites is suspect, and, may be inadequate. These sites have social or mystical value which may not be easy to replicate. Nonetheless, where revenue from tourists are realised from some of these sites, a hybrid of both cost method and investment method could be applicable. In spite of the above, compensation may not be adequate as these sacred places have social and cultural importance and, some are not transplantable, as they cannot be moved elsewhere. Thus, the Land Use Act, 1978, rather than allow the valuer to employ the most appropriate valuation method indicates the valuation method, to the satisfaction of the appropriate officer, to be adopted. These appropriate officers are usually the chief lands officer either at the state or federal level. But, in some of the ministries, appropriate officers may not necessarily be qualified estate surveyors and valuers in the country. Perhaps,

to resolve this problem, the choice of appropriate compensation valuation methodology may be resolved with the aid of guidance notes on such valuation by the valuer employed by the claimants in respect of compensation for the special places, and, also in respect of sacred lands acquired before the promulgation of the land Use Act, 1978 whose compensation are based on the values of land as contained in the Decree No 33 of 1976, where the compensation is payable now, the stipulated land values are out of tune with the current trend in the property market.

Moreover, where compulsory acquisition is prompted by the sacred sites being required for mining or oil pipelines, the Oil Pipeline Act Cap 338, 1990a and the Petroleum Act cap 350 of 1990b are applicable in the assessment of compensation payable. But, while the Oil Pipeline Act provides for compensation for land disturbance, the Petroleum Act, 1990 makes no provisions for compensation for land for oil purposes which is also the position under the Land Use Act, 1978. Although, the Petroleum Act Cap 350 of 1990b deals essentially with compensation of these sites for oil spillage, this conflict, must be resolved for there to be fair and adequate compensation. Appropriate machinery has to be put in place to review these laws to ensure assessment of just compensation. But, the procedure under the Constitution for the review of these laws are usually cumbersome and a time-consuming exercise.

Also, the principal legislation – The Land Use Act, 1978 – governing compensation in the country is silent on how the erstwhile landowners – families, chiefs or traditional authorities, communities – dispossessed of their sacred shrines, monuments and groves on the eve of the 29th March, 1978, the day the Act was promulgated, when their rights in these lands were expropriated and vested in the Governor of each State of the Federation, are to be compensated. This is highly important, as there were no lands in Nigeria without a customary owner before and on the day the Land Use Act, 1978 was promulgated. Moreso, neither ownership by prescription nor the principle of bona vacantia were recognised under the Nigerian customary land tenure system at the time of promulgation of the land law. Although, as explained earlier, the allodial or paramount title still resides in the customary owners, but, subject to the provisions of the Act.

Also, it seems that a public purpose under the Act 1978 may be simply invoked by a public body to serve its ideal of the public good in the compulsory acquisition of sacred places. This is subject to abuse as there is no definition of the phrase "public purpose" under The Land Use Act, 1978. In view of this, we are back to the days of the sovereign who would act at will, at discretion, or at caprice as long as it served his ideas of the public good, and compensation was paid. Perhaps, public purpose is a political question for decision by the legislative and executive branches of government.

Again, the Land Use Act, 1978 provides in Section 30 that where there arises any dispute as to the amount of compensation calculated in accordance with the provisions of Section 29, already explained above, such dispute shall be referred

to the appropriate Land Use and Allocation Committee set up by the government under the said Act. It is clear from Section 47 (2) of the Act that no further appeal will be from the decision of such a committee. If this is so, then, the provisions are not only retrograde but also in conflict with the fundamental principle of natural justice which requires that a person shall not be a judge in his own cause. The Act must, in making these provisions, have proceeded on the basis that the committee is a distinct body quite different from the Governor or the local government. It is submitted, however, that it will be difficult to persuade the public that this is so and that the compensation is fair and just since the members of the committee are all appointed by the Governor of each state in the country.

Notwithstanding the foregoing, what is fair, just and adequate with respect to compensation of sacred places could be determined by qualified Estate Surveyors and Valuers, charged with such responsibility under Act No 24 of 1975, failing which, the matter could be refereed to an appropriate Lands Tribunal or court for determination. It suffices, therefore, to state that The Nigerian Institution of Estate Surveyors and Valuers, in collaboration with the Estate Surveyors and Valuers Registration Board of Nigeria, should put in place a strong committee to convince the National Assembly for the review, as shown above, of all laws relating to compulsory acquisition and compensation in the country. This will promote codification of good practice as well as ensure assessment of fair and adequate compensation for sacred places or other non-market land uses in the country.

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Land Restitution and Restitution Valuation in South Africa

Valmond Ghyoot

Abstract This study provides a broad overview of the land restitution process in South Africa and the associated valuation implications. The historical and legal basis of land restitution is described, followed by a brief review of progress with the implementation of this policy. Recommendations on how the land restitution process may be improved are provided. A discussion of valuation problems and the available guidelines on valuation for land restitution follows. The valuation approaches employed in three land restitution cases are described and analyzed. The study concludes that, despite problems, the restitution process is progressing well and that administrators, legal professionals and valuers are contributing to its success.

Introduction

Land reform is an ongoing process in many areas of the world, including the Pacific Rim, Latin America, Canada, Europe, Asia and Africa. Most of the land reform literature focuses on land access, land tenure and land policy.[1] Less

[1] The following studies are representative examples: Bromley (n.d.) discusses the land rights movements in Australia, New Zealand, Canada, the United States and South America. Griffiths (2006) provides a comprehensive overview of land tenure and land policy for indigenous peoples in Latin America, while De Janvry and Sadoulet (2002) reviews 70 years of land reforms in the region and gives guidelines for future land access programmes. León (2005) focuses on land restitution in Guatemala and suggests how the process may be improved. Cotula et al. (2006) analyze poverty reduction and the requisite policy to improve land access in Africa, Latin America and Asia. Flores-Bórquez and Grover (2005) discuss appropriate land restitution policy to restore past expropriation in Chile and Canada. Jacobs (2001) focuses on the role of women in land reform, while Anon (2005) includes the plight of all indigenous peoples. Roth (2002) summarizes general land issues and policies in Southern Africa, while Carey Miller and Pope (2000) analyze the land reform process in South Africa from a legal perspective. Many organizations that focus on land tenure and related problems are referenced by the International Land Coalition (2006).

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attention is given to the accompanying valuation and compensation problems. However, some notable studies address value and compensation in land reform: Fortes (2005) provides an in-depth analysis of compensation models for indigenous lands, while Hosios and Smith (2006) discuss the quantification of historical undercompensation and usage losses of the land of indigenous people. Myers and Shah (2004) debate whether market value is relevant when assessing customary lands and provide evidence that values are perceived to be lower. Sheehan (2002) provides an overview of compensation in expropriation cases, covering several countries. Terblanché (2004) comprehensively discusses the determination of compensation for land restitution in South Africa. Zimmerman (2005) also discusses compensation but focuses on the South African Constitution.

This study focuses on land restitution in South Africa since 1994. It provides a broad overview of the land restitution process and highlights some valuation implications of this process.

Historical Setting in South Africa

The release of Nelson Mandela in 1990 and South Africa's peaceful transition to democratic rule in 1994 delighted the world. Annual tourism increased from one to three million in two years and now totals about seven million (SA Tourism Strategic Research Unit, 2005). Robben Island, which houses an ordinary jail, became a world heritage site because of its history and distinguished inhabitants. After the euphoria had subsided, the legal and administrative obstacles left by decades of discrimination against Black people had to be eradicated. A key issue was restitution of the land that had been expropriated in terms of racially based legislation under the apartheid government.[2]

The new government set itself the task of distributing 30% of agricultural land to Black people by 2014. This did not include the 13% of land already under Black control in the "homelands" created under the previous policy of separate development (apartheid). According to the Department of Land Affairs, the land surface of South Africa totals 122 million hectares (ha) (approximately 300 million acres[3]) of which 100 million ha (247 million acres) is agricultural land (Coetzee, 2005b). Black South Africans are estimated to own 18 million ha (44 million acres) of this farmland. The state wants to transfer

[2] "Apartheid government" is a colloquial term for the government that came to power during the 1948 Whites-only elections in South Africa. This government designed and implemented the apartheid system, where people were segregated on a racial basis. It was replaced after the first democratic elections in 1994.

[3] One hectare equals approximately 2.47 acres, or approximately 1.17 morgen.

another 22 million ha (54 million acres) into Black ownership to reach its goals (Leuvennink, 2005).

Ever since all racially based land measures were abolished in 1991,[4] land reform, including land redistribution, land tenure reform and land restitution (Gwanya, 2003), has received wide attention at all levels of government, business and civil society in South Africa. Because of the emotional implications of land ownership, it has also been the subject of much debate in the popular press. Amid this ongoing debate, legislators, administrators and valuers have to implement the land reform programme.

Legal Foundation

After the elections of 1994, the Constitution became the new legal basis for land tenure and administration in South Africa. Section 25 of the Constitution, the "property clause", provides inter alia for expropriation of land in the common interest (see subclauses 1 and 2 in Exhibit 1) and the determination of compensation (subclause 3). When compensation is determined, the circumstances that have to be taken into account include the current use of the property and its market value, which are customary in valuation practice. The other circumstances are novel. Consideration of the history of the acquisition and use and the extent of state investment and subsidy in the property is unique to South Africa – according to Adv G Grobler, SC (2002), no other legal system has a similar clause. Grobler explains that these considerations serve to prevent double expenditure by the state. The final consideration when determining compensation, namely the purpose of the expropriation, is also new. Traditionally the purpose of an expropriation was not considered. The property was simply valued as it existed in the hands of its owner (see, for example, Gildenhuys and Grobler, 1980:s86). To date, no case law or other authority exists on how this final consideration is to be interpreted.

In subclauses 5–7, the Constitution's property clause further provides for access to land, tenure security and restitution of land that had been taken because of racially discriminatory practices (see Exhibit 1). In South Africa, these matters are jointly referred to as land reform (Gwanya, 2003). Various statutes have been enacted to give effect to these objectives. For example, equitable access to land (subclause 5) is promoted inter alia by the Land Reform (Labour Tenants) Act, 1996, which facilitates land tenure by labourers who exchange their work for the use of farmland. Security of tenure (subclause 6) is promoted inter alia by the Communal Land Rights Act, 2004, which reinstates the communal land tenure that had been abolished under discriminatory legislation. Land restitution (subclause 7), to reverse the effects of rights terminated

[4] Abolition of Racially Based Land Measures Act, 1991.

Exhibit 1 Extracts from section 25 of the Constitution of the Republic of South Africa, 1996

25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application -

  (a) for a public purpose or in the public interest; and
  (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

  (a) the current use of the property;
  (b) the history of the acquisition and use of the property;
  (c) the market value of the property;
  (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  (e) the purpose of the expropriation.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices[5] is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913[6] as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Source: The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996)

under apartheid, is provided for by the Restitution of Land Rights Act, 1994 (as amended), and is the focus of this overview.

[5] The meaning of "racially based discrimination" is set out in a legal context by Pienaar (2005).

[6] The date of 19 June 1913 is significant because the Native Land Act came into operation on 20 June 1913. This was the forerunner of apartheid and eventually land access by Blacks was restricted to about 13% of the land in South Africa (Anon, 2006a; Anon, 2006c). Patterson (2003) argues that the legislators attempted to prevent claims based on aboriginal title by providing a cut-off date of 1913. However, one successful restitution claim may have been brought on this basis – the Richtersveld case. The Richtersveld is a sparsely populated region in the north-west of South Africa, adjacent to the Atlantic Ocean. This land restitution claim (see De Bruin, 2005a,b,c) has been described as the largest and most expensive land claim in South African history. It is also the longest running and by the end of 2005 had lasted six years. This community was deprived of their land in 1922 and the state, through its company

The Restitution of Land Rights Act builds on the measures provided for in the property clause of the Constitution. This Act establishes the Commission on the Restitution of Land Rights ("Land Claims Commission") and the Land Claims Court. The Commission must administer, investigate and verify restitution and compensation claims. These claims had to be lodged by 31 December 1998, although there have been many calls for an extension of this period, on the grounds that some affected people were not aware of their rights to claim restitution (Govender, 2005; Greyling, 2005). A claimant has to prove the validity of the claim and the ownership and dispossession records are verified by the Department of Land Affairs. The Commission also tries to negotiate a settlement agreement with the current owner and with the claimants. If agreement cannot be reached, the claim is referred to the Land Claims Court, which was also established in terms of the Act. This court has the status of a high court, just below that of the Constitutional Court. However, it must remain accessible to the poor and illiterate and must establish processes to make quick decisions (Margolius, 1999; Gwanya, 2003).

An extract from Section 33 of the Restitution of Land Rights Act is given in Exhibit 2. It will be discussed briefly.

Apart from the requirement for restitution of past discrimination, the Act addresses matters such as equity and justice, the feasibility of restoring ownership and the avoidance of major social disruption. In determining compensation for the expropriated party (subclauses eA–eC), allowance must be made for prevailing circumstances and amounts received during the expropriation, and for hardship suffered. Should the property be restored to the original owners, compensation for the current owner should take into account both the current use and the history of the acquisition and use of the land. In all cases, the time value of money should be taken into account. As will become clear in this study, the determination of compensation can be quite complicated.

Alexkor, has been mining the diamond-rich land and coastline of the Richtersveld since then. In stark contrast, the Richtersveld community has been living in relative poverty. Crucially, the expropriation in 1922 was on racial grounds. This entitled the community to claim restitution of the land, or compensation, in terms of section 25(7) of the Constitution of South Africa (see Exhibit 1). However, the state disputed the claim. The case was heard by the Land Claims Court, the Court of Appeal and the Constitutional Court before the state acknowledged that the community is entitled to compensation and to restitution of their land. However, agreement could not be reached on the settlement. The community rejected an offer of shares in the mining company Alexkor and pointed to the billions of rands [dollars] worth of diamonds that had been mined on the land since 1922. They demand a share of those proceeds also. This could amount to hundreds of millions of rands [a few hundred million dollars]. However, as regards the land, shares in Alexkor may be acceptable, instead of restitution. The case had not been settled at the time of writing and further appeals were expected. If Patterson (2003) is correct, this case may have opened the door to other claims based on aboriginal title.

Exhibit 2 Section 33 of the Restitution of Land Rights Act, 1994 (as amended)

33 Factors to be taken into account by Court

In considering its decision in any particular matter the Court shall have regard to the following factors:

(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
(b) the desirability of remedying past violations of human rights;
(c) the requirements of equity and justice;
(cA) if restoration of a right in land is claimed, the feasibility of such restoration;
(d) the desirability of avoiding major social disruption;
(e) any provision which already exists, in respect of the land in question in any matter, persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress results of past racial discrimination;
(eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
(eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
(eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
(f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of Section 9 of the Constitution. [Section 9 of the Constitution deals with equality before the law.]

Source: Restitution of Land Rights Act, 1994, (Act 22 of 1994, as amended)

Implementation of Land Restitution

In the three years from 1996 to 1999, the Land Claims Commission adopted a legal approach and referred all claims to the Land Claims Court. As a result of the lengthy process, only 41 claims were settled over this period. Thereafter, the Commission was empowered to employ a direct administrative approach, and over the following three years, 29,836 claims were settled (Gwanya, 2003). By April 2006, 4 million ha (9.9 million acres) of land had been transferred to Black people, 1 million ha (2.5 million acres) as a result of land restitution and 3 million ha (7.4 million acres) as a result of the land redistribution programme. Currently there are about 8,000 out of 68,000 restitution claims outstanding, of which 7,000 are in rural areas (Van Vuuren, 2005b; South African Broadcasting Corporation, 2006b). The government wants all claims finalized by the end of 2008 (Govender, 2005).

The implementation of land restitution has fueled a huge debate in the press. A selection of provocative newspaper headlines is given in Exhibit 3. The headlines mirror the strongly conflicting views on land restitution in South Africa. In what follows, some of the problems that have been encountered during implementation will be discussed.

Many observers regard the land restitution progress as being too slow (Anon, 2006b). By the third quarter of 2005, after 11 years of democracy, only 3% of

Exhibit 3 A selection of provocative headlines in the press

A land crisis to dwarf Zim[babwe] ... (Venter, 2001)
Cheating with land claims (Coetzee, 2005a)
Foreign land ownership is 'colonialism' (Mulder, 2005d)
Foreigners want certainty over purchase of land in SA (Kloppers, 2006)
Ideology is a bankrupt farmer (Janse van Vuuren, 2005)
Land bomb is ticking (Bernstein, 2005)
Land perhaps only correctly divided in 90 years (African Eye, 2005)
Land projects waste R100 [$14] million in Limpopo Province (Louw, 2005)
Land: en route to a big fight (Du Plessis, 2005d)
Land reform fails (South African Broadcasting Corporation, 2006a)
Mbeki: Lower prices in store for farmers (De Lange, Joubert and Coetzee, 2006)
Messing with basic principles affects free market, ... (Mulder, 2005e)
Most land reform projects in Limpopo [Province] have failed (RSG, 2005)
Over-hasty distribution drives land prices up (Kloppers, 2005)
PAC warns that more land invasions could follow soon (Staff reporters and Sapa, 2001)
Poor valuations drive farm prices up further (Van Rooyen, 2005)
Property ownership: the debate has only started (Van Wyk, 2005)
Proposed land action 'threatens the economy' (Mulder, 2005c)
R5 per hectare ($0.29 per acre) all that keeps these new farmers from their farms (Du Plessis, 2005b)
SA inconsistent with land (Du Plessis, 2005c)
Slow land reform will be challenged (Mulder, 2005a)
Uneasy sleep ... unless SA people tackle land issue together (Van der Westhuizen, 2001)
Value of land perhaps irrelevant (Coetzee, 2005c)
Willing buyer, seller will soon be dropped (Mkhabela, 2005)

Source: Author

agricultural land had been transferred to Black owners (Boyle, 2005). The president of Agri SA, an organization that represents commercial farmers in South Africa, explains this small percentage by the fact that most claimants prefer cash, not land. At this rate, he says, the goal of 30% of agricultural land in Black ownership by 2014 will not be reached (Du Toit, 2006; Helfrich, 2006). A newspaper headline in mid 2005 (African eye, 2005) states that land will perhaps only be correctly divided in 90 years!

One cause of slow progress is undoubtedly budgetary constraints. During 2005, the Department of Land Affairs stated that it would not reach the 2014 goal because of limited funds and inadequate staff (Coetzee, 2005a,b). The Land Affairs budget is R300 ($43[7]) million p.a., while an estimated R1.1 billion ($157 million) is needed per year. The Department is disappointed with the National Treasury for apparently not understanding the need for funds (Coetzee, 2005b). At provincial level only 1% of the budget is for land reform

[7] A conversion rate of $1 to 7.00 rand to the dollar has been used throughout.

(Bernstein, 2005). In a recent article, The Economist urges South Africa simply to increase funding for the land reform programme (Anon, 2006b).

Budgetary constraints are exacerbated by rising property prices. In their presentation at the National Land Summit on Land Reform in July 2005, the National African Farmers Union (NAFU) decried the cost of agricultural land. They also objected to the fact that farming has become a business and that agricultural land has been transformed into a production commodity (National African Farmers Union, 2005:2, 5–6). South Africa has experienced a rapid increase in property prices since 2001. The fact that agricultural land prices have increased more slowly than urban land provides scant comfort, because the increase in 2005 was still 30% over the previous year (Duvenage, 2005). Such increases will invalidate most budgets. Undoubtedly, the large-scale purchasing activity by the government has had an effect on prices. In Limpopo Province, for example, more than 50% of farm land is for sale in restitution-related transactions (Kloppers, 2005). A further inflammatory influence is the fact that most farmers whose farms are purchased for restitution will immediately buy new land, which of course places upward pressure on prices (Van Rooyen, 2005). From the state's point of view, the fact that its purchasing activity creates an artificially inflated market is unavoidable (see Gildenhuys and Grobler, 1980:s73).

The large number of business failures among new farmers is disheartening. A recent main news item on SABC2 (South African Broadcasting Corporation, 2006a) was entitled "Land reform fails". The bulletin revealed that in Limpopo Province, the productive capacity of many farms that had been purchased for previously disadvantaged persons has been destroyed. One farm, in the Tzaneen area, had been purchased for R1.4 million ($200,000). It has now been sold back to commercial farmers for less than 8% of that amount. A radio broadcast at the end of 2005 bluntly stated that most land restitution projects in Limpopo Province had failed (RSG News, 2005). A country-wide investigation into land restitution uncovered numerous cases of failure and found no instances where farms had been maintained or improved after restitution (Du Toit, 2004:ii). Typically, the new owners were drawing salaries but produced little on the farm. One commentator reported as follows: "An audit of 177 land reform projects in North West [Province] found that 27% of farms were not producing anything, 24% had never produced anything, and 44% were either not producing or in major decline. However, 42% were producing surpluses above subsistence", although they were not necessarily profitable (Donaldson, 2005). These failures are understandable if one considers that buying a farm is not simply buying land but actually the acquisition of a business (Duvenage, 2005). New farmers often do not have the skill and finances to run a farming operation. The National African Farmers Union (2005:3) argue that the new small-scale farmers are outside of the value chain and cannot produce competitively. The Minister of Land Affairs, Ms Thoko Didiza, has admitted that the Department had not trained land reform recipients for their new role (Donaldson, 2005). In defence of land restitution, Mr Tozi Gwanya, South Africa's Chief Land Claims Commissioner, says that the previous upliftment programme of the same scale, for

poor Whites in 1948, spanned 20 years. He submits that overnight results should not be expected with the current programme (South African Broadcasting Corporation, 2006b).

Another cause for concern is job losses by farm labourers. The commercial farmers who operated many of the farms that were purchased for restitution purposes employed large numbers of unskilled labourers. Most of these labourers are not employed by the new farmers. A joint report by the Department of Agriculture, Agri SA and NAFU states that the more than 70,000 farm units in the 1980s have decreased to between 40,000 and 50,000. This has resulted in job losses of about 300,000 (Wyngaard, 2005).

Proposals to Improve Implementation

Administration and Funding

At the National Land Summit on Land Reform in July 2005, a spokesperson for the Africa Institute, Professor Sam Moyo, argued that the lesson to be learnt from the Zimbabwe experience is that radical decisions are necessary to make reform happen as quickly as possible. The alternative would be that someone else makes it happen. According to Moyo, Zimbabwe initially had similar policies to those of South Africa, but restitution took too long, as is now happening in South Africa. Moyo warns that slow land reform will be challenged (Mulder, 2005f). However, a recent survey revealed that two thirds of urban Blacks in South Africa are opposed to Zimbabwe's land reform programme (Pelser, 2005).

The Minister of Land Affairs has undertaken to speed up the pace of land reform. The Land Claims Commission has created 280 additional posts to finish land claims before 2008 (Leuvennink, 2005) and the budget will increase from R735 ($105) million in 2001 to R5.2 billion ($743 million) in 2007 (Boyle, 2005). Reliance on the principle of willing buyer and willing seller will also be reconsidered, as the negotiations take too long. At the Land Summit there was unanimous support for dropping this negotiating principle, in favour of expropriation (Boyle, 2005; Govender, 2005; Mulder, 2005b). Expropriation was the method used by the previous government to acquire land for their policy of racial segregation. Expropriation is covered by a well-understood law and has long-established legal precedent. Because of this legal stability, it is probably the quickest and fairest solution. However, it will require competent valuers whose valuations can withstand the test of legal scrutiny.

Support of New Farmers

With regard to failures by the new farmers, it is clear that much more than land restitution is necessary if the state's drive to restore Black people to the land is to

succeed. This was stressed by speakers throughout the National Land Summit on Land Reform in July 2005 (Mulder, 2005a). At the summit, the Land Claims Commissioner for Gauteng and North West provinces, and the SA Communist Party agreed that, if a second restitution process were to take place, much thought would be required to make it more successful than the current process (Van Vuuren, 2005a). Restitution must of course also occur without disruption to the nation's agricultural production. This was stressed recently by the Land Claims Commissioner for Gauteng Province, Mr Mphela (Helfrich, 2006). Training and ongoing mentorship are critical. The agricultural extension officer programmes are the ideal vehicles for this purpose.

Land Database

The various Deeds Offices keep an accurate record of land ownership in South Africa and no title insurance is necessary. However, the records are expensive to access and the use of Geographic Information Systems is limited. There are no statistics available on the government's land redistribution programme (Wyngaard, 2005). The records for land restitution are better, but it became clear during this study that the records are inaccurate, with different statistics on progress being issued by various representatives of the state. A spokesperson for Agri SA says that about 4% of agricultural land is sold annually (Mulder, 2005d). There is thus sufficient agricultural land for redistribution to enable the state to achieve its goals of 30% Black ownership by 2014. During the first six months of 2005 alone, 2,101 farms were sold in South Africa, excluding those that changed hands as part of the assets of a limited corporation, and of which the Deeds Office therefore has no record (Duvenage, 2005). A comprehensive and accessible land database would alleviate this problem.

Change of Focus

At the National Land Summit on Land Reform in July 2005, the Land Claims Commissioner for Gauteng and North West provinces made the startling declaration that "Ideology is the death knell of land reform" and "Impressive slogans will not resolve the problem". He explained that 10 years after land redistribution had started, some communities had still not achieved any return from their land. In contrast, spazas (informal shops) in townships also receive no government help but succeed despite this. The Commissioner asserted that this stems from the orientation of the individual. Furthermore, he says that a broader definition of land reform is needed. Land is not only for farming but for other businesses also (Janse van Vuuren, 2005; De Bruin, 2005b; Van Vuuren, 2005a).

Ann Bernstein of the Center for Development and Enterprise Study made similar appeals: Land reform has to adapt to 21st century requirements. The land debate is influenced more by perceptions about historical events than by plans for future wellbeing. Rural land reform is based on emotions rooted in the past. More than 60% of South Africans live in urban areas and the figure is increasing. The focus on agricultural land is excessive, considering that the contribution of agriculture to GDP dropped from 23% in 1920 to 3.4% in 2002. There is more need for urban than for agricultural land. Most South Africans view land as a place to live, not to farm, on (Bernstein, 2005; Du Plessis, 2005a,d; Van Vuuren, 2005a; Pelser, 2005; Van Eeden, 2005). Recent research has shown that 82% of urban Blacks prefer a job with a salary in an urban area rather than a tract of rural land (Pelser, 2005). Not unexpectedly, the economist Hernando De Soto (2001:78) predicts that informal settlements in the urban areas of South Africa will increase dramatically.

Having described the underlying legislation and the progress in the implementation of land restitution in South Africa, it is possible to highlight some of the valuation implications of the process.

Valuation for Land Restitution

Valuation Problems

The restitution programme has from its inception been plagued by poor valuations (Van Rooyen, 2005). Valuation assignments are generally awarded after a tender process. Because of their low quotations, successful tenderers often cannot afford to do proper research and analysis and the valuation reports are accordingly poor. A spokesperson for Agri SA has said that farmers are unwilling to sell because some of the valuers used do not inspire confidence (Duvenage, 2005). Several experienced valuers have privately expressed the opinion that farms are being overvalued – on average by about R500,000 ($71,000) per farm. Such overvaluation more than negates any advantage the state may have obtained from employing the lowest tenderer. In some provinces, review valuers have had to be appointed because of unacceptable valuations – an expense that would have been saved by appointing the best valuers in the first instance. On the other hand, overvaluation is perhaps understandable, as by so doing the valuer is unlikely to be called to defend the valuation in a court of law. This may occur if an aggrieved landowner challenges a restitution valuation in court. A slight over payment may also be a better economic choice than long-term delays associated with administrative and legal processes.

The state has consistently tried to achieve negotiated settlements by applying the principle of a willing buyer and a willing seller (Mulder, 2005b,d). The alternative, expropriation, is politically less desirable. Some sections of the

press have even equated expropriation with confiscation – an obviously incorrect and inflammatory comparison. Expropriation could also increase costs, because in expropriation additional compensation is payable for direct financial loss and for solatium ("comfort money" to compensate the forced taking). This compensation approach is employed in many countries (Sheehan, 2002). Fortes (2005:9) argues that the quality and empathy provided with compensation are more important than its quantum. This positive attitude is inherent in the willing buyer/willing seller approach adopted by the state.

In South Africa, there is an ongoing debate about which value to apply when purchasing farms: market value or productive value (Hall and Lahiff, 2006; Boyle, 2005; Joubert, 2005; Zimmerman, 2005). Critics regard the use of market value as an impediment to land reform, because of perceived higher costs and slower implementation of reform. *Market value* is the price a willing buyer and willing seller are likely to agree upon under normal conditions in an open market (see also International Valuation Standards Committee, 2005:27). *Productive value* is commonly employed by agricultural economists and reflects the present value of the potential income stream from farming. The debate is fueled by the upwardly spiralling market values that result when the state purchases farms for restitution purposes. Productive value is usually lower than market value and does not increase when the demand for land increases. From a valuation perspective, productive value is an inherent characteristic of the subject property, and as such, does not determine value in exchange (see Ratcliff, 1972a). At present, the state is still relying on market value, although this is being reconsidered (Boyle, 2005; Coetzee, 2005c). Internationally, there is a similar controversy about the use of market value in land reform. For example, Myers and Shah (2004) contend that the traditional notion of market value is not appropriate when assessing customary lands, citing court judgments where traditional lands were valued at lower than market value.

Valuation Guidelines

Apart from standardized international valuation principles developed over decades, valuation for the land reform process in South Africa has had to incorporate unique principles. In an effort to clarify these principles, the Department of Land Affairs drew up a guideline for valuers (South Africa, 2000). The guideline covers restitution and other types of valuation required by the Department. For restitution, a two-step valuation process is required: Firstly, market value has to be determined; then it must be adjusted according to the non-market value factors listed in Section 25(3) of the Constitution (see Exhibit 1). In order to determine "the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property", the valuer has to quantify any acquisition subsidy, infrastructure subsidy and interest rate subsidy that was provided. Each subsidy must be escalated to the

present using an appropriate index, such as the Consumer Price Index (CPI) or a suitable land price index.[8] These subsidies should then be subtracted from the market value of the property and a recommendation on just and equitable compensation should be made (South Africa, 2000:11–14).

In its guideline, the Department of Land Affairs suggests the following formula for determining the present value of subsidies (South Africa, 2000:16):

$$\text{Present value of subsidies} = (\text{B} - \text{A}) \times \text{k0} + \text{E1} \times \text{k1} + \text{E2} \times \text{k2} + \text{E3} \times \text{k3} + \ldots$$

Where

B is the true market (or productive) value of the subject property at the time of historical acquisition;
A is the actual price paid at the time of acquisition (and B–A is thus the acquisition subsidy);
k0 is the inflation factor used for land value escalation, being either CPI or LPI [a suitable land price index];
E1, E2, E3 etc are the historical values of infrastructure subsidies and interest rate subsidies; and
k1, k2, k3 etc are the corresponding inflation factors used to escalate these subsidies to present value.

For purposes of illustration, assume that all escalation is based on the Consumer Price Index (CPI), with the following index values: year 0 = 100, year 5 = 125 and year n (the present) = 200. For a property originally valued at \$1,000,000, but purchased at \$800,000 and with a \$100,000 infrastructure subsidy five years later, the escalation factors would be calculated thus:

$$\text{k0} = 200 \div 100 = 2$$

$$\text{k5} = 200 \div 125 = 1.6$$

The present value of all subsidies would be calculated as follows:

$$\begin{aligned}
&(\text{B} - \text{A}) \times \text{k0} + \text{E5} \times \text{k5} \\
&= (\$1,000,000 - \$800,000) \times 2 + \$100,000 \times 1.6 \\
&= (\$200,000) \times 2 + \$160,000 \\
&= \$400,000 + \$160,000 \\
&= \$560,000 \text{ in today's money}
\end{aligned}$$

[8] The Consumer Price Index (CPI) is an index based on the prices of a basket of consumer goods and services. It is updated monthly and published by the Central Statistical Services of South Africa. Land price indices for regions, farm types, agricultural sectors or overall LPIs are published in the *Abstract of agricultural statistics* (see South Africa, 1999). These indices have not met with wide acceptance among valuers, but, when available for a region, are useful in estimating a basic price range, for example when a bank has to consider a loan application.

Quite apart from the problem of determining historical values with a reasonable degree of accuracy, some of the valuers appointed do not have sufficient knowledge of the principles of time value of money to use the formula correctly. The application of this formula has led to many disputes and varying interpretations.

Another formula that has been used widely is the "Putfontein formula", named after the farm where it was first used in valuation (sometimes it is erroneously referred to as the Gildenhuys formula). The formula has the following form (Grobler, 2002:3–4):

$$\text{Just and equitable compensation} = (\text{A}/\text{B} \times \text{C}) + \text{D} - \text{E}$$

Where

A is the price the current owner paid originally;
B is the actual market value at the time of original purchase (and A/B is thus the proportion of market value paid originally);
C is the current market value, without the improvements which the current owner has added;
D is the value that the beneficial improvements made by the current owner add to the land; and
E is the value of special benefits that the current owner received from the state under the non-market related payment conditions.

Continuing with the previous illustrative example, and adding the fact that the property today is valued at $2,000,000 and that the owner has made beneficial improvements valued at $100,000:

Just and equitable compensation could then be calculated as follows:

$$\begin{aligned}
&(\text{A}/\text{B} \times \text{C}) + \text{D} - \text{E} \\
&= (\$800,000 \div \$1,000,000 \times \$2,000,000) + \$100,000 - (\$100,000 \times 1.6) \\
&= (\$1,600,000) + \$100,000 - \$160,000 \\
&= \$1{,}540{,}000 \text{ in today's money}
\end{aligned}$$

Adv G Grobler, SC (2002:4) points out that the formula is flawed because the purchase conditions for subsidized farms were onerous. For example, farms could not be offered as security and could not be sold for ten years. As a result, their historical market value cannot be determined, because it would be difficult to sell a farm on the open market under such onerous conditions. Beneficial financial arrangements also cannot be quantified, because these would be affected by market value. The fact that a proportional discount must now be deducted also assumes that the state was a partner in the farming business all along and that a proportional part of the increase in value is attributable to the state. Finally the formula assumes that value is an additive concept – something that market evidence regularly proves to be incorrect. Grobler asserts that the

formula cannot be used and that its widespread use has stopped. This argument would also apply to other formulaic approaches to valuation. Hosios and Smith (2006) correctly point out that compounding over long time periods creates a bias, and suggest using a bond portfolio approach.

Grobler reaffirms the classic property economics principle that there is a distinction between mechanical approaches and real analysis (see Rams, 1974 and Ratcliff, 1975). To an extent, the entire discussion about valuation guidelines is too theoretical. As always in valuation, the problems presented by each valuation assignment have to be resolved in a unique manner, according to the situation at hand. As the following cases show, simple recipes or formulas are not adequate.

Case Studies

Case 1: Portion 1 of the Farm Schilpadnest 385 KQ[9]

This 2,313 ha (5,713 acre) property was expropriated in 1962, and the inhabitants were moved to another farm in December of that year. In addition to land value, they were compensated for the improvements on the land. All salvaged building materials were transported to the new farm at the state's expense. During the 1990s, their representatives claimed compensation in terms of the Restitution of Land Act, and an historical valuation was commissioned (Belling and Ghyoot, 1999).

The valuation instruction called for consideration and comment on *inter alia* -

- the historic value of the land,
- the actual compensation paid to the community and
- any undercompensation to the community.

All amounts had to be escalated by the Consumer Price Index to the date of valuation (30 July 1999).

As part of their investigation, the valuers examined historical aerial photographs and topographic maps, spoke to farmers and agricultural officers who knew the area in the 1960s, and traced farm sales in the Deeds Office. Eleven farms that were sold at that time were analyzed, together with the other evidence, and an historical value, for the land only, was determined. The valuers concluded that the compensation in 1962 should have been higher by one third. When escalated by the Consumer Price Index, the recommended additional compensation for the land amounted to R515,088 ($73,584) in July 1999.

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[9] South Africa's cadastral system for registration of land parcels is based on a grid designated alphabetically, for example, "IQ", "IR", "IS" and so on. Within each grid block, farms are numbered sequentially. The farm 385 KQ is number 385 in grid block KQ. The name "Schilpadnest" is an additional descriptor.

As regards improvements, the historical aerial photographs show structures on the ground, but without further evidence it was not possible to determine their value in 1962. However, the original valuation and compensation record was traced in the National Archive. The record appeared to have been compiled with care, noting construction materials, the presence of water tanks and loose bricks and even numbering and recording ruins that had no value. Owners and the amounts paid to each one were also recorded. In total, there were 326 privately owned structures, consisting mostly of huts that were constructed of clay and other materials found on the property. There were also classrooms and churches. Every payment was confirmed by a signature, a thumb print or a note about alternative arrangements. Exhibit 4 contains an extract from the valuation report and reflects the original payments made for improvements, with suggested additional compensation. Columns 1 and 2 contain respectively comments and the reference number of each structure. In such expropriation cases in South Africa, compensation usually also includes an amount for direct financial loss and for inconvenience. At the time, the method used was to add 20% of market value. Columns 3–6 list the values of improvements at the time, whether there is proof of payment, the allowance for loss and inconvenience and whether this was paid. Note that some improvements listed had no payment record and that the allowance for loss and inconvenience was not paid at all. Some community members had stated in the past that compensation was paid only for materials, but not for labour. To allow for labour, the valuers therefore recommended that an amount of one month's pay (R20 or $3 at the time) be added to the value of each house (these houses could easily be built within that period). The records further show that structures built of clay, grass or poles appear to have been assigned a nominal value only. The valuers recommended additional compensation for such structures. These recommendations are reflected in columns 7 and 8 of Exhibit 4. The final two columns in the exhibit reflect the total recommended compensation in 1962 and the corresponding escalated value in 1999. The total recommended compensation for *individuals* in July 1999 was R446,368 ($63,767). Separate recommendations on compensation for the classrooms and churches were also made – see the bottom of the table. The total recommended additional compensation in July 1999 amounted to R72,695 ($10,385), payable to the *community*.

The Schilpadnest community accepted the historical valuation report and the recommendations on additional compensation.

Case 2: Remaining Extent of the Farm Kinde Estate 269 IN

This 1,370 ha (3,384 acre) property was part of a farm expropriated from its Black owners in 1963 and later sold to White farmers. At the time, it was unimproved and used for grazing of livestock. The new owner added fences, boreholes and other improvements over time. However, the state subsidized the

1	2	3	4	5	6	7	8	9	10
Comments	Reference No.	Original valuation	Proof of payment?	20% for loss and inconvenience	Proof of payment?	Suggested additional compensation	20% loss and inconvenience on additional	Suggested total additional compensation in 1962	Suggested total additional compensation in July 1999
	1	R 120	Y	R 24	No	R 20	R 4	R 48	R 1 472
	2	R 35	Y	R 7	No	R 20	R 4	R 31	R 950
	3	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	4	R 5	No	R 1	No	R 20	R 4	R 30	R 920
	5	R 165	Y	R 33	No	R 20	R 4	R 57	R 1 748
	66	R 675	Y	R 135	No	R 68	R 14	R 217	R 6 653
	67	R 520	Y	R 104	No	R 52	R 10	R 166	R 5 090
	68	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	69	R 615	Y	R 123	No	R 62	R 12	R 197	R 6 040
Ruin	110	R 0	–	R 0	–	R 0	R 0	R 0	R 0
	111	R 40	Y	R 8	No	R 20	R 4	R 32	R 981
	112	R 75	Y	R 15	No	R 20	R 4	R 39	R 1 196
	113	R 100	Y	R 20	No	R 20	R 4	R 44	R 1 349
	114	R 125	Y	R 25	No	R 20	R 4	R 49	R 1 502
Ruin	115	R 0	–	R 0	–	R 0	R 0	R 0	R 0
	116	R 75	Y	R 15	No	R 20	R 4	R 39	R 1 196
	117	R 55	Y	R 11	No	R 20	R 4	R 35	R 1 073
	125	R 110	Y	R 22	No	R 20	R 4	R 46	R 1 410
Material only	126	R 50	Y	R 10	No	R 0	R 0	R 10	R 307
	127	R 20	Y	R 4	No	R 20	R 4	R 28	R 858
Material only	129	R 0	–	R 0	–	R 0	R 0	R 0	R 0
	130	R 95	Y	R 19	No	R 20	R 4	R 43	R 1 318
	324	R 30	Y	R 6	No	R 20	R 4	R 30	R 920
	325	R 20	No	R 4	No	R 20	R 4	R 48	R 1 472
	326	R 5	Y	R 1	No	R 20	R 4	R 25	R 767
Individual totals		**R 27 755**		**R 5 551**				**R 14 559**	**R 446 368**
School	57	R 900		R 180					
School	63	R 850	–	R 170	–	R 600	R 120	R 720	R 22 075
Teacher's house	60	R 125	No	R 25	No	R 20	R 4	R 174	R 5 335
Church	65	R 10	No	R 2	No	R 20	R 4	R 36	R 1 104
Material only (Church)	128	R 40	No	R 8	No	R 0	R 0	R 48	R 1 472
Church	185	R 705	No	R 141	No	R 71	R 14	R 931	R 28 544
Church	248	R 350	No	R 70	No	R 35	R 7	R 462	R 14 165
Community totals		**R 2 980**		**R 596**				**R 2 371**	**R 72 695**

Suggested total additional compensation in 1962	Suggested total additional compensation in July 1999
R 16 930	R519 063
$2,419	$74 152

Exhibit 4 Suggested compensation for improvements (extract)
Source: Belling and Ghyoot (1999)

purchase price and also provided a low cost loan. Because the expropriation was done in terms of racially discriminatory legislation, a successful restitution claim was lodged and a valuation was requested (Belling, 1998).

The valuer had to determine the present market value of the farm in 1998 and the present value of any benefits the current owner had received from the state. Because the original purchase price had been subsidized, a second, historical valuation was also necessary – the difference between the market value and purchase price in 1970 would indicate the amount of subsidization of the purchase. This amount could then be escalated over time to obtain the present

value of this benefit to the new owner. The farmer had also obtained a low cost loan from the Department of Agricultural Credit and Land Tenure. If the annual interest payments over time were deducted from what the market-related interest payments would have been, the value of this subsidy could be calculated for every year and escalated to 1998. These calculations are reflected in Exhibit 5.

In Exhibit 5, the top left-hand table reflects the actual interest payments by the farmer. Apart from the low interest rate, which varied from year to year, no interest was charged in 1981 and in 1988. The table to the right reflects what the

Loan History: Actual Interest Payments Versus Market Interest Payments

Actual interest @ 5.00 % p.a.						Market interest		
Year	Payment	Capital portion	Interest portion	Outstanding balance		Year	Interest rate %	Interest portion
1970	3,453.83			25,516.93		1970		
1971	2,277.72	1,001.87	1,275.85	24,515.06		1971	6.00	1,531.02
1972	2,265.52	1,039.49	1,226.03	23,475.57		1972	6.00	1,470.90
1973	2,199.02	1,020.68	1,178.34	22,454.89		1973	6.00	1,408.53
1974	2,144.13	1,020.68	1,123.45	21,434.21		1974	6.00	1,347.29
1975	2,092.53	1,020.68	1,071.85	20,413.53		1975	6.50	1,393.22
1976	2,041.78	1,020.82	1,020.96	19,392.71		1976	7.00	1,428.95
1977	1,990.32	1,020.68	969.64	18,372.03		1977	7.00	1,357.49
1978	1,939.42	1,020.68	918.74	17,351.35		1978	7.00	1,286.04
1979	1,889.09	1,020.68	868.41	16,330.67		1979	7.00	1,214.59
1980	3,307.59	2,041.36	1,266.23	14,289.31		1980	7.00	1,143.15
1981	0.00	0.00	0.00	14,289.31	<= Interest holiday	1981	7.00	1,000.25
1982	1,739.20	1,020.68	718.52	13,268.63		1982	10.00	1,428.93
1983	1,715.57	1,020.68	694.89	12,247.95		1983	10.00	1,326.86
1984	3,283.64	2,061.44	1,222.20	10,186.51		1984	11.34	1,388.92
1985	1,532.01	1,020.68	511.33	9,165.83		1985	14.00	1,426.11
1986	1,480.51	1,020.68	459.83	8,145.15		1986	13.88	1,272.22
1987	1,433.39	1,054.83	378.56	7,090.32		1987	12.56	1,023.03
1988	0.00	0.00	0.00	7,090.32	<= Interest holiday	1988	13.02	923.16
1989	2,596.85	2,041.36	555.49	5,048.96		1989	15.58	1,104.67
1990	1,273.69	1,021.10	252.59	4,027.86		1990	17.00	858.32
1991	1,222.07	1,020.68	201.39	3,007.18		1991	17.00	684.74
1992	1,172.86	1,022.08	150.78	1,985.10		1992	17.00	511.22
1993	1,119.94	1,020.68	99.26	964.42		1993	15.98	317.22
1994	1,013.48	964.42	49.06	0.00		1994	14.21	137.04

Exhibit 5 Present value of benefit from subsidised purchase price and low cost loan
Source: Belling (1998)

Subsidy on Purchase and on Interest, with Equivalent Compounded Amount

	Purchase price		Interest payments		Net	Compounded	Compounding
Year	Actual	Market	Actual	Market	benefit (±)	benefit	rate p.a.
1970	28,970.76	48,000.00			19,029.24	**19,029.24**	
1971			1,275.85	1,531.02	255.17	**20,045.58**	4.00%
1972			1,226.03	1,470.90	244.87	**21,092.27**	4.00%
1973			1,178.34	1,408.53	230.19	**22,166.16**	4.00%
1974			1,123.45	1,347.29	223.84	**23,276.65**	4.00%
1975			1,071.85	1,393.22	321.37	**24,529.09**	4.00%
1976			1,020.96	1,428.95	407.99	**25,918.24**	4.00%
1977			969.64	1,357.49	387.85	**27,342.82**	4.00%
1978			918.74	1,286.04	367.30	**28,803.83**	4.00%
1979			868.41	1,214.59	346.18	**30,302.17**	4.00%
1980			1,266.23	1,143.15	-123.08	**31,391.17**	4.00%
1981			0.00	1,000.25	1,000.25	**33,804.03**	4.50%
1982			718.52	1,428.93	710.41	**36,458.17**	5.75%
1983			694.89	1,326.86	631.97	**39,459.92**	6.50%
1984			1,222.20	1,388.92	166.72	**42,191.54**	6.50%
1985			511.33	1,426.11	914.78	**45,848.77**	6.50%
1986			459.83	1,272.22	812.39	**49,641.32**	6.50%
1987			378.56	1,023.03	644.47	**52,767.86**	5.00%
1988			0.00	923.16	923.16	**56,382.18**	5.10%
1989			555.49	1,104.67	549.18	**60,314.29**	6.00%
1990			252.59	858.32	605.73	**64,538.89**	6.00%
1991			201.39	684.74	483.35	**68,894.56**	6.00%
1992			150.78	511.22	360.44	**73,388.68**	6.00%
1993			99.26	317.22	217.96	**78,009.96**	6.00%
1994			49.06	137.04	87.98	**82,115.46**	5.15%
1995						**86,763.19**	5.66%
1996						**93,921.15**	8.25%
1997						**103,275.70**	9.96%
1998						**109,647.81**	6.17%

Exhibit 5 (continued)

market-related interest payments would have been at the interest rates then offered to the farming community in general. In the bottom table, the actual purchase price and the market value of the farm in 1970 are shown, followed by the actual and market-related interest payments (copied from the tables above). The net benefit as a result of subsidization in that year is shown next, as well as the compounded value of this subsidy. The final column reflects the interest rate

used for compounding. This was the actual tax-free return offered by the Post Office during the projection period, and is the risk-free investment most likely to be used in that region. The table ends with a compounded value in 1998 of R109,647.81 ($15,664). This is the present value in 1998 of the benefit the farmer received in terms of subsidies on the purchase price and on interest payments over the years.

The valuer determined the market value of the farm in 1998 to be R1,070,000 ($152,857). Deducting the present value of the subsidy benefits from this yields an amount of R960,352, rounded to R960,000 ($137,143), which is the net amount due to the current owner when the farm is returned to its original owner.

The Kinde Estate valuation has not been challenged. It is not known whether the restitution claim was settled and the property returned to the original owner.

Case 3: The Farm Sebele 931 KP

This 4,087 ha (10,095 acre) farm belonged to the state, and it adjoins a "big five" game reserve. The term "big five" implies that the reserve houses all five of the major animals traditionally sought by big game hunters: lion, elephant, rhinoceros, leopard and buffalo. In 1986, the farm was leased to a farmer under a renewable lease. The lease agreement provided that the farm could be purchased from the state after a probationary period of seven years. Because he intended to purchase the land, the farmer made considerable improvements to the property over the period 1986–2003. These included upgrading the carrying capacity of the veld (unworked land), adding boreholes and game fencing, renovating and extending the homestead and erecting other buildings and structures. Several species of game were introduced and an architect-designed game lodge and other amenities for tourists were constructed. Over the years, the farmer tried on several occasions to purchase the land but, by 2003, a land claim on this farm had been lodged. The state therefore decided to purchase the tenant's rights and to use the farm for land restitution purposes.

The state wanted to compensate the tenant for beneficial improvements made to the land over the period 1986–2003, and a valuation was commissioned on a before-and-after basis (Belling, 2003). The before value, in 2003, is of the farm with all its potential to be incorporated into a big five game reserve but as if the upgrading of the veld and the improvements made since 1986 had not taken place. The after valuation, also in 2003, is of a fully established game farm with good grazing, a lodge and other camps, and the potential of being incorporated in the adjoining big five game reserve. The difference between the two valuations would be the compensation owing to the tenant in 2003.

Fortunately for the valuer, there were sufficient comparable sales in the region during 2003 to provide evidence of both scenarios. It was possible,

from market evidence, to estimate the market value of the farm as if its veld were denuded and there were virtually no improvements. Because of its potential as a game farm adjacent to a major reserve, this "before" value was R26.5 ($3.79) million. It was also possible to estimate the value of the farm in its upgraded and developed condition. This "after" value was R33 ($4.71) million. The difference of R6.5 ($0.92) million could be attributed to the upgrading and improvements that the tenant had made.

The problems of a historical approach were avoided by concentrating on comparative sales in 2003 only. The relative simplicity of the valuation strategy meant that fewer assumptions were required to determine compensation. For example, it was not necessary to decide which escalation rate to use, or what the contributory value of improvements in the past may have been, or even to try to interpret sales that had occurred in the past, when market conditions and perceptions about highest and best use were markedly different.

The valuation has not been challenged. The restitution claim was settled, and the property was returned to the original owner.

Commentary on the Three Valuation Cases

The first two valuation cases made use of compounding to escalate past values to the present. In case 1 (the farm Schilpadnest 385 KQ), the construction costs of improvements in 1962 were escalated by the Consumer Price Index (CPI) to the equivalent value in 1999. The eventual settlement offered to the restitution claimants may have been generous, but any excess should be regarded as solatium, or "comfort money". This supports the argument by Fortes (2005:4) and by Sheehan (2002), namely, that compensation for forced taking of land should also allow for matters such as spiritual, social and cultural deprivation and for other losses that may be difficult to quantify.

In case 2 (the farm Kinde Estate 269 IN), the values of subsidies over more than two decades were escalated to 1998 at the risk-free rate available in that region at the time. This rate is lower than the increases in the CPI over that period and consequently the reduction (R109,647.81, or about $15,664) in the compensation made to the current landowner (because of subsidies received in the past) amounted to about 10% of the total compensation.

Cases 1 and 2 demonstrate the risk of introducing a long-term compounding bias, as mentioned by Hosios and Smith (2006). In case 3 (the farm Sebele 931 KP) this potential bias is avoided by relying only on comparable sales at the time of the valuation in 2003. This approach is defensible and should be used for restitution valuations, where possible. For example, the replacement cost estimates for case 1 (Schilpadnest 385 KQ) could as easily have been done for the present, instead of compounding the estimates from 1962.

In land restitution, the intention of the legislator is to put people who were disadvantaged in the past back as closely as possible into their original situation. As argued by Ratcliff (1972b:100, 332), precision is not critical in

valuation for public purposes, as long as the principle of fairness is observed. All three of the cases discussed here appear to have been handled in a way that was equitable to all stakeholders. The cases also illustrate that a valuer cannot rely on standardized approaches. Every valuation assignment is unique and often requires a custom-built approach.

Conclusion

Land reform has been taking place for several decades, in many continents. In the case of South Africa, the process only started in 1994, after the first democratic elections. This broad review of the South African experience traces the historical setting, the judicial foundation and the implementation of the land restitution component of land reform. Implementation problems and suggested remedies are discussed.

Valuation for land restitution is discussed with reference to valuation problems, state guidelines and three case studies. The cases illustrate the complexities encountered by valuers in this field. These include the problem of visualizing circumstances as they existed decades ago and deciding what the current value implications are. Another problem is that perceptions of highest and best use, the basis of value, are distorted by time. Then there is the matter of compounding values over time to fairly represent today's values. Formulaic approaches are shown to be suspect, and an approach that relies only on comparative sales in the present is described.

This study into the enormous task of land restitution in South Africa has also uncovered a wide variety of opinions. An independent observer has to come to the following conclusion: The state set ambitious land reform goals for itself and the new South African nation. An admirable legislative and administrative framework has been set in place. The problem of land reform in general, and of land restitution in particular, is extremely complex and progress has been slow. There have been many critics, but it appears as if the role players – administrators, land law specialists and property valuers – are doing their best. Overall, progress is not unacceptable.

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Property Rights and Land Market Dynamics: An Economic Interpretation of the Indigenous Land Tenure Transformation Process in Nigeria

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Abstract This study examines the nature and causes of the evolution of property rights, with particular emphasis on the role of market forces in shaping its outcome. Using the Nigerian Land Use Act as the platform, it constructs an evolutionary theory of property rights assignment that recognizes the role of cultural and political forces, while giving primacy to economic considerations. It concludes that the behavior of Nigerian landowners to the regulatory shock is consistent with rational economic considerations but inconsistent with the expectations of the confiscatory legislation. The study employs data on landowners' applications for the formalization of existing property rights to the new 'Right of Occupancy' over the first 15 years of implementation. The test of the landowner response to this requirement concludes that landowners are holding back on statutory formalization of their property rights as a rational response to the legislation.

Introduction

The modern conception of property rights is a product of the evolution of social and political institutions in Western societies. Utilitarians hold that property should be held to maximize the flow of total social benefits determined as the summation of utility for all members of the society. Hence, an individual's property rights could be violated or re-assigned if it leads to a higher level of benefits for society. On the other hand, the concept of distributive justice holds that the maximization of benefits to society should emanate from an initial assignment of rights and privileges to various members of society.[1] Hence, feudalistic, apartheid or democratic socio-political systems have produced different property rights models across different societies over time. Earle (2000)

[1] See Cooter and Ulen (2004), Chapter 4 on "An Economic Theory of Property"

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observed that "based on historical and archaeological evidence, complex societies rested on the development of property rights well before capitalism. Tributary economies of both chiefdoms and pre-capitalist states require alienation of values to finance stratification and institutional elaboration."[2] This connotes some universalism in property rights assignment that would permit some construction of property rights evolution, if only rudimentarily. The author went on to cite examples of chiefdoms that span the gamut of private-communalistic property rights spectrum to include:[3]

- Proto-historic Hawaiian chiefdoms in which the paramount chief wielded sovereignty over property rights, which were assigned to his subordinate chiefs to be exercised on his behalf only.
- Iceland chieftains in which "All land was owned individually by chieftains and free farmers and buttressed by legal codes and procedures for dispute resolution".
- Inca Empire of prehistoric Andes with a mixed system the empire claimed ownership of lands, while allowing some to be individually owned and inheritable, some by the rulers and others by communities.
- The Mayas exercised ownership of land at both individual and lineage levels.

This study examines the nature and causes of the evolution of property rights, with particular emphasis on the role of market forces in shaping its outcome. This is accomplished in the context of an economic evaluation of some key provisions of the Nigerian Land Use Act of 1978 (LUA).[4] Land use regulation has been characterized as falling most appropriately in the zone of confluence among economics, law and politics.[5] Noting the need for a balanced approach to land use policy, Garret (1987) observed that an optimum land use is attainable only through a combination of free markets and regulation. This middle ground runs against conventional wisdom in both economics and law. Economists, particularly in the new urban economics tradition of (Fischel 1985), by and large, consider efficiency as the sole criterion for judging land use policies. Others including Coase (1960), an economist; and Posner (1986), a

[2] See Earle (2000) p. 44

[3] Op cit. pp. 46–48. Along the same lines, Cooter and Ulen (2004, p. 74) also referenced an African tribe called Barotse for which it was said that "Property law defined not so much the rights of persons over things as the obligation owed between persons in respect of things."

[4] Nigeria is the most populous African country with a population of 140 million according to its latest census (2006) and has a land area of 924,717 square kilometers (357,000 square miles.) According to the UN-Habitat Organization, 45% of its population is urbanized. It runs a mixed capitalist economy more in the tradition of state capitalism. For an exposition of the indigenous property rights framework that predated the Land Use Act, see Elias (1961) and Ola (1977). For a full version of the LUA, see Federal Republic of Nigeria (1989).

[5] This position is espoused by Garrett, Jr. [8] who proposed that "An analysis of land use involves an understanding of economic concepts, while the implementation of land use policies occur through the political process that is guided by the judiciary. An analysis of land use therefore must incorporate economics, public policy and court rulings."

legal scholar, would allow for a legal or regulatory role to be guided by economic principles. Given the importance of land in both the economic and institutional context, it is inevitable that its utilization and control will continue to attract controversy and hence positive economics[6] would merely just be another paradigm for analyzing decisions on its use. The author's position is that values and socio-cultural premises should be juxtaposed with economics in analyzing land use decisions, in the Garrett tradition, with economics taking the center stage.

The LUA was promulgated to supplant the preexisting, dualistic property rights system that grafted the indigenous frameworks of landownership in the Nigerian societies to the English system during the colonial period dating from about 1884–1960. LUA "vests" absolute ownership interest in land in state governors and essentially eliminated all prior rights of individuals or groups without compensating landowners for the interests forfeited. The legislation rescinded all estates held by individuals in undeveloped land in excess of a half hectare (1.25 acres.) and supplants all ownership interests with a government-controlled "Right of Occupancy" (R of O). The State governor is assisted in his assignment of rights to urban land by a panel named the Land Use and Allocation Committee. Rural land comes under the tutelage of local governments which assign rights through Land Allocation Advisory Committees. It has been observed that much of the land expropriated under the legislation still remains in the hands of individuals and families in the sense that a large number of those who would forfeit rights to their land in excess of half a hectare when they apply for the new R of O simply fail to do so. It remains a challenge for the government to fully implement the "vesting" [of proprietary interests] provision of LUA. In essence, orderly market transactions on the terms of the new legislation are not occurring in the market place.

One unintended, but inevitable, consequence of the Land Use Act (LUA) has been its distortion of the operations of the Nigerian land market by giving rise to an underground market operated by land owners seeking to negate the confiscatory consequence (i.e. "Taking") of government action on their land. This has led to many calls for its abrogation or amendment by various parties in the body politic. In 1992, the Nigerian Law Reform Commission (NLRC) recommended administrative restructuring to eliminate local government control over rural land, the curtailment of the powers of the governor to assign or revoke interests, and an easing of transferability restrictions. It further recommended that "allodial[7] title to land and not the beneficial interest in land"

[6] Positive Economics deals with the analysis of statements of cause and effect. Such statements can be confirmed or refuted by appeal to real-world observations. This is contrasted with normative economic analysis which deals with 'statements that embody value judgments' which cannot be confirmed by appealing to data but only by reference to one's ethical views. (See Katz, 1994, p. 7.)

[7] Allodial interest in land is an ownership right that is absolute and may not be expropriated by any sovereign or other power. It is also not subject to any encumbrance.

should be vested in the governor. The current president, Umaru Yar'Adua, is said to be in favor of such a step as well.[8] These calls emphasize the need for a fit between the new property rights reassignment and Nigeria's contemporary socioeconomic conditions and the dangers of making bureaucratic or political discretion to be the dominant instrument for decision-making in the land market of a largely mixed capitalist economy. Giving primacy to no-economic forces will stymie the impact of land on economic growth. This growth concept is inherent in the experience of Western societies where historically there has been a progression from the feudal-aristocratic framework in the agrarian and early industrial age to its current manifestation as a post-industrial and service information age. This leads to the general hypothesis:

> The current property rights framework in Nigeria being a product of the prior period system of mixed indigenous communal and private property rights systems, is in consonance with its long run evolutionary path.

This implies that the LUA is a natural outgrowth of the post-colonial land use regime and, hence, will operate in tandem with the old order. A test of this hypothesis requires an understanding of the tenure transformation process, which is predicated upon the following tenets:

- Land tenure systems in societies constitute the resultant of a resolution of cultural, political, and economic vectors with the latter having the dominant influence among the trio.[9]
- As societies are subject to change over time, land tenure systems cannot be static but will reflect those changes. The change agents, be they internal or external, will leave their imprint on the resultant property rights paradigm, producing a shift in the status quo.
- The market constitutes the stage for charting the course of the change. We will appeal to the market mechanisms that shape the outcomes to decipher the effects of the changes.

The remainder of the study proceeds as follows. The next section discusses pertinent issues on land tenure systems and the economics of land reform with particular emphasis on the Nigerian case. In that section, the dynamics of land tenure change will be discussed. This will be followed by the presentation of a framework for assessing the market effects of regulatory and political shocks to the tenure state as landowners and other market participants formulate their responses to the Nigerian Land Use Act. Finally, some empirical ramifications of the framework are discussed using data garnered from a field study to test the following specific hypothesis:

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[8] "Who Owns the Land?", Editorial, Nigerian Online Today, May 9, 2007.

[9] In this way, the transformation of Western societies particularly as may be gleaned from epochs of economic growth and technological progress, provide some paths to possible maturity in the evolutionary process.

Private landowners will respond to the Land Use Act in a manner consistent with the expectations of the legislation. Hence, landowners holding undeveloped land in excess of half a hectare will apply for the Right of Occupancy in place of their moribund title in a timely manner.

Land Tenure Systems and the Economics of Land Reform

The LUA was legislated with good intentions and a clear set of regulatory and political objectives that would strengthen the hand of the government in controlling property rights and delivering better services to the public. Much has been written on the merits and demerits of the Act [see Adigun (1990), Antwi and Omirin (2006, 2004), Iwarere (1994), Omotola (1980, 1991), Umezuruike (1989)] detailing the implementation issues, the legal rationale and consistency, socio-political issues, and the market effects. This study seeks to extend these perspectives by focusing on the question of the dynamics of tenure change.

LUA and the Change Process

How the legislation has influenced land use change is examined by appealing to Douglass North's public choice paradigm on the role of the state in property rights evolution as discussed in Fiani (2004). North's seminal work on the functioning of markets in the process of economic growth stipulates that the State's primary role is to define, assign, and enforce property rights. This works well when efficient institutions exist. Such institutions minimize transaction costs involved in the bargaining process. This will occur where the state introduces a mechanism for making property rights more secure, define property rights more succinctly, and enhance the enforcement of these rights. The LUA redefines the titling of land through the application process for the Certificate of Occupancy, adds some bureaucratic layers to the application process, along with increased transaction costs. Collectively, these steps have made the property rights institutions less efficient. The re-assignment of property rights inherent in the leasehold estate (Right of Occupancy) to replace the freehold weakens the instrument and its value and redistributes wealth in a way that makes some citizens worse-off without being able to deliver on the promise to accomplish its welfare objectives. More so, the technology is not in place to enhance the mapping of land, while the contractual process precipitated by the rearrangement becomes more tedious and adversarial, an attribute it had hoped to improve upon. All told, the property rights regime ushered in by the LUA is less efficient and does not promote growth. Less invasive action stripped of the confiscatory effect would accomplish the desired change better by eliminating the problem of security of tenure, providing incentives for current landowners to exercise a higher scope of rights and inject more capital and technology into the administration of the system.

Property Rights Evolution and Market Dynamics

From the literature on land tenure, change can be observed to emanate from three general influences:

- Population growth in tandem with economic transformation,
- System shocks, (this could be a deliberate rearrangement of a society's initial or existing assignment of property rights or a major policy overhaul. Some examples of this factor include colonization and massive governmental interference), and
- Globalization and integrating world economies.

The Nigerian experience has been impacted by all these influences to varying degrees, the most dominant of which has been the giant system shock in the name of the Land Use Act. The Nigerian path can be broken into four phases:

- *Pre-1884 – Era of Land Tenure Formation*: During this period, the initial assignment of rights based on the communal tribal system with variations across different regions prevailed. The economy was primarily agrarian and contacts with the outside world did not materially alter the property rights framework.
- *1884–1960 – Era of Tenure Reformation and Dualism*: The colonization shock occurred at this time and operated along with some economic transformation and a limited globalization factor, primarily in the form of transatlantic trade with the colonial powers. The establishment of the crown colony and settlement by the British led to the institution of private property rights in Lagos and other urban areas.
- *1960–1977 – Era of Experimental Dualism*: Nigeria became independent in 1960. The post independence era ushered in home-grown administrators who maintained the dualistic framework as delivered by the British. Given the intensity of political struggles, no effort was made to adjust the tenure nomenclature. The ascendancy of the military dictatorships saw a governing style that had little tolerance for the requisite bargaining machinations that drive the market economy behind the private property rights system. In an effort to simplify this process, the government enacted the Land Use Act that further distorted the preexisting duality in 1977 by packaging the old traditional tenure arrangement and the colonial property rights framework into one untested concept of the Right of Occupancy.
- *1977-Present – Era of Land Tenure Pragmatism*: The Land Use Decree was a system shock that produced a new re-assignment of property rights. It prompted extensive administrative discretion and massive governmental intervention that distorted the emerging land market process. Rather than operate on the sideline, the regulatory force disturbed the market bargaining process among productive forces. The ensuing distortion has been further accentuated by the latent economic expansion of an oil economy with

population growth and rapid expansion of the urban centers, particularly at Abuja and Lagos.

This regulatory shock has generated many consequences, two of which, welfare effect and market distortions, are discussed below.

Property Rights Restructuring and Welfare Effects

In studying property rights and its evolution, it is important to recognize the primacy of wealth distribution as a key consequence of the process. Well-intentioned governmental efforts like the LUA that seek to redistribute wealth in response to perceived inequity, enhance the productivity of land or attain some other broader socio-political objectives, must do so with this understanding. The transition from the current to the new distribution of rights involves, inevitably, winners and losers. The public choice paradigm draws the distinction between a Pareto-optimal welfare state, which holds wealth distribution constant and property rights restructuring, like the LUA, which produces wealth redistribution in part by affecting relative factor prices for land and labor. Grossman (1994) in his theory of endogenous determination of the equilibrium distribution of property expresses the same idea:

> Throughout history, the responses of human societies to the problems of distributing property and of allocating resources between productive and appropriative activities probably have had greater consequences for welfare than have their responses to allocating resources among different productive activities taking property rights as given, which is the problem on which economic analysis traditionally has focused.

Market forces will be inevitably unleashed towards resolving the conflict inherent in the adjustment in the absence of incentives and other forms of compensation. A simple model, the "Mattingly hypothesis", is used to evaluate the market dynamics below.

Market Effects of the LUA: The Mattingly Model

Mattingly (1991) in his analysis of urban land markets in developing countries pointed out the need for a proper understanding of the dynamics of the market as a basis for policy formulation. The case of New Delhi, where an attempt to control growth by establishing "green belts" around the city resulted in extreme shortages of land for low-income housing in the city, illustrates the dilemma faced by land use policy makers. Interventions involving public works to enhance urban amenities, such as off-site infrastructure and on-site services ["site and services"] have been shown to exert a positive effect on the market from both supply and demand standpoints. But these involve commitment of capital, which is generally in short supply. Legislative invasion requires little

fund commitment but has the most disruptive impact on market functioning. For this reason, it has a great appeal for third world policy makers.

Mattingly (1991) propounds that any such legislation juxtaposes property rights ("right of use"), development activity ("type of use"), and market forces ("price of land"). The legislation also invariably creates two parallel markets called "Formal" and "Informal". Formal markets constitute the legislatively recognized media for carrying out land transactions, while the informal represents the underground market arrangements by which participants adjust for "unfairness" (i.e. market correcting for inequities) introduced by the legislation. The participants in this market on the supply side are owners of unimproved vacant land and developers of improved land. Their responses to the market forces are depicted in the matrix below.

The Market Model

The Mattingly Thesis noted above may be represented as

$$[\Delta TU, \Delta RU] ==========> [\Delta Y, \Delta W, \Delta PP]$$

That is, legislative interventions altering the type of use (ΔTU) and the right of use (ΔRU) would result in redistribution of incomes (ΔY), wealth (ΔW), and purchasing power (ΔPP). The LUA does not specifically affect the type of use, but it drastically restructures the right of use. Hence, this thesis may be restated for the purpose of evaluating the market effect of the LUA as follows:

$$[\Delta RU] ==========> [\Delta P, \Delta Q]$$

That is, by restructuring the right of use, the LUA would precipitate price (ΔP), and quantity (ΔQ) effects in the real estate market. These influences are mapped out by the following matrix. Each cell depicts the rational, behavioral response of a market participant to the legislation in a specific segment of the dual market. For simplicity, income distributional effects considered above are left out of the picture (Exhibit 1).

Some Hypothesized Market Effects

Salient hypothesized market effects from Exhibit 1 include landowners withholding their undeveloped land in excess of half hectare (1.25 acres) from the formal market by not recording it in avoidance of forfeiture to the state as the Act stipulates. This rationing effect would not preclude the development of the land but would be a deterrent due to problems of the security of tenure (estate). Hence, this would spell a diminished development activity particularly for low-to-middle income housing due to the fact that the impact of the increased

Exhibit 1 Expected market effects of the LUA

	Hypothesized effect in the:	
Economic agents	Formal market	Informal market
Owners of vacant land in excess of 0.5 hectares (1.25 acres)	Vacant land in excess of 0.5 hectare cannot be traded in the formal market since the law confers no proprietary right on the holder. This creates a supply bottleneck as these holders hold off their land or engage in limited transaction in the informal market. Development activity diminishes in the low-to-middle income residential market as a result of this rationing.	The legislated appropriation of vacant land exceeding 0.5 hectares create market distortions as landlords build defenses to fight off loss due to 'taking'. Such action could involve withholding the property from the market in anticipation of favorable legislative changes. Since the trading of the land can only occur outside of the official purview, rationed release to the market will occur where and when a high demand exists. The effect of this quantity rationing would be a higher price.
Owners of improved land or unimproved land under 0.5 hectares (1.25 acres)	Diminished property rights coupled with transactions cost of obtaining the new Right of Occupancy and the payment of ground rents would increase operating cost for landlords. This will be translated into higher land prices. There will be differential effects on different property types. Existing low- and middle-income housing stock will appreciate in part because the rate of production of new housing would fall due to the new regulatory burden. Developers will shift to high-income housing that can more readily absorb increased operating/transactions costs imposed by the regulation. The same will apply to the more capital-intensive commercial developments.	While the prospects for the formalization of this market is high, costs are incurred from bureaucratic frictions encountered in the process. Land owners and developers who are unwilling or unable to obtain a certificate of occupancy through the formal process will operate in the informal market for this purpose. These will tend to be small-scale developers that operate in the low-to-middle income market segment or the less capital-intensive project.

transactions cost would be greater. Both of these constitute the quantity effect. This dual (quantity) effects would translate into a higher price effect under the modified Mattingly hypothesis above.

For owners of improved land or unimproved land under 0.5 hectares (1.25 acres), there is similarly a price effect. Also, for similar reasons as above, the quantity effect will lead the owners-developers to favor the market for premium-priced housing, as well as capital-intensive commercial developments in the formal market. Owners with small holdings may choose to operate in the informal market.

Empirical Test of Model

Does the behavior of landowners in the land market reflect the stipulations above? The answer to this question will be based on the test of the hypothesis:

> Private landowners will respond to the Land Use Act in a manner consistent with the expectations of the legislation. Hence, landowners holding undeveloped land in excess of half a hectare will apply for the Right of Occupancy in place of their moribund title in a timely manner.

The hypothesis is tested using the flow of applications for translating the existing rights into the Rights of Occupancy under the LUA regime. If landowners behave in a manner consistent with the LUA legislation, there will be a normal flow of activity in the formal market and a limited or weak informal market. The data were generated from the files of the Lagos State Ministry of Lands and Housing based on transactions for different parts of the state. Geographically, it is the smallest state in the country with a land area of 357,700 hectares of which 17% is under water.[10] However, it has the highest population (about 9 million or 6.4% of Nigeria's total population by 2006 Census)[11] of all states and, harbors 31% of all industrial establishments and 65% of commercial activities nationally. Moreover, a high percentage of its internally generated funds derives from land transactions.

The Data

The monthly data for 1987–1992 (Exhibit 3) were manually extracted from the applications in the files to supplement the annual summaries (Exhibit 2) which was made available to the public at the time. The tedious manual extraction process arising from efforts to maneuver around operations and work schedules

[10] Some estimate this proportion to be 22%.

[11] United Nation Habitat Organization estimated its 2000 population to be 13.4 million being the 6th largest globally at the time. The organization's projection of its 2015 population is 23.2 million or third largest behind Tokyo and Bombay.

that were not particularly designed for this research's data retrieval needs led to some discrepancies among the annual totals for 'Private' applications from 1987 to 1990 for the corresponding years of Exhibits 2 and 3.[12] Direct information on the size of the land for which Certificates of Occupancy were approved was not available. While item 3 of the application form for residential uses asks the applicant to state the 'size or dimension' of the plot, the transactions were only recorded by the number of plots rather than their size. Hence the relative size of the land for which applications were received could not be determined on the spot.[13] The maximum size of undeveloped plot for which a C of O is granted is half hectare according to Section 34 of the LUA which also states that the rights over any excess shall be forfeited to the state government. There is no such limit for developed land. Question 4 of the application requests the applicant to state what portion, if any, of the plot is developed but the information was not accessible.

This study concerns itself primarily with the dynamics of the land market during the first fifteen years of the legislation based on the author's direct extraction of much of the data from applicants files, a rather tedious process, as it has not been readily available in the desired format. Studies based on later periods (e.g. Omirin and Antwi, 2004, 2006; Omirin, 1998) have employed primary data collection approach by surveying landowners in the marketplace.

Exhibit 2 represents the annual summaries of applications for different categories of C of O's from 1978 to 1992; while Exhibit 3 presents the monthly breakdowns of 'Private' applications from 1987 to 1992. There is no immediate explanation for the trough between 1985 and 1990 in Exhibit 2. In general, much less activity in conversions from pre-legislation property rights assignment to the new Right of Occupancy by private land owners appear to be taking place at this time than would normally be expected. Iwarere (1994) postulated a theoretical conversion path using the geometric distributed lag model which

[12] These discrepancies for the 'Private' Applications were as follows:

Year	Exhibit 3	Exhibit 2	Discrepancy
1987	1251	1814	–31.04%
1988	1151	1147	0.35%
1989	1709	1748	–2.22%
1990	1620	1624	–0.25%

The on-site tally tended to be lower than the official tally. Only the 1987 discrepancy, 31%, is particularly large.

[13] The size of the land involved in each transaction could only be determined by cross-referencing the transaction counts from the land registry with survey maps at the Survey Division and the land use maps from the Physical Planning Division, all of which were at different geographical locations. Time, cost and the logistical friction made this exercise unfeasible at the time of the fieldwork.

Exhibit 2 Applications for certificate of occupancy in Lagos State: 1978–1992

Year	Category				
	(a) Private*	(b) Ratification**	(c) State***	(d) TOTAL	(e) = (b) + (c) % Non-Private****
1978–83++ Total	10,232	365	n.a.	n.a.	n.a.
1978–83++ Avg.	1,701	61	n.a.	n.a.	n.a.
1984	2,185	1,066	3,009	6,260	65.01
1985	1,355	1,627	2,962	5,944	77.20
1986	1,459	1,496	3,001	5,956	75.50
1987	1,814	690	800	3,304	44.61
1988	1,147	533	2,089	3,719	89.86
1989	1,748	347	1,106	3,201	45.39
1990	1,624	411	1,252	3,287	50.59
1991	2,099	n.a.	n.a.	n.a.	n.a.
1992	2,079	n.a.	n.a.	n.a.	n.a.

Source: Lagos State Ministry of Lands and Housing, Lands Division, Ikeja.
Note: ++ The annual breakdown of C of O data for 1978–83 is not available. As it was provided only as an aggregate, the average is obtained by dividing each total by 6.
*Private: Application for existing interest in land acquired through private transaction prior to the enactment of the LUA in 1978. It could be for developed or undeveloped land within or outside the half hectare threshold.
**Ratification: This involves formalization of right of occupancy on land occupied by someone without lawful authority from the government prior to its coming under direct government control. Typically, it is the process by which squatters on land acquired or demolished by the government is enabled to obtain legal title to the land. It is otherwise referred to as "Regularization".
***State: Land located in a government-controlled development scheme. Such schemes generally involve the provision of site infrastructure (so-called site and services.)
****Non-Private: The sum of applications for 'Ratification' and 'State' Allocation. This represents transactions on land over which the government exerts direct control.

anticipates 50% of undeveloped land over half hectare held by private landowners would be converted to the Right of Occupancy in fourteen years, even under a moderate response.[14] From Exhibit 2, a total of 25,742 Private applications were received over the first fourteen years (1978–1992). The size distribution of the plots in these applications is unknown.[15] In the absence of this information, if we assume an average of one hectare per application to accommodate applicants with holdings in excess of half hectare, then only about 25,000 hectares were converted from freehold estates to Rights of Occupancy

[14] See Iwarere (1994) pp. 255–56.

[15] The Lagos State New Towns Development Authority's list of priority schemes at the time of this study (1996) consisted of 13,816 plots on 6,258 hectares. This gives an average of 0.45 acres per plot. The first set of planned non-agricultural development schemes on Lekki Peninsula in 1985 was for 9,696 plots on 2,844 hectares or 0.29 hectares per plot.

Exhibit 3 Monthly distribution of applications for private certificate of occupancy in Lagos State: 1987–1992 *

Month	1987	1988	1989	1990	1991	1992
January	125	73	153	125	95	124
February	126	94	115	113	113	172
March	176	128	133	160	169	207
April	82	66	76	69	113	124
May	62	50	142	112	169	94
June	89	81	167	99	144	145
July	93	65	133	96	204	240
August	85	20	162	165	230	197
September	71	63	132	152	179	208
October	106	115	139	143	213	171
November	81	137	156	148	205	146
December	117	233	173	221	247	225
TOTAL	1251	1151	1709	1620	2099	2079

Source: Lagos State Ministry of Lands and Housing, Lands Division, Ikeja.
*This represents the activity pattern for land under non-governmental control in its transition to formalization under the LUA. It provides a pure measure of private landowner response to the Act.

over fifteen years. This represents less than 10% of potentially convertible land.[16]

In essence, the data indicate a much lower flow of applications for translating existing rights to R of Os than expected by landowners holding half a hectare or more during the first fifteen years of implementation. The proportion represented by owners holding more than the 0.5-hectare threshold is bound to be even much less.

A glaring attribute of the land market precipitated by the LUA, apart from this prolonged conversion of land from private to public domain is the proliferation of public projects. The property development marketplace is dominated by public land development schemes, many of which are land development projects that provide on-site infrastructure which are tailored mostly for the upper income. For example, the Lagos state New Towns Development Authority had on its docket as of 1996, development projects totaling 6,258 hectares (15,647 acres) in 13,816 plots or 1.75% of its land. Of the plots, 12,218 were for residential properties. This is captured in the last column of Exhibit 2 [column (e)] for 'Non-Private' (NP) applications which represents the transactions on land over which the government exerts direct control. It is the sum of the two previous columns. The first is 'Ratifications', which represents the Right of Occupancy (R of O) on land conferred after its

[16] Total land area is 357,700 hectares of which 17–22% are estimated to be under water. This leaves 279,000–296,000 hectares, less institutional land not in private hands. The proportion converted could be higher than 10% depending upon the share of institutional land in total developable land.

acquisition by the government where the applicant had no formal prior title. The second, 'State', is land located in government-control development scheme. NP represents market activity in the government-dominated segment of the land market. This constituted an average of 64% of market activities from 1984 to 1990. As noted above, the burden from transactions costs and other fees simply price the lower-to-middle income clientele out of the market. Exhibit 3 affords us a further glimpse at the 'Private' market from 1987 through 1992 when the detailed monthly data are available. Private market activities as represented here remained anemic but on a gradual increase. The pace of applications are generally highest in the latter third of the year. Other studies (Omirin and Antwi, 2004) indicate that the land market is more vibrant than represented by the data here at an informal level. Market transactions at the informal level represented the private market response to the legislation as the landowners way of exacting a fair price for their interest. On the official front, this would be illegal according to Section 34(7) and subject to N5000 (Nigerian Naira) fine or one year imprisonment if convicted. Hence, a grantee under such transaction would either have to backdate it or face criminal prosecution and forfeiture of the right acquired.

Conclusion

This study does not accept the hypothesis that private landowners holding undeveloped land in excess of half a hectare will readily apply for the Right of Occupancy. In essence, they will hold back on statutory formalization of their property rights as a rational response to the legislation.

What lessons can we learn from the Nigerian implementation of the Land Use Act? On the regulatory front, we see that a free-wheeling exercise of land use regulatory power by the government introduces negative unintended consequences into the market. The noble intentions attending such power plays are not sufficient to guarantee unmitigated policy success. The Nigerian Land Use Act has sought an equitable access to land utilization by all citizens, enhanced power to propagate public policy objectives, and a simplified administrative machinery. In the process, it has produced a cumbersome regulatory machinery and a property rights dilemma. It has deflected the central role of market signals in the transformation process in deference to political and bureaucratic mechanisms for the performance of the allocative functions of the market. Economists generally agree that such interference should be limited to curing the effect of externalities. This underlies the need for caution and a careful exploration of the socio-economic dimensions of land use policies before their legislation. Secondly, putting land allocative functions in the hands of administrators and special panels is an appeal to arbitrariness and excessive administrative discretion in land use decisions that supplants the normal objective process of the market with subjectivity.

The study also depicts a process of property rights transformation in the face of economic, social and political forces based on the evolution of property rights frameworks in Nigeria from pre-colonial to post-colonial era. Of the spectrum of events that have affected the land tenure transformation process, the study focused on the market responses to the most recent transforming event, the Land Use Act of 1978. The questions that demand an answer in evaluating the new framework is: What market failure constitutes the basis for the legislative approach, and how is the new framework curing the problem?

The changes due to the legislation translate into a transformation of the prevailing structure of the land market: increased public sector participation in the land market and the rise of an informal land market to optimize private landowner return on their property rights. Other studies have observed that this latter phenomenon operates via a layering of land transactions in the marketplace, a process by which the buyer of a privately held land pays a statutorily hidden price to the owner (holder who has chosen not to regularize his interest as statutorily required not to forfeit rights in undeveloped land in excess of 0.5 hectares) prior to registering the land to obtain formal title.

As a check on the influence of increased public sector participation, another test of the market effect was conducted for owners of vacant land in excess of 0.5 hectares (OWNG5) in Lagos State by analyzing data on applications for Certificates of Occupancy to formalize the status of ownership interest during the first fifteen years (1978–1992) of its implementation. The test indicates that their rate of applications for 'Private' Certificate of Occupancies is significantly lower than the other two categories, 'Ratifications' and 'State' applications which are under government purview. No doubt, enhanced public sector participation through improvement in public services and infrastructural provision enhanced urban economic growth. However, unintended consequences of constrained private land market activities and other market frictions exert negative consequences. This study did not measure these effects, which are needed to enhance our understanding of governmental interference in land markets. Also, infrastructural provision is an improvement on the previous policy of direct production of housing randomly allocated without regard to the preferences of individual households. More focus on enhancing infrastructure across the economy will produce greater impact on the economy.

Another dimension of the increased public sector participation in the land market is the observed steering of residential development activities in the direction of high income individuals. Braimoh (2006) observed that from 1984 to 2000, residential land in low-population density areas (LPD) of Lagos metropolitan area increased from 18,000 hectares to 35,000 hectares, a growth rate of 4.24% per year. Correspondingly, the growth was from17,700 hectares to 26,000 hectares or 2.43% for Medium Population Density (MPD) areas and 6,600–7,600 hectares or 0.89% annual growth for the High Population Density

(HPD) areas.[17] This observation further validates the hypothesized effect of the LUA as depicted in Exhibit 1 above. The magnitude of this becomes clearer if we consider that some of the HPD areas such as Lagos Island have a density of 215,000 per square kilometer (556,859 persons per square mile) while Ikoyi, an LPD area, has only 9,800 people per square kilometer (25,382 persons per square mile).[18]

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[17] See Braimoh (2006, 2007).

[18] See Olayiwola (2005), Page 187.

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The 21st Century Property Challenge: Reconciling Spirituality, Sacred Places, and Profit-Seeking Property Involvements

Stephen E. Roulac

He ali'i ka 'aina, he kauwa ke kanaka.
Land is the chief, humans its servants.
Pukui, Mary Kawena (1983).
'Olelo no'eau: Hawaiian proverbs and poetical sayings.
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Does property serve culture, or does property serve commerce? If you honor the past, your loyalties are to the old school; you would tend to favor the perspective that *property serves culture*. But if your worldview is dominated by a modernist, progressive, futurist outlook, you would tend to come down on the *property serves commerce* side of the debate.

Those who favor the idea that the institution of property manifests important cultural connotations, will necessarily connect property with people – and not just any people, but, most specifically, with *indigenous people*. The modernist view of property, on the other hand, is more universal, really independent of particular people, and certainly agnostic insofar as *indigenous people* are concerned. To address the divergent commerce vs. spirituality perspectives concerning property, in this chapter, I introduce the concepts of *property culturists* and *property modernists*, which appear in the literature for the first time in this writing.

Whereas the *property culturist* treasures the legacy elements of a particular property, valuing history and symbolism while cherishing a property's aesthetic attributes and their meaning, the *property modernist*, favoring clean lines and a fresh slate, minimalism over adornment, is coolly unsentimental about who a property's owners, occupants, and service providers might be.

For purposes of exposition to advance the comprehension of the cultural and modern approaches to property, the two schools of property orientation are presented as more monolithic than truly applies in practice. In both theory and practice, it is not quite this simple, for the schools of property can

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property be though of as position on a spectrum. Thus, this is rather a binary than a black or white distinction.

Inevitably, conflicts surround and characterize the *property culturist* and the *property modernist* view of value. This conflict is by no means original, for the eminent David Ricardo, regarded as the leading economic thinker of his time for his classic treatise, *The Principles of Political Economy and Taxation*, wrote in the preface to the first edition of his masterwork

> The produce of the earth – all that is derived from its surface by the united application of labour, machinery, and capital is divided among three classes of the community, namely, the proprietor of the land, the owner of the stock or capital necessary for its cultivation, and the labourers by whose industry it is cultivated.
>
> But in different stages of society, the proportion of the whole produce of the earth, which will be allotted to each or these classes, under the names of rent, profit, and wages, will be essentially different; depending mainly on the actual fertility of the soil, on the accumulation of capital and population, and on the skill, ingenuity, and instruments employed in agriculture.
>
> To determine the laws which regulate this distribution is the principal problem in Political Economy; much as the science has been improved by the writings of Turgot, Stuart, Smith, Say, Sismondi, and others, they afford very little satisfactory information respecting the natural course of rent, profit, and wages (Ricardo, 1817).

The eminent Mr. Ricardo, of course, was writing from a Western perspective, a perspective that focuses on productivity, which, ultimately, can be measured, translated into and transacted in commercial terms. What Ricardo identified as the principal problem in political economy, has continued through today to be the essence of investment enterprise. Arguably, for the property discipline, from a long-term perspective, the principle problem in the 21st century shall be the *efficacious reconciliation of the spirituality of sacred places with profit-seeking property involvements*. This chapter represents an initial step forward to address this reconciliation.

Property Culturist and Property Modernist

The *property culturist* recognizes and honors the idea that each particular property has a particular connection to a particular people. The *property modernist* perceives that people are interchangeable, their involvements can be denominated in financial currencies; ownership roles, tenancies, and building associations can be transferred, exchanged, replaced, without consequence or even comment. Such a view, however, is heretical to the *property culturist*, for the property cannot be separated from those people, who have long-time connection to that property. But, for the *property modernist*, people are hardly relevant, for everything concerning the property can readily be expressed in the economist's vocabulary of utility, which can then readily be translated into financial terms (Roulac, 1994).

In practice the *property modernist* is new to the property. From the perspective of those who are intimately familiar with the property, by virtue of their long-term connections to the property, those new to the property are foreigners. The dichotomy of attitudes between the property modernist and the property culturist is eloquently expressed by Samuel Manaiakalani Kamakau: "You foreigners regard the winds, the rain, the land, and sea as things to make money with; but we look upon them as living friends with whom we share the universe."

Property culturists' sensibility is informed by a sense of what has been before and what shall be subsequently. The *property modernist* attitude tends to be to take *now what they want now*. This differentiated orientation parallels the distinction advanced by, *Quinn* between *leavers* and *takers*, with the former reflecting the *property culturist* and the latter the *property modernist*. (Quinn, 1992).

Arguably, the majority of today's *property culturists,* who advocate the interests of local property, were, themselves descendents from ancestors who were at one time newly arrived in that place – and therefore, earlier, really more *property modernists* than *property culturists*, who had long connections to that particular place. Invariably, the *modernist* vs. *culturist* classification debate descends into timing. How long does it take to evolve from a *modernist* to a *culturist*? How long until the former nouve!AU *modernist* assumes the status, legitimacy and self-awarded moral superiority of the latter established *culturist*?

Property culturists are more likely to be indigenous – i.e. have extended, perhaps for many centuries, lineal ties to the place. *Property modernists,* by contrast, are *place nouveau,* having recently arrived on the scene, by acquiring a property interest, most likely funded not by direct involvement in the local economy but from financially rewarding commercial/entrepreneurial activities pursued in some distant place.

For the *property modernist*, valuation is an exercise dominated by engineering, mechanics, and financial calculation. People do not really count in the counting of the value of a property, insofar as the *property modernist* is concerned. Not so for the *property culturist*. The *property culturist* cannot conceive of property as independent of the people, more specifically, of indigenous people.

The *property culturist*, when considering the relationship of property to people, is of course, considering the property in the context of indigenous people. The word *INDIGENOUS* is the modernization of the Latin Indigiena: someone born in a place. So, indigenous people and their relationship to property, have a fundamental, primal, integral connection to place. The *property culturist* and the *property modernist* perspectives are compared and contrasted in Exhibit 1. To view property as indigenous is to be a *property culturist*. In application the *property culturist* is a proponent of the rights of indigenous people concerning their indigenous property involvements. To insist that any

Exhibit 1 Meaning of indigenous in the property context

Indigenous	Not indigenous
1. Long-term connection to property	Only recent contact with property
2. Prior established connection to property	No establish connection to property
3. Prioritize commitment to property stewardship	Self-interest dominates property stewarding
4. Emphasis on honoring the past and preserving property for the future	Past/future not of concern
5. Cherish the land	Use the land
6. Culture is critical	Culture is relevant only in a compliance context
7. Orientation to champion preservation and protection	Exploitation emphasis

cultural considerations are subordinated to your own objectives, desires, and aspirations, is to be a *property modernist*.

Indigenous people, in the context of property, refer to those people who have a heritage, a linkage, and a lineal connection to the place of that property, by virtue of their ancestors having been of and from that place. The question of valuation of property in relationship to indigenous people necessarily is fraught with conflict, with differing perceptions and competing values, and therefore, unavoidably, conflict. If you would embrace the *property modernist* viewpoint, you would trample on what for indigenous people is sacred, holy, and cherished. Indeed, *property modernists* quite probably disrespectfully walk over, figuratively, if not literally and overtly desecrating the graves of *property culturists'* ancestors. Desecration of sacred building grounds, by no means is a phenomena restricted to what concerns the interests of indigenous people or real estate developments (Galbraith, 2007). Desecration of burial grounds is a felony or misdemeanor in every state (Galbraith, 2007).

Property culturists cherish spirituality, as manifested in sacred places. *Property modernists* worship profit-seeking property involvements. The Gods of spirits and the Gods of commerce, however, do not easily reside in the same pantheon. The challenge, then, is to reconcile spirituality and sacred places, which are so integral to the *property culturist* view, with profit-seeking property involvements, which are so fundamental to the *property modernist* priority.

Mountains are especially important as sacred sites (Kungurtsev and Luchakova, 1994). The Hindus believe that God can incarnate not only in human form but as a mountain. Such mountains as Kailas and Arunachala are considered to be incarnations of Shiva, while Nanda Devi and Annapurna are abodes of Parvati, Shiva's wife, the Goddess of Bliss. "Sometimes in the West this notion of certain mountains as incarnations of God is understood as symbolic or metaphoric, but for Hindus, it is quite literal and even experiential" (Kungurtsev and Luchakova, 1994).

Places that are conducive to an advanced, highly developed crown center will likely attract and nurture more significant people than places that are not as conducive to highly developed crown center work (Kungurtsev and Luchakova, 1994). "A developed crown energy center" relates "to a capacity for taking a broad, objective, large impressive view, and for strategic thinking and planning far ahead" (Kungurtsev and Luchakova, 1994).

One of the challenges confronted by those who have a stake in the preservation of culturally significant lands and sacred sites is that they may not, on their face, be visually distinctive, aesthetically pleasing, or even readily recognizable. As one enthusiast of the "Mysterious Mound – building culture that thrived in North America long before settlers landed in Jamestown," observes, "Even the grandest of them suffers from the stubborn fact that they're essentially heaps of dirt. Still, they are impressive in their enigmatic way. The prehistoric people who build them with simple tools put enormous effort into these projects and they have lasted across centuries" (Miller, 2007).

Increasingly, high-end development seeks to create a sense of place (Ramsey, 2007). Whereas cultural significance has long been viewed as evolving over time, now some perceive that cultural significance can be created or manufactured. Thus, conventional high-end residential development aspires to replicate in a private community the proprietary, commercial version of distinction that characterizes a property that is deemed to have cultural significance. Just as indigenous people honor spirituality, some of their counterparts at the luxury end of the residential property spectrum honor a form of property that is an expression of commercial success and financial stature. Sometimes that is expressed as a McMansion style residence, and sometimes that is expressed through properties that epitomize the unique experience not to be found anywhere else (Ramsey, 2007).

Many conservationists, of course, tend to be sympathetic to the larger concept of the agenda of the *property culturist*. Conservationists may also be recently converted to the cause of promoting a specific property. *Property culturists,* on the other hand, tend to have a less of a commitment to the larger issue of preserving lands of cultural significance and sacred sites than they do to protecting property that is most specifically known to them. *Property culturists,* however, tend mostly to deal at the micro, property-specific level. Conservationists, oriented as they are to larger place issues, can be ideal partners for the *property culturists*.

The *culturist* vs. *modernist* property perspective is informed by the source of land ownership. The sources of land ownership and ownership of property interests control over its use can take a multitude of forms, including

- Indigenous rights
- Land settlements
- Military conquest
- Revolution to overthrow prior government

- Territorial purchase
- Land grant
- Condemnation, which taking may or may not involve so-called fair compensation.
- Land use laws, controlling the form, type, and scale of property improvements.
- Land use regulations and interpretations
- Planning commission proceedings
- Architectural and design review boards
- Neighborhood review panels
- Requirements for certain professional studies, such as Environmental Impact Reports
- Litigation to enforce interpretation of land use laws
- Community action
- Financial payments

Amongst the numerous parties that have interest in and rights to land, specifically its title and use, are

- People, indigenous tribes that originally settled the land
- Recipients of land grants
- Entrepreneurial warring armies/tribes
- Nation states, which may govern such lands
- Special government entities that may establish unique, special jurisdiction over such lands
- City states
- Private parties

Private parties may own a majority of rights concerning such land, or alternatively may own very few land rights.

Divergent Knowledge Paths

A significant distinction between *property culturists* and *property modernists* is that the former tends to relate to property in the context of an experiential frame, whereas the latter relates to property more from an analytic frame. Indeed, many *property modernists* have limited first person experiential connection to property generally or any given property involvements specifically. Some *property modernists* hold that the financial structure, the capital structure and the derivative financial engineering creating an interest in the property is all that matters (Roulac, 1996).

How property is documented or not documented looms large as the cultural traditions influence how property may be pursued and how decisions about that property may be taken. As Cowan (1995) observes, concerning Native American learning, "Words are written down less often than for Americans and

Europeans, because the act of writing them too often restricts further understanding about the referent to which words point. Instead, understanding is itself understood as a continual unfolding lifelong process of attention, data gathering and integration. Stories are told repeatedly and passed between generations because the serve as linking mechanisms that weave context into patterns that provide meaning for concepts" (Cowan, 1995).

Consequently, the *property modernist* approach can be analogized to a dictionary that is a place where the words are (Rand, 1967), whereas for the *property culturist* stories of place convey the interrelated experiences of those who have interacted with that place (Bateson, 1979).

One opening for the integration of spiritual and commercial perspectives in property is the source of knowledge concerning the property. In the commercial context, knowledge is increasingly recognized as the crucial differentiator in competitive environment. In property investing, specifically, knowledge is crucial to the due diligence function (Roulac, 1994) (Manning and Roulac, 2000; Drucker, 1999; Mulgan, 1997). Arguably a useful construct in thinking about due diligence is that due diligence *is applied knowledge creation in application*. Whereas the *property modernist*, being new to the property, necessarily must initiate a due diligence study of the property, in order to make an informed decision, the *property culturist* already has the knowledge and information concerning the property that are generally perceived to be relevant, as a consequence of a long-term involvement with the property.

The realm of *property modernism* is most advanced, most developed in the context of architecture. Leading modernist architects are explicitly, consciously aware of the context in which their designs might be placed, rather than being predominantly self-referential in orientation. Indicative of relative innocence and implication of cultural significance of many architects and their clients is the observation by UNESCO Europe and North America Chief Machtrid Rossler, "We have to work with developers and architects as they often do not really have a clue about world heritage" (Venning, 2007).

For the *property culturist*, the crucial knowledge of a property is more spiritual than economic. The *property culturist* knowing a place would possess this exacted self-knowledge, for to know one's place is to know oneself, which is recognized as the cornerstone of Indian spiritual tradition, for the highest form of knowledge is recognized as self-knowledge (Murthy, 2007).

The *property culturist* concentrates on knowing the story of the property: its history, with the cultural aspects of the history being as, or more, important as the political and economic aspects. To the extent she searches for knowledge, the *property modernist* seeks to understand current context, how that context might evolve and how that knowledge might inform the design decisions, while the *property culturist* is focused on knowledge of the property's heritage.

The more studious, sincere, and respectful *property modernist*, ultimately, will cross paths with the *property culturist*, for the former's knowledge

journey must lead to study of prior context and therefore, ultimately, cultural traditions. Similarly, the respectful, responsible *property culturist*, must, given the responsibility and trust embedded in the stewardship of property, explore current context and future prospects. That exploration by the *property culturist* necessarily will lead to an intersection of interests with the *property modernist*.

Necessarily the sources of land title control influence the expectations of the parties that have an interest in land. Title insurance has emerged as a relatively recent institution to address modern commercial concerns. Whereas the title industry functions in Western society to provide some assurance to purchasers of land that the seller in fact has "clear title" to convey to the prospective purchaser, in truth, the institution of title insurance deals with rather straightforward, even simplistic matters, for any such disputes seldom occur in a common cultural context. In practice, title insurance in commercial applications is innocent of indigenous peoples' concerns. At this time, no such institution has emerged to mediate conflicts between market participants, whose cultural frames of reference, and therefore priorities, may diverge in a dramatic manner.

Philosophy, Property, and Physics

A review of philosophy, generally, and its application in the context of economics, specifically, provides an illuminating perspective concerning how ideas of ethics, morality, and appropriate behavior have influenced the evolution of property institutions.

As the institution of private ownership initially evolved, an underlying concept was that property responsibility and access would be held in private hands, with the idea of common use. This duality of property was advanced by Aristotle and later substantiated by Thomas Aquinas (Small, 2008). Advances in philosophy and economics in the 18th century reversed the communal concept underpinning property. In the philosophical realm, Hume advanced the idea that a self-referential basis of morality dominated social considerations (Hume, 1777). Central to Hume's position is that so long as the involved parties, presuming themselves to be "moral actors," agree to the terms of any economic transaction, ethical considerations and larger philosophic concepts of justice are irrelevant.

The premise of self-referential morality, in the context of economics and property, was further emphasized by Adam Smith, who advanced the idea of individual self-interest as the most appropriate form of social conduct (Smith, 1759). This ethical construct was further articulated in his classic *Wealth of Nations*, which advanced the idea that the *invisible hand* of collective commercial market interaction amounted to what was "best for society" (Smith, 1778). Consequently, the collective conduct of all engaged in the property markets was

tantamount to what was presumed to be good for the community, and therefore, ethical.

The extension of the self-interest premise of classic economic theory is advanced further by John Stuart Mill, who asserted that utilitarianism dominated any consideration of spirituality or morality (Mill, 1848), and David Ricardo, who advanced ideas concerning how the use of property could be captured in rent (Ricardo, 1817).

At the same time that Hume and Smith were considering that self-interest dominated moral concerns – the implication being that individual commercial aspirations trump communal considerations – Immanuel Kant noted that certain things are valued beyond any price that might be reckoned in a commercial context (Kant, 1785). According to Kant, "a human being is regarded as a person. . .is exalted above any price" (Kant, 1785). Broadly speaking, indigenous people consider land as equivalent to a member of their family. Consequently, to sell land, effectively means treating the proceeds of the land sale as superior to any obligation to a member of your family. Extending the ethical logic advanced by Kant, Small suggests, "There are some categories of value that are not considered appropriate for commercial equivalence. For indigenous people, their connection to their land falls in such a category" (Small, 2008).

Concerning ideas of natural philosophy, to date, no compelling argument has been advanced that supports any one individual exclusively enjoying a divine right to a particular property interest over time. Notwithstanding the consideration that perhaps no such individual possesses divine right – though some self-proclaimed religious leaders have asserted this proposition, as have various rulers and kings – certain tribes and people have advocated positions that they do have divine right to a property. Such an *asserted divine right* differs from an individual's divine right, as this collective divine right would extend across time, embracing all people who had come before and all people who might follow, concerning their fundamental rights to access and/or control decisions concerning that property.

Consideration of the discipline of physics can be helpful in considering the inherent tension associated with property involvements. A fundamental premise of physics is that a particular place can be occupied by only one body, one element at a particular point in time. But over time, as long as those bodies/elements are not seeking to occupy the same place at the same time, many can occupy the same place. This truism of physics, then, leads to the idea that any property may have been enjoyed, experienced, and utilized by many others in times past and will, most probably, be utilized by many others in times future. Consequently, a current user of property enjoys but temporary access to that property, as many before and many after will utilize that same property, albeit, perhaps, in different forms and ways, depending upon the nature of improvements that may be conceptualized, initiated, and completed for that property.

There are practical reasons for private property ownership, including, specifically stewardship. Without private property ownership, there may be no authority, responsibility, and concern for how the consequences of a property's use may affect others, not only today but in future times. Out of naiveté, incompetence or irresponsibility, some may interact with property in ways that are destructive – not only currently but for perpetuity. Least offensive, perhaps, is a structural improvement, reflecting aesthetic insensitivity. Worse is the land use that does violence to other people, by virtue of ejecting people from the access to the land and/or conducting activities that are detrimental to others' property experiences. Most inexcusable is the wanton destruction of a property's inherent natural beauty and integrity, such as strip mining or the overt desecration of artifacts, such as the Taliban's destruction of the many-centuries-old sacred Buddhist head statues in Afghanistan (Goldberger, 2004).

Though use and ownership of property are not only central to but the essence of property rights in Western society, these considerations are only part of what is important to the relationship between an indigenous people and their land (Small, 2008). Rather, the essence of the "relationships between indigenous people and their land...is always based on non-material, non-commercial foundations and its primary significance is usually cultural" (Small, 2008). Compensating a property owner's loss may be resolved partially for investment purposes but hardly at all, when use and especially stewardship considerations come into play, for "There is something beyond occupation use rights that constitutes a core value and indigenous ownership. This means that the alienation of rights pertaining to land cannot be fully evaluated using material/commercial equivalencies" (Small, 2008).

For an investor whose motive is purely financial, whose satisfaction, and, therefore, success are measured purely in terms of the calculus of the rate of return calculation, financial consideration may be fully satisfactory compensation for the taking of a property. But not every person would feel that financial payment was, in itself, insufficient compensation, if a valued asset were taken from him.

Place Choice Plus Prosperity Equals Property Tension

Place choice is the most significant factor that differentiates society in the 21st century from society in the 17th century. Place choice simultaneously creates new opportunity for many and poses major new threats for some – especially those who have a long-standing, spiritual, even sacred, connection to places. Place choice leads to conflicts between those who aspire to interact with, even dominate a place new to them, and those who have a long connection to that place. The latter's desire for nothing more than to continue to experience the place of their ancestors, is directly compromised if not

threatened by the former's desire to establish their own new place connection to the latter's place.

Conflicts involving indigenous people and their relationships to property are directly derivative of the substantial expansion of place choices. It used to be that the people of a place were the place. What was done on behalf of the place was done on behalf of the people in that place, but it is not like that anymore. Now, the relationship between the people of a place and the place is complex, opaque, confusing, even contradictory. The people and the place are now separate, different, not the same.

Because of place choice, the economies of places are no longer isolated but are now interdependent. The overall outcomes realized by companies and people in different places are therefore much more divergent. So, rather than the rewards to enterprises and people in different places being concentrated within a narrow band, now there is much more divergence in the outcomes realized by those who are most successful, relative to those who are least successful. And, those who are most successful can use the financial rewards of their success to enjoy place experiences in other places, especially in places where they have no long-standing – or even any – prior connection.

Place choice results from the interaction of technology values, and regulations. Advances of transportation, information, communication and power technologies have made possible exponentially more and more specialized, differentiated, and interdependent place experiences and place interaction. Today, there are ten critical place choices that people make about their places (Roulac, 2006b). Specifically, people make multiple choices about the places in which to:

1. Live
2. Work
3. Travel
4. Eat
5. Meet
6. Learn
7. Play
8. Shop
9. Worship
10. Prosper

Whereas in times past, many of these activities occurred in a single place, now, increasingly, these activities occur not just in one place but in multiple places (Roulac, 2006b). In certain advanced Western societies, for example, one in five households owns a second residence.

Concurrent with place choice proliferation has been increasing and broadening prosperity. A significant byproduct of the interaction of place choices and prosperity is that growing numbers of people have the means and inclination to control property interests in places that are not their primary place of residence. So long as the people of the place were indigenous to the

place, everyone in that place knew of the place's traditions. And, people with connections to place were largely disinclined in interacting with property in that place in ways that would compromise those cultural traditions. The odds of a sacred site being desecrated by a property development project are much greater in the instance where the promoter of the development project has no personal connection to that place.

If the developer/promoter has no direct lineal interest in the spiritual and/or cultural significance of a place, the developer/promoter will likely have different priorities, and therefore make very different decisions, than if the promoter has no first hand, first person knowledge of and connection to that spiritual tradition, the circumstances that caused that particular place to be a sacred site, or if their own lineal connection to that sacredness has been lost, perhaps partly due to past place choices made.

The conflicts between indigenous people and property, then, have evolved directly from the pervasiveness of place choice, coupled with the prosperity that enables nonindigenous people to exert influence over the properties and places to which they have no long-term ties. Inevitably, the intersection of place choice and prosperity leads to property acquisitions by people not of that place, which can lead to overt conflicts with the interests of indigenous people in relationship to lands that to them are sacred.

Place choice not only threatens the integrity of culturally significant lands and sacred sites, through destructive direct development, it also poses an indirect threat through triggering wider scale, spill-over consequences, such as forest fires, which many actually start not on culturally sacred lands, but ultimately are very destructive to them. One consequence of place choice is that increasingly people are electing to build in places that heretofore were not targeted for building (McKinley and Johnson, 2007). No small amount of this new development is targeted for places in close proximity to public lands. As University of Wisconsin Forest Ecology and Management Professor Volker Radeloffer observes, "It's is like a tsunami, this big wave of development that's rolling toward the public lands" (McKinley and Johnson, 2007). And, inasmuch as public lands may contain culturally significant property generally, and sacred sites, particularly, the expanding pace of development that threatens public lands, therefore, threatens integrity of culturally significant lands and sacred sites (Miller, 2007).

Property in the 21st century increasingly is the focus of tensions between antiquity and modernity, between tradition and progress, between yesterday and tomorrow, between indigenous people and newly prosperous self-indulging people. Among the forces that contribute to 21st century property conflicts are

1. Explosion of demand for property goods and services, as this accelerating demand is confronting a fixed supply of property.
2. Escalating income inequality, enabling people from other places to bring financial resources to outbid locals for prime properties in the locals' places,

with the result that a select group has much more financial capacity to indulge in material expenditures than do others.
3. Expansion of concentrated wealth, enabling more and more people to have substantial means to acquire prime property interests in places whose inventory is increasing at a much more modest pace, if at all, relative to wealth concentration.
4. Higher primacy of place and housing, as property is assigned greater importance than previously, thereby motivating people to pay more for it than in earlier times.
5. Proliferating place multiplicity, whereby people increasingly have multiple property interactions and thereby interact with more places. People more often wish to own multiple residences.
6. Phenomenal change in property markets, whereby a substantial amount of property that was owned by the state in earlier times, has recently moved to private ownership. Significantly, in the last couple of decades, around half of the world's property, which previously was not available to the private market, has now been transferred from the state into the private market (Roulac, 2001).
7. Land tenure reforms in communist/socialist regimes, in much of Eastern Europe, Asia, and Latin America, have created phenomenal opportunities for people previously disenfranchised from property market participation, in any capacity other than as an occupant/renter to enjoy property ownership (Roulac, 2001).
8. Growing concern for the rights of indigenous people, who previously were denied property rights, or whose rights were restricted (from a Western perspective), and whose property access and use was constrained (from a cultural perspective).
9. Growing demand for limited resources, such as water, with existing market mechanisms being inadequate to resolve competing demands.
10. Escalating conflicts between traditional indigenous views of property rights and more recently created private property interests, are motivated to capitalize on quasi-monopoly circumstances concerning resources that historically and traditionally were perceived to be a resource rightfully belonging to all.

Depending upon your values, you could reach a very different conclusion concerning these and related issues. While some concerted and inspiring efforts are initiated to preserve culturally significant lands, inevitably, the onslaught of development leads to the destruction of these properties' natural state.

Your worldview ultimately determines your perspective on property issues (Roulac, 1999). If your dominant value perspective is investment motivation, present value will guide your property involvement decisions. If your dominant value is property as the means to promote experience and productivity, then *use*

value will give your property decisions. If your dominant value in viewing property is cultural tradition, than perpetual values will guide your property decisions.

Western and Indigenous Values in Conflict

Valuing a property with cultural significance by conventional modernist means is an incomprehensible presumption, in the eyes of the *property culturist*, for such an undertaking is a sacrilegious affront to indigenous people. The *property modernist*, though, would view this cultural property perspective as quaint, if not overtly antiquated, equivalent to the social context of the Luddites' opposition to technology advance. To the degree a modernist recognizes the previous or current use of a property by indigenous people, it is only so far as that history can be monetized either positively (e.g. in marketing) or negatively (e.g. transformation will require additional permits and costs related to legally protected historic sites).

The fundamental conflicts inherent in endeavoring to reconcile Western commercial concepts of property with indigenous cultural values are described by Small, who observes, "the valuation of indigenous interests, by equating them to a set of material use rights and assessing their market value, is flawed because it diluted indigenous understanding of people's relationship to the land and to the Western position. . . Valuation of indigenous interests is analogous to forcing indigenous people to price and alienate something that is as precious and as necessary to their self-identity as their own kin. It is no surprise that those who accept compensation on these grounds are extremely self-conscious of making public their acts, which are arguably equivalent to cultural treason" (Small, 2008).

The challenges of reconciling divergent perspectives and priorities concerning property is captured well by Isakson and Sproles, who write, "The exchange of property rights can be inhibited by high transaction costs, especially when the bargaining agents come from very different cultures. In order for voluntary exchange of property to occur, those with the ownership rights of the property must communicate a series of offers and counter-offers with those who wish to acquire these rights, until the meeting of the minds occurs. When the parties speak a different language and come from different cultures, this communication becomes very difficult. As a practical matter, the interests of those concerned with stewardship of lands, especially when such stewardship responsibility is addressed from the perspective of cultural significance and long-held indigenous traditions, inheritably, 'speaking a different language' insofar as it involves the determination of what might appropriately be done with those lands . Moreover when the property is owned collectively or is being acquired by a group, these groups are typically represented by bargaining agents" (Isakson and Sproles, 2008).

A complicating factor in addressing appropriate managerial practices for lands that transcend pure Western/European concepts of ownership, beyond inherent communications difficulties, is that consummating agreements concerning property use, within and between groups, may be elusive at best. As Isakson and Sproles observe, regarding land held in trust, "First the US Government has severed the right of alienation (the right to dispose land) from title to land, arguably here thinking that Native Americans would not make responsible and prudent decisions" (Isakson and Sproles, 2008). Consequently, implementing development transactions is cumbersome, if not functionally impossible. Of parallel concern is the consideration that the decision making process is inherently complex, for, "there will be little agreement among Native Americans and between non-Indians [sic] regarding exactly what the highest-end, best-use of land might be. Native Americans fought long and hard battles to regain their heritage and culture, and they're not likely to give it up simply to develop their lands commercially" (Isakson and Sproles, 2008).

A comprehensive study of compensation experience involving sacred shrines, monuments and groves in Nigeria concludes that "compensation is going to hardly be adequate for sacred sites, because of their social and cultural importance functions" (Aluko et al., 2008). The inapplicability of applying Western concepts of private property owned by a single individual, as contrasted to the concept that "land belongs to countless hosts" (Aluko et al., 2008), is the conclusion as expressed by Viscount Haldain: "The next fact which is important to bear in mind in order to understand the native landlords is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual" (Tijani, 1921).

A further fundamental consideration concerning *sacred sites* is that they perform a function "which cannot be replicated on the open market," and therefore may not reliably be valued (Aluko et al., 2007). Notwithstanding the uniqueness and irreparability of sacred sites, the evidence of compensation, paid for takings in Nigeria, is that payments are in fact substantially less than equivalent properties, lacking such sacred significance (Aluko et al., 2008).

The more assertive *property culturists* perceive themselves as representatives of and advocates for the rights of culturally significant lands and sacred sites. This position follows from a half century pattern of employing public police power to promote certain broader social interests. In particular, as police power has been extended to include a number of activities, it is not unreasonable to think that it could include preservation of culturally significant lands and sacred sites. Support for this interpretation can be found in Berman v. Parker (1954): "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional applications of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not limit it."

Where a municipality exerts control over a property's use it can be said that a "taking issue" is created. Those who misuse culturally significant land and sacred sites are in fact "taking" their special value and uniqueness from society, as society has a legitimate interest in protecting its precious resources, and as culturally significant land and sacred sites are precious resources.

Certain *property culturists* would insist that culturally significant lands and sacred sites possess legal rights, one of which is not to be wantonly debauched. For more than a third of a century, the trend of litigation and the social development of the law has been to recognize legal rights for natural objects (Stone, 1972).

There is an uneasy balance between the *property modernist* objective to prosper from exploiting the appeal of a place and the resulting consequences of the marketing success of diminishing that place's appeal. For instance, considering Waikiki (the center point of Hawaii tourism), "There is growing fear that Waikiki is in danger of losing much of that which Hawaii is known and marketed for. The Aloha spirit and unique alliance ... Waikiki has come to resemble the place from which the majority of tourism themselves come. As one astute observer put it, 'If you were to shoot a picture of Waikiki, you would think you were in Japan. And, the people who don't like that the most are the Japanese. They really don't want to feel like they never left home'" (Umenoto, 2006). An alternative approach to homogenization of sense of place is reflected by the emerging recognition of ecotourism which seeks to marry local economic dependent, preservation, and place experience (Materman, 2007).

Commercial Property vs. Sacred Property

Recently, sacred sites advocates prevailed in defeating a proposed initiative to overcome the difficulties of running a skiing facility, dependent upon natural snowfall by supplementing nature by man-made snow. The successful opposition by 13 Native American tribes argued that mountain tops are sacred. According to a *Wall Street Journal* report, "The tribes regard the mountains as living deities that would be offended by man-made snowmaking, especially if it used treated wastewater that the tribes contend would contaminate plants and spring water used in religious ceremonies. The courts compared spring snow made from treated wastewater in the peaks to requiring Christians to use reclaimed water for baptisms" (Timiraos, 2007).

Inevitably, the concept of what is sacred is less than well received by most of those who are not advocates of culturally significant lands and sacred property. Navajo spokesman George Hardeen observes, "Tribes have been saying since the foreigners first arrived that they hold their land sacred. This is not a new argument. Now we have this new yardstick," referring to the recent decision blocking artificial snowmaking (Timiraos, 2007). Whereas some would consider all lands sacred, others consider this proposition as

specious, obstructionist, even bogus. According to Eric Borrosky, general partner of the Snowball Resort near Flagstaff, Arizona, whose ski-making initiative was thwarted, "every federal project is now going to be held hostage by Native Americans saying, 'Boy, that area is significant to me'" (Timiraos, 2007).

Others assert that determination of what is sacred is more selective and circumstantial than precise and consistent. Some may pursue campaign to preserve properties in which the builders may have an interest. Mr. Borrosky asserts that such posturing is "the height of hypocrisy." Gordon Watkins, whose bed-and-breakfast in Flagstaff suffers from the restrictions on snowmaking activities, objects to the legitimacy of the sacred site argument on the grounds that "the Indians have desecrated their lands for economic purposes for decades" (Timiraos, 2007).

Strategies that can combine the existing attributes of the property through a partnership of land-oriented entrepreneurial involvements and preservations concerns offer great prospect to promote the objectives of *property culturist*s. As a case in point, a strategy of dealing with conservation easements, providing a mechanism for long time ranch families to continue to work the land, and concurrently arranging foundational funding, can enable private partnerships between ranchers and conservationists, that can promote the dual objective of ranchers and conservationists, both of whose orientation, may mirror in many ways those concerns of *property culturists* (Franko, 2007).

The increasing attention to global warming can be linked to indigenous people's concerns about the protection and integrity of their lands. A broader view of property would encompass not only those parties interested in a property's status and destiny but also people and sentient beings connected to or influenced by that property and the property itself (Roulac, 1999).

Indicative of how environmental activists may speak for the interests of indigenous people and their lands is the perspective of Kassley Sigel, a staff attorney for the Center for Biological Diversity, concerning that organization's objective to support a 70,000 population community development on the 700,000 acre Tejon Ranch located in the central valley north of Los Angeles and south of Bakersfield, who observes, "This wilderness area is iconic. It is California's heritage. There is no reason to put a new city there" (Humes, 2007).

The growing priority being placed on ethics generally suggests that the general sentiment of society is moving to be more respectful of issues of concern to indigenous people (Roulac, 2006a). To the extent that those with property involvements direct more attention to ethics and acknowledge the greater role of ethics in property decisions (Roulac, 2006a), those who have a concern that ethical considerations be appropriately considered shall have a greater prospect of their interests and concerns being addressed, than if such ethical issues were not prioritized.

Arguably, litigation that has the objective of protecting endangered species and their habitats is a form of advocacy on behalf of the interests of indigenous people. As indigenous people feel an inherent oneness with natural environment and the sentient beings that inhabit the natural environment, advocacy for the interests of endangered species and their habitats, ultimately is advocacy for the interests of indigenous people. To the extent that advocates of endangered species and their habitats, such as the Center for Biological Diversity are successful in litigation to block development that would be contrary to the perceived interests of endangered species and their habitats, then by logical extension that success on behalf of endangered species and their habitats is tantamount to success for indigenous people, viewed from a larger construct (Humes, 2007). In fact, the Center for Biological Diversity over the last two decades has prevailed in some 90% plus of the 100 or so lawsuits that it has filed, resulting in protection of some 70 million acres of habitat, much of which could be considered as being indigenous lands (Humes, 2007).

Indicative of the significance of sacred sites to society is the recent featured story on the front page of the Sunday Business section of *The New York Times* whose headline captured substantially significant issue in an aspect of this topic: "Far from the reservation, but still sacred?" (Schwartz, 2007) this article describes how land advocates believe that the history of a place should inform and, ultimately, determine the future development of a place. In Yuma, Arizona, Quechan Indian leader, Mike Jackson, "points to the sandy flatlands on the rust-colored Gila mountain ranges shimmering in the distance. 'They came this way,' he says, describing how his ancestors followed the winding course of the Colorado River and ranged over the hundreds of miles of what his now Western Arizona and Southern California.

"There's a lot of important history here, both from Quechan and the US. And, if it's up to him that history will go a long way in determining the future of this corner of the capital of West, one of the fastest growing parts of the country and a place where developers are increasingly running up against newly powerful but traditional minded American Indians leaders like Mr. Jackson.

Now, the battlegrounds are ancient sites like the religious circles, burial grounds and mountain tops across the West that Indians hold sacred and are protected by federal environmental and historic preservation laws. After successful smaller battles, Mr. Jackson is now challenging a bigger project, arguing the construction of a planned $4 billion oil refining in Arizona could destroy sites sacred to his tribe (Schwartz, 2007).

Three Property Owners

There are three primary categories of property owners: stewards, users, and investors. Although they all commonly own property, their interests and circumstances diverge dramatically. The divergent interests and objectives of

Exhibit 2 Not all property owners are alike

Attributes	Stewards	Users	Investors
Time Horizon	Perpetuity	From when commence to when complete involvement	From when commence to when complete involvement
Calculus of return	Measured by preservation of sacred and cultural legacy	Cost of occupancy and contribution to business operations and/or family life	Present value of income and sale proceeds
Currency of returns	Cultural and strategic	Strategic and financial	Financial
Specific currency	Spirit	Utility	Money
Fiduciary commitment	Trust to preserve cultural traditions	Operational efficiency and strategic contribution	Financial prudence
Role of tangible	Paramount	High	Low
Orientation toward the tangible	Ends emphasis dominates means	Means to productivity, operations efficiency, and marketing outcome	Means to realize financial ends
Role of brand and symbolism	Essence of ongoing cultural statement and tradition	Essential to marketing objectives	Pride of ownership for promotional purposes
Primary orientation concerning time	Past	Intermediate	Future
Emphasis on preservation or innovation	Preservation	Mixed	Innovation
Value to honor	Sacred	Use economics	Profit
Priority to maximize	Protection	Utility	Wealth
Critical success factor	Custodian	Utility	Growth
Outlook	What has been	What is	What might be
People commitment	Unique, collective	Specific	Undefined
Stakeholders	Many, unspecified	Very few	Few
Essence	Trust	Use	Transaction

Source: Roulac Global Places LLC
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property stewards, users and investors, are highlighted in Exhibit 2. Attributes considered, from the different perspectives of property stewards, users, and investors, include

- Time Horizon
- Calculus of return
- Currency of returns

- Specific currency
- Fiduciary commitment
- Role of tangible factors
- Role of orientation toward the tangible
- Role of brand and symbolism
- Primary orientation concerning time
- Emphasis about preservation or innovation
- Value to honor
- Priority to maximize
- Critical success factor
- Outlook
- People commitment
- Stakeholders
- Essence

The metaphoric mosaic map of property orientation depicts a very different property perspective for the steward than for the user and for the investor in property.

The *property culturist* tends to be more oriented to stewardship than to transactions, while the *property modernist* tends to prioritize the transaction over stewardship. While some *property modernists* have a very short time horizon, increasingly *property modernists* are employing a long-term perspective, thinking in terms of legacy. The *property modernist* taking this long term perspective tends to start the time count from the instant present, whereas the longtime perspective employed by the *property culturist* tends to emphasize the past much more and devote comparatively less attention to the future. The present focus of the *property culturist* tends to be on protecting property and its cultural significance from intrusions that might alter the property today and, through such alternations, therefore diminish or even destroy the property's past cultural significance.

Following considerations of the different property perspectives between stewards, users, and investors, as expressed and explicated in Exhibit 2, a valuation model that is most efficacious for one type of property owner could be less adaptable, even overtly dysfunctional, for another type of property owner. Consider *currency of returns*, by way of example. If the primary measure is financial, as it is for investors, a conversation with a user who prioritizes strategic and financial considerations has a very different dialogue dialectic than would a conversation with another like-minded property participant, whose investment prioritization leads to a financial currency of returns.

If either the investor or the user were to interact with a property steward, concerning currency of returns, the latter would insist that cultural and strategic objectives dominate. The user and the steward may, in fact, share common strategic considerations, concerns, and critical imperatives. But, then the user is concerned, at least to some degree, with score keeping and financial metrics, whereas the steward is most concerned with the preservation

of cultural legacy. Similar differences and divergences apply to the many other attributes summarized in Exhibit 2.

Property can be viewed through the prism of interaction of past–present–future time horizons and self vs. societal reference. If you focus on the past, you have very different priorities than if you focus on the present. Similarly, if your orientation is primarily self-referential, you may emphasize very different priorities than if you emphasize societal concerns. Hardin 1968 the intersections of these considerations are depicted in Exhibit 3 for certain types of property involvements. The present and perpetuity are, of course, polar extremes, in meaning, application, and implication.

The intersection of property purpose and time horizon is manifested differently for different property types. Thus, certain property types serve differing time horizons for users, stewards, and investors, respectively. The intersection of different property purposes and time horizons, ranging from short to long – including use, stewardship, and financial – are depicted graphically in Exhibit 4.

The objectives that a particular investor applies to his property involvements necessarily influence his priorities and decision criteria. With a pure goal, investors can be very focused on one aspect of property involvements. Such investors may primarily emphasize financial factors, which dominate the considerations of the majority of property investors. When additional objectives – such as social advocacy, job creation, protect landmark places and properties, cultural preservation – are added, the investors' decision priorities become more complex, especially when considered in a portfolio context. Some such investors may have many conflicting priorities, which collectively and interdependently are diverse, even conflicting, embracing both financial and non-financial considerations.

Exhibit 3 Property time horizon and referential orientation

	Referential orientation	
Time horizon	Self	Society
Past	Family residence	Preservation of sacred and culturally significant property
	Family farm	
	Family real estate company	
Present	Investment	Environmentalism
	McMansions	Housing
		Facilities
		Parks
Future	Investing	Preservation of sacred and culturally significant property

Source: Roulac Global Places LLC
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Exhibit 4 Property purpose and time horizon

	Time horizon		
Property type	Short		Long
User	Hotel	McMansion	Dream House Family Home
Stewardship	Naming rights	Iconic building	Cultural sacred site
Financial/Investor	Commodities Derivatives House flipping Hedge fund	Private equity	• Family dynasty • Investment builder • Wealth manager, investing in long term investment fund

Source: Roulac Global Places LLC
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Those whose property involvements are characterized by self-referential present emphasis, will concentrate on investments in the form of financial perspective and on McMansions from a user perspective. For those whose property involvements feature the family farm, multi-generational family house, and family real estate company, the past may loom larger than the present. Societal emphasis, with more of a present orientation, includes environmentalism, affordable housing, community facilities, and parks (Williams 2007).

A past orientation, from a societal perspective, is expressed in the form of concentration on and preservation of sacred and culturally significant properties. Those with a past orientation and strong societal perspective will likewise extend an earlier concentration of preservation of sacred and cultural properties into the continuous future.

Depending upon your place, you may have a very different view of property. People in one place may view property very differently than may people in another place. Place informs property perspective, in terms of such significant attributes as:

- Ethical foundation
- Orientation
- Time horizon
- Reference
- Sanction of institution possession
- Transaction decision basis
- Value presumption
- Institutional context
- Compensation for taking

One comparative assessment in terms of how the eastern/Asian view of property diverges dramatically from the Western/American view of property, in terms of these attributes, is illuminated in Exhibit 5.

Exhibit 5 Eastern/Asian property vs. Western/American property

Attributes	Eastern/Asian	Western/European
Ethical foundation	Spirituality	Utilitarianism
Orientation	Community concern	Self-interest
Time horizon	Continuous	Short
Reference	Society	Individual
Sanction of institution of possession	Society	State
Transaction decision basis	Trust for the future	Negotiated between parties
Value presumption	Precious – Unique	Commodity – Disposable
Institutional context	Cultural tradition: the past dominates the present and guides the future	Military force: might makes right
Compensation for taking property	Property is unique and cannot be compensated in financial terms	Measurable and therefore compensable in financial terms

Source: Roulac Global Places LLC
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Reconciling Competing Property Motives

Another perspective on the motives and priorities that can govern property is offered in Exhibit 6, which lists a spectrum of property involvement motives and priorities. Inescapably, increasing the scope of investment objectives complicates strategic decisions that market participants face. The narrower the scope, the sharper the focus, and therefore the easier the implementation and execution program. But, as the collection of objectives expands, especially as the objectives

Exhibit 6 Spectrum of property owners' involvement motives and priorities

Property involvement motives	Illustrative investors
Financial	Majority of investors: individuals/ pensions
Avoid investments that compromise/violate investment values	Socially responsible investors
Hedge high risk industry	Start-up high risk technology enterprises
Promote sector specific investment activities – real estate development	Construction labor union
Property is major component of enterprise	University hospital
Protect land from destructive development	Land conservative trust
Promote programmatic objectives: housing, economic development	Non profit housing corporation
Champion non-financial cultural objectives: sacred sites, environmental	Quasi public agency with high purpose public policy priorities

Source: Roulac Global Places LLC
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are less rather than more coherent, more conflicting that congruent, the strategic priorities of decision makers evolve to be more dispersed than concentrated.

To date, the majority of the literature of the property discipline focuses on single objectives. Such single objective focus is, as noted above, much easier to implement than is more complex focus. But the reality, today, is that more and more stakeholders in economic enterprises have multiple objectives. Given that they have multiple objectives, these same stakeholders insist that all objectives be respected, promoted, and championed. Simply stated, these stakeholders expect balance in pursuit of multiple objectives, recognizing that some of these objectives may be in conflict with other objectives.

With the growing prevalence of multiple and often competing objectives, the concept of a *balanced scorecard* has emerged to measure corporate business performance (Kaplan and Norton, 1996). So, increasingly involvement in property should lead to incorporate the *balanced scorecard* concepts to combine consideration of financial motives and culturally significant priorities.

Central to reconciling competing priorities concerning spirituality, sacred spaces and profit-seeking property involvements is to consider the divergent objectives of the three major participants: investors, users, and stewards. While many others may perceive themselves as being stakeholders in property involvements, unless they establish some legitimacy in the role of *de facto property stewards* – which may, with sufficient initiative, ingenuity and persistence, be translated into a de jure role – the decisions concerning properties are made by those with ownership interests.

The relative relationships among the financial–culture dimensions of property involvements are illustrated in Exhibit 7. Motives of property involvements can be positioned along a spectrum of financial arrangement, ranging from high to low, and culture, ranging from high to low. Investors generally prioritize finance and de-emphasize culture, while users may provide attention to both financial and cultural considerations, albeit not to extremes. Finally, stewards tend to downplay finance and highlight culture.

As seen in Exhibit 7, the user straddles financial and culture motives. Both investors and stewards need to be sensitive to the polar extreme considerations that may motivate their involvements. The more the investor can participate in culturally significant property involvements, the more likely the properties that comprise the investor's portfolio can manifest iconic attributes, which themselves can command greater significance, meaning, therefore, brand value. Expressing this in another way, patrons of property goods and services on offer by the businesses operating in an investor's property will pay premiums for cultural significance over what they would pay, were such attributes lacking.

Similarly, from the stewardship perspective, to the extent the property can manifest certain financial viability, specifically appealing to and offering the same motives as would be favored by the property user, the more efficacious, rewarding, and significant may be the stewardship role. A property held with

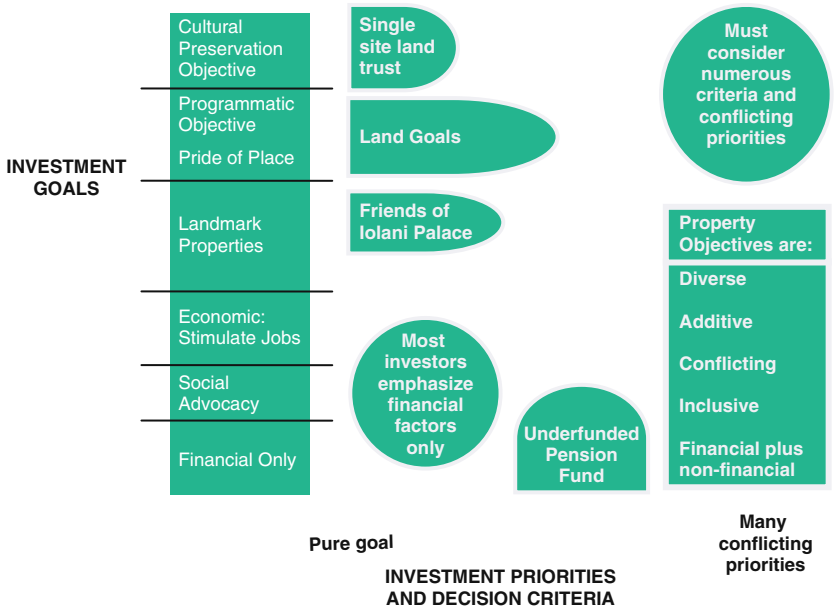


Exhibit 7 Divergent investment objectives influence priorities and decision criteria for property involvements
Source: Roulac Global Places LLC
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stewardship objectives that combine a user aspect – essentially allowing people to experience the property through offering a value proposition that motivates those people to pay meaningful consideration for their place experience – may, through appealing to such user motives, generate financial resources that provide the financial means to fund the costs of stewardship. In the best of circumstances, certain stewardship properties generate sufficient resources not only to pay their own way but also generate financial resources that can be used for the stewardship of other properties that are not self-sufficient. Thus, the ideal property stewardship outcome is to not only be self-sufficient but to generate additional financial resources that can fund additional stewardship purposes.

Thus, rather than the property being a financial burden, whose operating economics must be funded from other sources, a self-sufficient property, that generates financial revenues in excess of the cost of operation, may provide a much more positive stewardship involvement than might a property in which such positive financial circumstances are lacking. A property that generates sufficient financial resources, through combining some revenue-generating user(s) experiences, can provide the financial means to better maintain, preserve, and manage the property than would be the case, were that revenue-generating aspect be lacking.

More than Finance

When the significance of property extends beyond the financial statement, financial calculation no longer is an adequate currency. What is meaningful to one person may be meaningless to another. The divergence may become more pronounced, when one extends the dimensions of time beyond the present, to the past and future. And, when the point of reference is not just one person's perspective or a particular group's perspective, but to include a people's or tribe's perspective, the differences become much more significant.

When you think of property in purely financial terms, financial compensation is adequate. But if you think of property as more than rents and cash flow, then financial consideration is totally inadequate. Notably, this issue was central in the process of the creation of the World Trade Center in Lower Manhattan, New York City. The power of Eminent Domain was employed to condemn the properties of various retailers, located in the district that is now the site of the World Trade Center (Glanz and Kaplan, 2003). These small business owners could be considered as a de facto mini-tribe, which was destroyed, when the properties in which their businesses operated were taken.

Though the proprietors of these small businesses had built their commercial lives in that particular place, benefiting from not just their own store identity but also the collection of the many stores, which occupied that particular place, the Port Authority by its position and action, reflected indifferences to the economic hardship rendered by its condemnation initiative. Though the relocation allowance might have covered some part of the cost of moving the store to a new facility, in no way could such a modest payment compensate for the destruction of the business. Save for a new notable instance, the majority of proprietors lost not only the value of their businesses but, perhaps more importantly, a way of life: specifically, presiding over their business and the community represented by their combined business. That way of life could not be and was not replaced (Glanz and Lipton, 2003).

Following the destruction of the Twin Towers as a consequence of the September 11, 2001 terrorist attack, control of the property itself loomed large, assuming symbolic significance that transcended financial concerns (Glanz and Lipton, 2003). Though many attempted to take over the interests of the World Trade Center Properties, its controlling member and spokesman, Larry Silverstein, asserted that his involvement was motivated not by money alone. Indeed, he felt an obligation to rebuild the World Trade Center for the benefit of the people of New York (Glanz and Lipton, 2003).

The inadequacy of financial payment per se, in terms of compensation for a taking of a property interest, is visibly illustrated in the instance of the conflicts concerning the use of the World Trade Center Site, whose Twin Tower improvements were destroyed by the terrorist attack of September 11, 2001. Though many asserted that the victims' families interests dominated any other public purpose, ultimately their concerns and interests – as deeply felt and central to the

victims' families – were subordinate to the private property interest held by the World Trade Center Properties, the owner of the master lease and leaseholder improvements, which had been acquired earlier in 2001 from the Port Authority of New York and New Jersey (Glanz and Lipton, 2003).

Externalities and Property Value

Many forces, external to the property boundaries per se, influence the value of the property (Roulac, 2001). Many of the forces that create property value are associated with other properties. As the value impact process involves both positive creation effects and negative destruction effects (Roulac et al., 2005), necessarily the relationships between properties can be both positive and negative. Functionally, a *value transfer of benefits* can enhance the value of certain properties, just as a *value transfer of detriments* can diminish the value of certain properties.

Some properties necessarily create more positive value transfer benefits than do other properties. Similarly, some properties are meaningfully more significant beneficiaries of value transfer from other properties. This issue is of particular note for indigenous property valuation, inasmuch as indigenous property is more likely to create substantial positive value transfer effects for other properties, than would be the reverse situation of other properties enhancing indigenous properties.

While there is growing concern about environmental quality, many do not directly recognize the linkages and connections between environmental quality and economic activity (Power, 1996). All too often, the "environment" is treated separate and apart from the discipline of economics. In fact, there is a direct connecting linkage between economic activity, specifically the permanent economic base of places, and the quality of a natural landscape (Power, 1996).

People indigenous to a place are more likely to have a direct connection to the natural landscape of that place, than might people who are not indigenous to that place. Further, the most prominent aspects of the natural landscape are more likely to be significant to indigenous people than to other people without an established place connection. Consequently, those who prioritize the interests of indigenous people would tend to place more emphasis on the natural landscape than on economics, per se. But, those who would prioritize economics would tend to deemphasize the natural landscape. From an integrated perspective, there is a close interdependency, for as the quality of the natural landscape is an integral element of the permanent economic base of a community (Power, 1996).

Power argues that environmental quality is far more than aesthetic concern, but rather is an integral element of economic vitality, for "a community will not show much vitality, economic or social, if no one wants to live there. In places where most people are just putting in time until they can afford to move away, investment will be depressed and economic infrastructure, both public and

private, will be underdeveloped. The economy will slavishly follow fluctuations in distant commodity markets, and the community, populated by people uncommitted to place, will contain a disproportionate number of transients or commuters" (Power, 1996, pp.237–238).

Independent of the contribution that *pride of place* resulting from positive environmental quality may make to economic activity, a desirable natural landscape inherently enhances the appeal of a place (Power, 1996) and, therefore, the value of property in that place. Further, a desirable natural landscape may be directly connected to the cultural consequence of a positive social ambiance, in and around that place.

So, then, a positive natural landscape, connected to a positive social environment representing both the aesthetic and community attributes of place, can be crucial to enhancing the appeal of place. As a general proposition, those places that have greatest cultural meaning and sacred significance to indigenous people will often be closely connected to what might be perceived, independent of knowledge of the history of that place, as a "desirable natural landscape." Thus, indigenous property priorities strongly contribute to a desirable natural landscape, which landscape is enjoyed by those who may be innocent of the property's cultural significance and the sacred priority to indigenous people.

Positive Place Energy

To the extent places that are important to indigenous people are not only respected and honored but not dishonored, then the community ambiance shall be more positive, than it might otherwise be. Expressing this another way, conduct destructive to a place will inevitably be manifested through less than positive, adverse, even negative energy. Conduct that is congruent with places' legacy, specifically cultural traditions and sacred significance, will necessarily be more in harmony with that place and therefore more contributory to positive energy. Positive attitudes of indigenous people in the context of places contributes to positive energy for those places, just as negative attitudes of indigenous people are manifested in negative place energy.

Indigenous people, who are more comfortable with and secure in their places, will necessarily be more accepting of others, who might wish to have some interaction with and/or an involvement with their places. If indigenous people are less comfortable with and secure in their places, logically and appropriately, they may be more inclined to be less receptive, more antagonistic, even openly hostile to those who might desecrate their places.

The central 21st property challenge is to reconcile spiritually sacred places and profit-seeking property involvements. Effectively responding to this challenge mandates the proper balance of intersection of such factors as:

1. Indigenous peoples' pride of place, especially culturally significant places;
2. Non-indigenous people treating culturally significant places with respect;

3. Indigenous people not being antagonistic, but even being receptive toward non- indigenous peoples' place interaction with culturally significant places;
4. Good relationships between indigenous and non-indigenous people lead to positive place energy;
5. Positive place energy creates, in turn, more appealing place;
6. More non-indigenous people are attracted to culturally significant places;
7. People pay premiums for the experience of culturally significant places;
8. Non-indigenous people enjoy positive experience of culturally significant places;
9. Non- indigenous people treat culturally significant places with respect.

The intersections of respect, positive energy and place appeal forms a virtuous circle of components, which combine to create enhanced place value, as depicted in Exhibit 8.

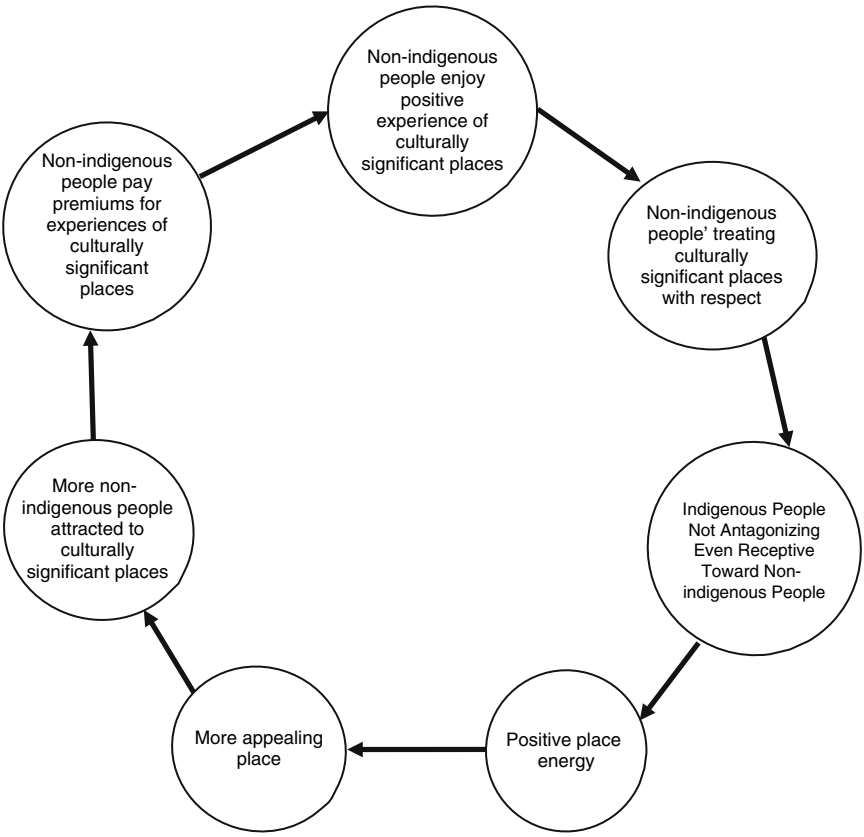


Exhibit 8 Virtuous circle of respect + positive energy + place appeal = enhanced place value
Source: Roulac Global Places LLC
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Competing Property Rights Theory

Increasingly, a property's cultural significance is emerging as a separate, distinctive property right. This property right is most often held by those who do not, in today's economy, hold a direct ownership interest in the property. Rather, this property right, may be considered to "run with the property," extending back in time to those who in earlier periods – generations, centuries, millenniums ago – had involvement with and an interest in the property. Because their ancestors were on that property, which property is a source of and central to their the history, the property is important to them culturally, they assert those interests and considerations inform, and, prospectively, ultimately control what ever might be done with that property in the future.

Increasingly, there is recognition of culturally significant property (Venning, 2007). Today, there are some "861 sites of cultural or ecological importance around the world, the United Nations Educational Scientific and Cultural Organization (UNESCO), has put on its protected list, updated this summer, it includes everything from historic cities and landmarks, such as Georgian Bath, as is Faz Medieval Medina and the Port de la Lune quarter and in Bordeaux, to newer buildings, such as the Sydney Opera House, and natural landscapes such as the Grand Canyon and the Florida Everglades" (Venning, 2007).

According to UNESCO spokesmen, Ronni Emalan, "The sites are of outstanding universal value, more than wonderful and quite unique." There is considerable competition amongst places to be added to this list, as only 22 sites are selected for world heritage status each year. As coveted as is this recognition, as Mr. Emalan points out, "a listing generates revenue, interest in tourism, but it can also create pressure as the management of the site becomes an increasingly urgent question."

The UNESCO world heritage recognition enhances a place's brand, stimulating tourism and local business alike, leading to strongly increasing property values. Visitor interest which might formerly have been confined to the prime summer tourism season now can extend year round. As Jurrasic Coast tourism manager Sally King observes, "We're now on the world stage" (Venning, 2007).

The conflicts between indigenous peoples and those who tend to favor modernity, are really property rights conflicts. *Property modernists* exercise property rights that are acquired for financial consideration. *Property culturists* believe that the dominant source of property rights is time, in place – and more explicitly by direct lineage to those who have connection with that place.

Indigenous people and non-indigenous people have fundamentally different perceptions of the concept of property rights. If you acquire a collection of property rights, paying financial consideration, you expect to do with

those property rights whatever is explicitly allowed – and not overtly precluded – by the exercise of those property rights. If your property rights, by contrast, are derivative from your ancestors' long ties to that place, unless you own direct (and legal as recognized by the government) title to the property interest in question, your particular set of property rights are more conceptual than legal.

In the realm of relationships, values, cultural traditions and spiritual practice, much of what is most important to *property culturists* is not necessarily legally mandated, formally codified, or even expressed in any official writing. For those who are *property modernists*, the conceptual property rights of *property culturists*, are interpreted as ambiguous, perceived as aspirational and often dismissed as irrelevant. That tension would ensue from these two competing perceptions of the world is inevitable and certainly not surprising.

So far, the resolution of these competing concepts more often favors the *property modernists*. But a significant issue, one which is only now beginning to be considered explicitly, is that if the *property modernists* have their way, if the *property modernists* literally trample into oblivion the values and priorities of the *property culturists*, then the very appeal of the places that the *property modernists* have now come to dominate, shall be destroyed. Inevitably, if left unchecked, the *property modernists* would turn sylvan settings into the urban equivalent to a denuded strip mine. Consequently, promoting the *property culturists* values is ultimately highly beneficial to the *property modernists*, even though the latter may not initially necessarily recognize that perspective outcome.

Toward Reconciliation of Spirituality and Property Prosperity

The green building movement offers a means of reconciling, even integrating, the competing concerns of *Property Modernists* and *Property Culturist*. As environmental considerations increasingly influence consumption decisions – a survey by Kimpton Hotels and Restaurants discovered that one in six of their patrons selected properties because of their environmental practices – championing strategies and tactics that respect and promote the cultural significance and sacred attributes of lands, offers an interesting opportunity for competitive distinction (White, 2007).

Consider the cause effect relationship between:

- Land conservation to keep property in natural habitat
- Environmental protection
- Green building
- Cultural significance
- Sacred site

The natural environment for many is per se culturally significant, especially for those who have long lineal indigenous connection to lands. To promote the conservation objective of protecting land from irresponsible development, necessarily you are aligned with those who are concerned with preserving the cultural significance and sacred site attributes of land. If you go further through environmental protection and land trusts stewardship approaches, you necessarily promote recognition and protection of significant lands and cultural sites, by virtue protecting land from irresponsible destruction.

Much of conservation is motivated by appreciation of the natural beauty of a place, leading to desire, next to motivation, and then ultimately to action to initiate strategies, programs, and financial funding support to preserve that place. Conservation and issues can be considered to be a precursor to the objectives of those with cultural significance and sacred concerns.

Prospectively, one of the most efficacious strategies that might be employed by those with concerns for protecting lands with cultural significance is to address the opportunities of *experiential stewardship*. Experiential stewardship combines the dual strategies of allowing, even encouraging public experience of culturally significant properties, while concurrently pursuing programs that fund the preservation and protection of culturally significant lands more effectively than might otherwise be achieved. And, through broad exposure, especially if the program is effectively marketed and managed, substantially positive financial resources may be realized, such that enable those trusted with the stewardship of culturally significant properties to generate sufficient financial resources from that endeavor to fund not only the direct costs of property stewardship, but also to generate surplus funds that can be used for larger scope culturally significant and sacred site protection initiatives. Thus, successful experiential of stewardship of one property can provide the financial means to promote the stewardship of other properties.

A further, and especially significant, prospective derivative outcome of experiential stewardship of culturally significant lands and sacred sites, is that by providing broader exposure and access to such properties, enhanced general societal awareness of the importance of culturally significant lands and sacred sites may be promoted. This may, in turn, lead to targeted donations from those exposed to the experience of such culturally significant and sacred lands, who could be motivated to direct targeted donation funding to support not only those lands but cultural significant lands widely. Thus, experiential stewardship could be a means of not only of preserving and enhancing design of culturally significant lands, but of the general concept of protecting culturally significant lands widely.

An important consideration in reconciling the dual motives and intentions of *property modernists* and *property culturists* is that the former are much more attuned to marketing and promotion, than the latter. The *property modernists*, who have the financial means to express place choice at a substantial level, do so largely because of significant societal financial rewards resulting directly

from their significant acumen, skill and success in promoting and marketing. Essentially, the *property modernists*, whose self-indulgent property aspirations may be of greatest concern to the *property culturists*, are, quite often, superb marketers of their own skills and enterprises' products and services. Property culturists generally tend not to possess similar marketing, acumen, skills and resources.

In contrast to *property modernists'* advanced marketing skills, *property culturists* who aspire to achieve their objectives of preserving culturally significant and sacred sites, can achieve their objectives by matching *property modernists'* marketing methods and talents. Some individuals, of course, blend the *property modernist* marketing skills with *property culturist's* sensibilities. This blend of marketing talent and *property culturist's* sensitivity may evolve in several ways. Some individuals may possess dual, balanced, matching marketing business talent, and love of place. Others may start with a love of place and subsequently develop business talent, as a means of promoting objectives, derivative of that love of place. Others may develop first business talent, and then, subsequently, develop a love of place, which prompts them, in turn, to apply their business talents to promote their love of place.

Those *property culturists* that aspire to be most effective can do so by pursuing a multi-prong strategy to promote awareness of culturally significant lands and sacred sites. Such a strategy is motivated by the recognition that if the broader society generally and the most powerful property resources, *property modernists* specifically, do not have awareness of the importance of culturally significant property and sacred sites, then any confrontation necessarily starts with *property culturists* in a most disadvantaged position.

An effective *Property Culturist* strategy to promote broad awareness of such objectives, through creating a dialog *before* specific confrontations may occur, has multiple benefits:

- With greater awareness, prospectively, sympathy and community support could be generated from the *property modernist segment of* greater society who may become aware of *property culturist's concerns*.
- The context in which conflicts might be considered prospectively may be more advantageous to the *property culturists*, to the extent they take the initiative to create awareness of their concerns and priorities, so that such conflicts may ensure are not framed as obstructions to progress.
- The more effective the *property culturists* are in advancing their agenda and objectives, the more likely *property modernists* may be able to take some of those factors into account, when planning their projects.
- Prospectively, *property culturists* may be able to motivate *property modernists* to pursue projects that are fully in compliance with *property culturist* concerns.
- Ultimately, the outcome of an effective *property culturist* campaign may motivate *property modernists* to provide financial resources to support their objectives, not only for a particular project, but on a broad, overall basis.

Property culturists need to become very astute in the *property modernists'* skill set. Concurrently, *property modernists* would do well to adopt the *property culturist's* awareness of their cultural heritage and the history of the land, and ultimately, *Property modernist* may develop a respect for, love of and even reverence toward, the land, so, too, can the *property culturists* learn much, about the *property modernists* life and way of being. In essence, the *property culturists* should *walk a mile in the moccasins* of the *property modernists*.

The *property culturists* should pursue proactive strategies, rather than being reactive and defensive, concerning their cause generally and each specific culturally significant land and sacred site specifically. By having a strategy in place, establishing organizations to support that strategy, and ultimately providing the requisite systems and structure, the *property culturists* are much more likely to achieve their objectives. Simply stated, *property culturists* cannot afford to be passive and reactive, they must be initiating and proactive. *Property culturists* must take the initiative to organize the resources to support their objectives. Property culturists should seek financial funding, in advance not when under duress and pressure. Although urgency can be a means to urge action, for major, complex undertakings, that are influenced by multiple factors, especially when time pressure is short, the odds of failure may be greater than the odds of success. Just as it is far better to drill the well before the water runs dry, so, too, is it far better to initiate the overall strategy and relationships building in advance rather than after the fact.

Though a very different mindset in relationship to property is employed by the *property culturist* than by the *property modernist*, the preferred property practitioner of the 21st century shall blend the reverential respect of the *property culturist* and the economic and commercial acumen of the *property modernist*.

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This Land Is Your Land, This Land Is My Land: Toward a Global Analysis of the Determinants of Successful Indigenous Tribal Land Claims

Robert A. Simons and Rachel Malmgren

Abstract With colonial occupation, independence, migration, inter-tribal warfare, and other changes in government, indigenous tribes have lost their lands. This exploratory research considers indigenous and tribal land claims on a global basis. Over the years, indigenous peoples have lost their collective property rights to own, use or exclude others from utilizing their traditional lands. Many countries, including the United States, India, Canada, South Africa, and others, have begun to develop processes by which land claims can be processed, and lands or money returned to the original groups. We compare the various legal systems for this process. To accomplish this, we have surveyed available data, which are collected by countries that include laws present in those nations and their constituent sub-national bodies, cases of tribal claims, basis for the claims, and court and financial outcomes. Case studies for several counties and their outcomes are described. Using inductive learning from case studies, a research design for an international study for modeling successful land claims is set forth.

Introduction and Overview

With colonial occupation, independence, migration, inter-tribal warfare and other changes in government, many indigenous tribes have lost their original lands. This exploratory research considers indigenous and tribal land claims on a global basis. Over the years, indigenous or tribal people have lost collective property rights to own, use or exclude others from utilizing their traditional lands. Many countries, including the United States, India, Canada, South Africa, and others, have begun to develop systems by which land claims can be processed, and lands or money returned to the original groups if the claims are upheld. The various legal systems for this process are compared in order to

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accomplish this. Information is collected by a country including laws present in those nations and their constituent sub-national bodies; cases of tribal claims, basis for the claims; and court and financial outcomes. Country land claim process case studies for four countries are described. Using inductive learning from case studies, a research design for international modeling of successful land claims is set forth.

Contrasting Private and Tribal Ownership Models

Tribal ownership is a communal or collective concept, where a number of individuals and families with a common ethnic or racial background own land collectively. The land is dedicated to a tribe, and may be nominally owned by the chief. Tribal members occupy parts of the tribal lands at the pleasure of the chief and have no claim on the property as a whole. This is fundamentally different from private property, where the property owner has much more control, usually total control, subject to zoning or other laws of the land.

The Western and European notion of private real estate as a bundle of rights is a relatively old idea, dating back to early scripture. The Western fee simple model includes several intertwined rights of property ownership, including use and enjoyment of the land, right to control the land (including the right to exclude others from coming onto the property), and the right to dispose of the property in a timely manner (Bell et al., 1999; Simons, 2008). These rights generally pertain to the surface of the land. It is also possible to assert air rights (including the right to light and clean air, as well as development rights) and mineral rights to subsurface assets such as oil, gas, water, and precious metals. These rights are vested in an individual or corporate owner, and usually the rights are bundled together.

Communal Rights: Traditional Land Ownership

Traditional, customary or tribal rights are a type of collective or communal ownership based on a common distinct ethnic, tribal, or clan bond or relationship. The notion is typically self-defined, and may coincide with a distinct language or dialect. In many cases, tribes are officially defined or recognized by a national government authority. Current or traditional tribal lands are typically held in the name of the chief or in trust by the national government or in a tribal corporation for benefit of the members. Land is communal, so it cannot be sold. Because it cannot be sold, it likewise cannot be used as collateral for a loan. Thus, many tribal lands suffer from a shortage of investment capital for economic and community development.

Some indigenous tribal land arrangements never involved full ownership: the tribe was nomadic, and only desired the right to use the land for hunting, fishing, gathering, or growing. Many tribal traditions exclude the notion of private property.

When tribal lands have been lost over time due to tribal warfare, changing demographics, national war, changing of national boundaries, treaty arrangements resulting from colonial activity, or other reasons, tribes may attempt to recover their past ownership status. How successful they are and how the tribal claims process works is the focus of this study.

Other Examples of International Land Claims and Economic Agreements

In addition to tribal or indigenous land claims, there are numerous examples of special economic zones by treaty, with right of reversion. For example, Hong Kong was just returned to the Chinese in 1997 after 99 years of British control. This is despite the fact that the Chinese government fundamentally changed over the time period. The territory neighboring Hong Kong Macao (Portugal/China) is also on an extended lease. Guantanamo Bay (US/Cuba), as well as U.S. military bases in Europe, Guam, and Japan are also examples of large sections of property that have been devoted to use by some type of agreement, although the Guantanamo Bay occupation is contentious.

Scope of This Research

The study is organized as follows. The first step is to define what a tribe is, and determine how many there are currently in the world, including how many have ceased to exist, or lack formal recognition. This includes characterizing the relationship between tribes and their national government(s). The next steps include a literature review of indigenous land rights and research by international bodies on land claim issues and related topics. This draws from numerous disciplines, including anthropology, real estate/property, and other fields. Next, brief case studies of land claim processes or examples in Canada, and the United States are set forth. This yields a synthesis of political and legal issues, and national initiatives for tribal land claims. This leads to a list of factors or variables associated with successful land claims, which could then be entered into a statistical model, ideally utilizing meta-analysis techniques. The dependent variable would be the successful reclamation of tribal lands, or financial remuneration for the loss. This study sets forth the likely variables in such a model but does not perform any data analysis.

This research does not include several types of land claims because the scope of the assignment is tribal or national homelands. These smaller claims are

important but are too numerous to mention. They include smaller project-based eminent domain, taking for a public purpose (e.g., roads, shopping centers, etc.), individual land claims against the state but at a private property rather than communal level; or property disputes between individuals. It does include international disputes where the basis of the claims can be considered tribal land claims, broadly defined.

Indigenous Tribes and Their Current Governments: At Odds

There are over 190 nations in our world, and most of them had different borders 100 or 1,000 years ago, and some nations did not even exist then. This process is common in most continents. For example, Europe still has ethnic wars in Kosovo. Also South America was colonized by the Spanish and Portuguese, and North America by the English, French, Spanish and Dutch. Western Asia, the Middle East, and Northern Africa have been occupied by Islamic forces, Mongols, Ottomans, and the British, among others. Throughout the world only Antarctica has escaped tribal issues. As demonstrated below, tribal issues are volatile and unresolved claims are frequent. To complicate matters, much of the colonization has a religious dimension, with many native tribes converted to Christianity or Islam. Thus changing borders is an unfortunate but normal process, considered over the long run.

The Nations

In North America, The United States and Canada grew at a rapid pace, swallowing up hundreds of Native American tribes since the 1700s. There are over 400 recognized tribes in the United States, and at least 60 in Canada. Many tribes have land reservations, but these are often in places other than their traditional homelands, and in virtually all cases the lands currently held by the tribe are smaller than the original tribal range. Both nations have set forth a process to reconcile these land claims. The U.S. process was largely completed about 40 years ago, although some tribal cases are still in the U.S. courts.

In Asia, the Soviet Union grew to incorporate formerly independent (e.g., Latvia, Estonia, and Georgia) countries, then, after the failure of the communist experiment, shrank back to ethnic-based national borders in the early 1990s, disgorging the former republics, which for the most part (with notable exceptions such as Ingushetia and Chechnya, which remain part of Russia) evolved back into national states. The Middle Eastern map was drawn primarily by the British in the early part of the 20th century, with countries like Iraq containing several ethnic groups (Shia Muslim, Sunni Muslim, and Kurds). The Kurds are spread out over four nations, without a national homeland. India has hundreds of indigenous tribes and has recently started a tribal claims process (Forests.org, 2005).

Africa was heavily colonized by European and Arab/Muslim imperialist powers. For example, South Africa's borders were set primarily by the British as recently as in the middle of the 20th century, reorganizing a dozen or more Southern African tribes (primarily the Sotho, Tswana, Zulu, Xhosa, as well as the Dutch Africaaner settlers). Setting the South African borders also affected the borders and ethnic makeup of the neighboring states of Botswana, Namibia, and Zimbabwe. This process was further complicated by the 50-year reign of the apartheid government, which created tribal homelands, and favored some tribes over others. After apartheid was overthrown, many tribes and other groups wanted to get land back, and there is an emerging legal process for this (Ghyoot, 2007). Also, alliances between the South African apartheid government and certain tribes (e.g., the San people) in neighboring countries resulted in the tribes relocating to South Africa (similar to the Hmong people from Laos relocating to the United States after the Vietnam War).

Thus, there are numerous tribal entities in flux throughout the world. Numerous tribes currently exist, retain a tribal identity, and often a language, yet must exist in a larger-than-tribal national entity (a recognized nation). Some of the tribes still occupy all or part of their original lands; others do not and want all or part of their original lands back.

Against this background of tribal awareness, the nations those tribes inhabit are not all stable. Some national entities are fairly well established in stable boundaries (for example, both North and South America and island nations such as Iceland, Madagascar, Australia, and Great Britain), but most nations of the world have had some changes to their boundaries within the last hundred years, and a substantial number have had changes within the past 25–50 years. The former Yugoslavia, former USSR, and most of sub-Saharan Africa are in this category. Changing borders and types of government, vacillating between monarchies where large tracts of land were held by the sovereign, communist/socialist states where land was owned by the state, dictatorships or countries that recently had a military coup d'etat and are under military rule, and emerging democracies mixing private and public/communal land economies are most common. The newer democratic governments trying to build a case for their own legitimacy often run contrary to tribal interests, which may factionalize the electorate. However, tribal bonds are strong, and often governments attempt to redress past perceived wrongs in terms of returning tribal lands to their original owners. One common problem is that the (formerly) tribal lands have been occupied by non-tribal members. In some cases, tribes have won settlements through lawsuits or a formal claims process but have not had their lands returned. Instead, they were awarded money.

With respect to data availability, Exhibit 1 includes countries studied throughout the monograph on Indigenous Peoples and Real Estate Valuation, their name, land area, type of government, GDP/per capita, population, tribal groups, international border disputes or internally displaced persons, and land claims. If known, it is also listed if they have any indigenous tribal peoples, and if

Exhibit 1

Country	Australia
Land area (sq km)	7,686,850
Population	20,434,176
Ethnic/ Indigenous	1% Aboriginal
Government type	Federal Parliamentary Democracy
GDP per capita	$33,300
Relevant international border disputes	East Timor and Australia agreed in 2005 to defer the disputed portion of the boundary for fifty years and to split hydrocarbon revenues evenly outside the Joint Petroleum Development Area covered by the 2002 Timor Sea Treaty; East Timor dispute hampers creation of a revised maritime boundary with Indonesia in the Timor Sea; Indonesian groups challenge Australia's claim to Ashmore and Cartier Islands; Australia closed parts of the Ashmore and Cartier Reserve to Indonesian traditional fishing and placed restrictions on certain catch; since 2003, Australian Defense Force leads the Regional Assistance Mission to the Solomon Islands (RAMSI) to maintain civil and political order and reinforce regional security
Tribal land claims	Legislation to return property rights to Aboriginals has been developed and progress is pending, since about 2000. (Small and Sheehan, Sheehan)

Exhibit 1 (continued)

Country	Botswana
Land area (sq km)	600,370
Population	1,815,508
Ethnic/ Indigenous	79% Tswana; 11% Kalanga; 3% Basarwa; 7% other
Government type	Parliamentary Republic
GDP per capita	$10,900
Relevant international border disputes	Concerns form international experts and local population over the ecology of the Okavango Delta in Botswana and human displacement scuttled Namibian plans to construct a hydroelectric dam in Popavalle along the Angola-Namibia border; Botswana has built electric fences to stem the thousands of Zimbabweans who flee to find work and escape political persecution
Tribal land claims	Basarwa (San) have unresolved tribal rights in desert areas

Exhibit 1 (continued)

Country	Canada
Land area (sq km)	9,984,670
Population	33,390,141
Ethnic/ Indigenous	2% Amerindian
Government type	Constitutional Monarchy that is also a Parliamentary Democracy and Federation
GDP per capita	$35,600
Relevant international border disputes	Managed maritime boundary disputes with the US at Dixon Entrance, Beaufort Sea, Strait of Juan de Fuca, and around the disputed Machias Seal Island and North Rock; US works closely with Canada to intensify security measures to monitor and control legal and illegal personnel, transport, and commodities across the international border; sovereignty dispute with Denmark over Hans Island in the Kennedy Channel between Ellesmere Island and Greenland
Tribal land claims	The Canadian First Nations (tribal) claims process has been active since late 1990s, and continues today. Over 60?claims have been processed (Simons and Pai).

Exhibit 1 (continued)

Country	Ghana
Land area (sq km)	239,460
Population	22,931,299
Ethnic/ Indigenous	45.3% Akan; 15.2% Mole-Dagbon; 11.7% Ewe; 7.3% Ga-Dangme; 4% Guan; 3.6% Gurma; 2.6% Grusi; 1% Mande-Busanga; 1.4% other tribes; 7.8% Other
Government type	Constitutional Democracy
GDP per capita	$2,700
Relevant international border disputes	Ghana struggles to accommodate returning nationals who worked in the cocoa plantations and escaped fighting in Cote d'Ivoire. Refugees 38,684 (Liberia), 14,136 (Togo)
Tribal land claims	The majority of land is communally owned. Land can be granted for development by a formal process which includes registering the title, paying a rent, and commencing development within one year. (Abdulai and Ndekugri)

Exhibit 1 (continued)

Country	India
Land area (sq km)	3,287,590
Population	1,129,866,154
Ethnic/ Indigenous	72% Indo-Aryan; 25% Dravidian; 3% Mongoloid with 8.1% tribal people (Chandigarh, Delhi, Haryana, Pondicherry, and Punjab
Government type	Federal Republic
GDP per capita	$3,800
Relevant international border disputes	Kashmir is the site of the world's largest and most militarized teritorial dispute with portions under de facto administration of China, India, and Pakistan. India maintains a strict border regime to keep out Maoist insurgents and control illegal cross-border activities from Nepal. Refugees 77,200 (Tibet/China), 50,730 (Sri Lanka), 9,700 (Afghanistan); IDPs at least 600,000 (about half are Kashmiri Pandits from Jammu and Kashmir) (2006)
Tribal land claims	A policy is being formulated to resolve problems facing tribals and their need for basics and additionally the policy includes an outline to ensure land is no longer taken without fair compensation.

Exhibit 1 (continued)

Country	Lesotho
Land area (sq km)	30,355
Population	2,125,262
Ethnic/ Indigenous	99.7% Sotho; 0.3% other
Government type	Parliamentary Constitutional Monarchy
GDP per capita	$2,600
Relevant international border disputes	n/a
Tribal land claims	Lesotho is essentially a Tribal homeland created by South Africa under apartheid. Borders are tribally based, and internal population is essentially homogeneous (Simons and Viruly).

Exhibit 1 (continued)

Country	Nigeria
Land area (sq km)	923,768
Population	135,031,164
Ethnic/ Indigenous	29% Hausa and Fulani; 21% Yoruba; 18% Igbo; 10% Ijaw; 4% Kanuri; 3.5% Ibibio; 2.5% Tiv
Government type	Federal Republic
GDP per capita	$1,500
Relevant international border disputes	Joint Border Commission with Cameroon reviewed 2002 ICJ ruling on the entire boundary and bilaterally resolved differences, the ICJ ruled on an equidestance settlement of Cameroon-Equatorial Guinea-Nigeria maritime boundary in the Gulf of Guinea; only Nigeria and Cameroon have heeded the Lake Chad Commission's admonition to ratify the delimitation treaty which also includes the Chad-Niger and Niger-Nigeria boundaries. Refugees: 6,051 (Liberia). IDPs: undetermined mostly short-term (communal violence between Christians and Muslims since President OBASANJO's election in 1999
Tribal land claims	Nigerian Land Use Act vests all land in a state to the governor and he will hold the land in trust for the benefit of and use by all citiazens (Iwarere)

Exhibit 1 (continued)

Country	South Africa
Land area (sq km)	1,219,912
Population	43,997,828
Ethnic/ Indigenous	79% African (including the Nguni people, comprising the Zulu, Xhosa, Ndebele and Swazi; the Sotho-Tswana people, comprising the Southern, Northern and Western Sotho (Tswana); the Tsonga; and the Venda.)
Government type	Republic
GDP per capita	$13,300
Relevant international border disputes	South Africa has placed military along the border to apprehend the thousands of Zimbabweans fleeing economic dysfunction and political persecution; as of January 2007, South Africa also supports large numbers of refugees and asylum seekers from the Democratic Republic of the Congo (33,000), Somalia (20,000), Burundi (6,500), and other states in Africa (26,000); managed dispute with Namibia over the location of the boundary in the Orange River; in 2006, Swazi king advocates resort to ICJ to claim parts of Mpumalanga and KwaZulu-Natal from South Africa. Refugees: 10,609 (Democratic Republic of Congo); 7,548 (Somalia), 5,764 (Angola)
Tribal land claims	After the apartheid regime was ended in 1991, numerous tribal and individual land claims have been asserted. Legislation has been set forth on processes for valuing the lands, and some claims have been processed, but the vast majority remain unresolved (Ghyoot, Simons and Viruly).

Exhibit 1 (continued)

Country	Swaziland
Land area (sq km)	17,363
Population	1,133,066
Ethnic/ Indigenous	97% African
Government type	Monarchy
GDP per capita	$5,200
Relevant international border disputes	In 2006, Swazi king advocated resort to ICJ to claim parts of Mpumalanga and Kwa-Zulu-Natal from South Africa
Tribal land claims	Swaziland, like Lesotho is also essentially a Tribal homeland created by South Africa under apartheid. Borders are tribally based, and internal population is essentially homogeneous (Simons and Viruly).

Exhibit 1 (continued)

Country	United States
Land area (sq km)	9,826,630
Population	301,139,947
Ethnic/ Indigenous	1% Amerindian and Alaska native; 0.2% native Hawaiian or Pacific Islander
Government type	Constitution-based Federal Republic, strong Democratic tradition
GDP per capita	$44,000
Relevant international border disputes	The U.S. has intensified domestic security measures and is collaborating closely with its neighbors, Canada and Mexico, to monitor and control legal and illegal personnel, transport, and commodities across the international borders; abundant rainfall in recent years along much of the Mexico-US border region has ameliorated periodically strained water-sharing arrangements; US Naval Base at Guantanamo Bay is leased from Cuba and only mutual agreement or US abandonment of the area can terminate the lease; Haiti claims US-administered Navassa Island. Refugees: 62,643 admitted during FY04/05; 10,586 (Somalia), 8,549 (Laos), 6,666 (Russia), 6,479 (Cuba), 3,100 (Haiti), 2,136 (Iran)
Tribal land claims	The US Indian Land Claims Commission was active in the 1950s through 1970s, where over 400 tribal claims were processed and many resolved (Isakson and Sproles). However, the onset of Tribal gaming (Casino gambling) started a new round of controversy, and some land claims are still active today.

Source: Central Intelligence Agency World Factbook
https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html
India's Draft Land Use Policy
Notes: Population estimates are for July 2007, GDP/Capita are estimated for 2006
IDP - internally displaced persons
ICJ - International Court of Justice (World Court)

there is a land claims process. According to the CIA website, there were about 237 nations or aspiring national areas in 2006 (including about 43 islands, many of which are lightly or not inhabited for a net of about 190 countries in the world). The data presented here is representative of data available worldwide (www.cia.gov/library/publications/the-world-factbook/fields/2070.html).

The Indigenous Tribes

Webster's definitions of tribe, indigenous, and aboriginal are as follows:

Tribe: A social group comprising numerous families, clans or generations, together with their slaves, dependents or adopted strangers; a group of persons having a common character, occupation or interest (Webster's, 1991 p. 1259).

Indigenous: Native, having originated in and being produced, growing, living, or occurring naturally in a particular region or environment; innate (Webster's 1991 p. 614).

Aboriginal: Being the first of its kind present in a region, often more primitive than other advanced types; also, Australian Aboriginal (Webster's, 1991 p. 45).

Of the three terms, indigenous best typifies the notion of a group, previously located in a particular place, with a land claim. However, it is the tribe that probably will make the actual claim, which is based on indigenous status. Not all tribes will have land claims, and some may be itinerant, but all indigenous groups would presumably have lands they originated from. Aboriginal is similar in many ways to indigenous, but it has a connotation of being associated with Australia. Henceforth, indigenous tribe shall be used to indicate a tribal group with a land claim.

The status of indigenous tribes within their nation(s) depends on several factors. Firstly, is the tribal entity intact as a community? If so, how many members are there? Do they live in a tribal homeland, and is it all or part of their desired/original homeland? Are they formally recognized by their government? How is the tribe doing economically? Do they have their own language? Are they integrated into the national government? Have many tribal members assimilated into the broader national society or do they remain distinct? Finally, is there a way the tribe can file land claims with a national or international body?

Googling "indigenous tribal land claims" yields over a million results. Wikipedia says "Precise estimates for the total population of the world's indigenous peoples are very difficult to compile, given the difficulties in identification and the variances and inadequacies of available census data. Recent source estimates range from 300 to 350 million as of the start of the 21st century. This would equate to just fewer than 6% of the total world population. This includes at least 5,000 distinct peoples in over 72 countries." (http://en.wikipedia.org/wiki/Indigenous_peoples). The International Working Group on Indigenous Affairs (IWGIA) is the source for the figures cited above. IWGIA publishes

various books on the subject, including a monograph on land claims (2004) and an annual report on indigenous tribal issues (2006) www.iwgia.org.

Also, indigenous peoples and their interests are represented in the United Nations primarily through the mechanisms of the Working Group on Indigenous Populations (WGIP). In April 2000, the United Nations Commission on Human Rights adopted a resolution to establish the United Nations Permanent Forum on Indigenous Issues (PFII) as an advisory body to the Economic and Social Council with a mandate to review indigenous issues.

Tribes and Tribal Members' Ties to the Land

Not surprisingly, there is no consistent model of what an indigenous tribe is across national boundaries, but there are some common factors. Tribes have an oral or written tradition that ties them to some land. Some tribes are also a nation state (by today's standard). The boundaries of the indigenous tribal homeland are often set by the tribe, based on indigenous land use patterns. Alternatively, boundaries may be set by a contemporaneous national entity. The difference between the two constitutes the land claim.

Tribes have a common language, social rules, and lineage pattern. The social patterns and customs define the tribe relative to other tribes. The lineage pattern allows certain members access to land, or land use rights such as gathering, harvesting, hunting or fishing, typically on a clan or family basis. The rights may also include a plot of land to be used as a primary residence.

How Is Tribal Land Owned?

Typically, the notion of private real property is not prevalent among tribal members. Exclusive use may pertain to chattel/personal property but generally not to real property (e.g., land). Tribal lands are usually owned by a common entity, such as a tribal corporation, or trust. In terms of formal deed registration with the appropriate civil authority, the chief may own the land in his name on behalf of the tribe. In some places, the trust is the national or sub-national government. The communal ownership means that individual's houses and lots where they live and farm are transacted on a formal or informal leasehold basis, with a right to use. Since the tribal lands are nominally recorded with the civil authority showing the tribe as the owner of record, the individual's property rights are not usually recorded at the civil level. They may be recorded at the tribal level, however. Thus, the family may own the house they built, but the land is held by the tribe. Lands used to raise livestock are normally held communally. Tribal lands can generally not be sold and thus cannot be used as collateral in a mortgage situation. This means virtually all houses are built with "cash" (rather than a mortgage). This explains why many tribal homelands

have numerous partially built structures: it may take years for a new house to be built and occupied, compared to a few months in the United States and other Western lands.

Some tribal members have assimilated into the larger civil society, but many maintain loose ties with the tribe and may have an interest (full or partial ownership or otherwise) in a house or land. They may retain voting rights with the tribe. Partial year occupancy and multiple household locations make tracking populations difficult in many countries with large populations.

Literature Review on Indigenous Tribal Land Claims

The subject of land claims has not been specifically addressed in a comprehensive way in the academic literature. However, there are pockets of literature that do pertain to the subject. These can be organized into the following categories: peer-reviewed literature addressing indigenous land and valuation; professional reports, most commonly funded by the World Bank and the IWGIA; and the anthropology literature on tribal property use patterns (the Max Planck Institute has been active here). Some land-related topics are summarized below.

In this American Real Estate Society monograph on indigenous property rights and valuation (all dated 2008), several related topics are addressed. A few of the papers directly address indigenous property issues. Ghyoot examines land restitution in South Africa, while Simons and Viruly look at tribal land issues in southern Africa, including Botswana. Abdulai and Ndekugri study indigenous landholding institutions as an impediment to economic use of land, through case studies of Tamale and Bolgatanga in Ghana. In North America, Isakson and Sproles study North American Indian tribal systems, and Simons and Pai examine the outcomes of tribal land claims in Canada. Down under, Small and Sheehan present the metaphysics of indigenous ownership, considering why indigenous ownership is incomparable to Western conceptions of property value. Finally, Sheehan examines indigenous water rights in Australia.

With respect to indigenous resource and land management and land ownership, Pulea (1984) addressed the indigenous laws regarding land management and found that they are more sustainable providing protection to animals during breeding seasons. Falade (1981) connects the Yoruba belief system with the conservation of natural landscape. Belling and Ghyoot (1999) conduct a case study of a land restitution case in South Africa. Also, Kotey and Yeboah (2003) present a report on the system of usufructuary interest for granted land (traditional or communal landownership) in Ghana. They find that granted land cannot mature into ownership and the rights of the grantee are subject to the community.

Concerning legal issues, Hallmann (1973) describes legal issues relating to property boundaries. Specifically of importance are the rights and ownership at coastal locations with regards to coastal erosion and ownership between high

tide and low tide land. On a related topic, Searles (1974) conducts a comprehensive study of eminent domain including historical content from ancient Greek and Roman governments and Biblical cases. Gwanya (2003) describes the process of land claims in South Africa. In another context, www.indianclaims.ca, 2004 provides a comprehensive source for information of the Indian's Claim Commission (ICC), history of ICC land claims in Canada, publications and much more.

On the topic of indigenous property rights and ownership, Widlock (2000) researches traditional property rights (use and enjoyment) in rural Namibia. UNCHS (1999) the United Nations Centre for Human Settlements provide information about how people in Southern Africa seek to obtain possession of land. Ceccherini (2005) addressed legislation pertaining to legal rights of indigenous peoples around the World. And also, Demsetz (1967) explained the economic forces that drive private property rights. The theory indicates that as land becomes more valuable, there is more inclination to make land privately owned.

Cultural foundations and property value were studied by Johnson (1995), who outlined the extent that Western value on land is entirely materialistic and influenced by the Enlightenment and influential economic philosophers David Hume and Adam Smith. Antwi and Omirin (2005) conducted a study of real estate market performance in Accra, Ghana, and Lagos, Nigeria.

National Case Studies

Case studies are provided to address the legal background, tribal inventory, and a study of outcomes and processes. The following geographic areas were used for study:

- U.S. Native American Experience
- Canada land claims process
- India emerging Tribal Policy

The United States. has recognized over 400 Native American tribal groups and many more are not officially recognized. The bulk of the Tribal land claims were addressed in the 1950s through 1970s, but some claims are still active today. Recognized tribes have many qualities of a sovereign nation within the United States. The example of the Seneca Tribe is detailed below.

An example of a recent U.S. Native American land claim settled by mitigation is provided for the Seneca Nation of Indians (SNI). In the Treaty of 1794, land was granted to the Seneca Nation by the United States. In the mid-19th century, the land was taken by New York under its power of eminent domain for use in the development of the Erie and Genesee Valley Canals (Coffey). The tribe received payment for a part of the acquired land.

Commercial use of both the canals was abandoned in the late 19th century. The tribal lands were used as part of a man-made lake bed that became a recreational destination after the canals were no longer in use. The state leased out the lakefront property where tenants built vacation homes and used the lake for recreation. The tenants treated the leased lots as though they were the fee holders and sold and resold the land.

For 150 years, the Seneca Nation and New York State have disputed the ownership of the land. The tribe has demanded return of ownership and sovereignty of these lands, along with a monetary settlement for damages. The state claims no liability to the SNI, since they had paid full market value of the land back at the time of the taking, in 1858.

In 2002, the U.S. District Court appointed a mediator. Through mediation the SNI "regained possession of record title to, and sovereignty over its land, free of any possessory interests, monetary claims, or other encumbrances" with the exception of easements. The tribe agreed to lesser monetary damages than originally claimed. The U.S. Government assisted in buying out the occupants of the tribal lands so the state did not have to bear all costs. The tribe and state obtained joint jurisdiction over the ring road, the lake bed, and the dam and spillway. In this case, mitigation was successfully used to solve a complex multiparty dispute with relatively small hardship to any party (Coffey).

Canada Land Claims Process Case Study: (Based on Simons and Pai 2008)

A case study example for Canadian indigenous land claims research is presented below. The focus is on the ongoing process because it is still active and is outside the conventional court system (as opposed to the U.S. example above) The process addressed the way about 60 tribes attempted to recover land and money from the Canadian government from 1990s to the present day using one of two prescribed tracks. The first is the *Comprehensive claims process*. The main actors are

1. the Canadian federal government,
2. provincial/territorial government,
3. Aboriginal claimant group, and
4. public boards.

Generally, about half the claims were successful in obtaining funds, but reacquisition of title to tribal lands was rare.

Five Stages of a *Comprehensive claim*;

1. Preparation, Research – study on the land use and occupancy financed by the Federal Government,

2. Proposition, Claim – the proposal is accepted, Negotiation – drafting of an agreement in principal
3. Elaboration Agreement in Principal – signed, Negotiations – drafting of a final agreement,
4. Approbation, Final Agreement – signed and approved, Law through Parliament, and
5. Implementation, The Carrying Out of The Agreement – establishment of public boards.

In order to establish a valid claim, the aboriginal group's statement must confirm:

1. The Aboriginal group is, and was, an organized society.
2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.
3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.
4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.
5. The group's Aboriginal title and rights to resource use have not been dealt with by treaty.
6. Aboriginal title has not been eliminated by other lawful means (www.ainc-inac.gc.ca, 2006).

The second track is the *Specific Land Claims,* which has five steps:

Step 1 – Submission of Claim
Step 2 – Research Claim
Step 3 – Acceptance by INAC or rejection of Claim (likely to go to ISCC)
Step 4 – Negotiations
Step 5 - Implementation

Two examples of the Canada Land Claims process are as presented below.

Blood Tribe/Kainaiwa of Alberta – 1889 surrender. In 1889, Canada accepted a surrender of 440 acres of land reserved under Treaty 7 without a public vote or payment. In April 1998, Canada agreed that it had taken the land in breach of the Indian Act and it agreed to negotiate compensation. The land could not be returned because it is now privately owned.

Moosomin First Nation of Saskatchewan – 1909 surrender. Canada took, against the First Nation's express wishes, a surrender of 15,360 acres of prime agricultural land reserved under Treaty 6, for sale to non-aboriginal farmers. As a result, the community was moved to land that was not suitable for farming and its livelihood was destroyed. In December 1997, the government agreed it had not acted in the First Nation's best interests and accepted this claim for negotiation of a settlement. In October 2003, Canada and the First Nation signed a settlement agreement for $41 million in compensation.

In India a National Policy on Scheduled Tribes is being formulated. This National Policy has many objectives with several relating to land and is an important measure to ensure the rights of tribal people in India. There are 698 scheduled tribal groups with seventy-five of those being "Primitive Tribal Groups". A plausible estimate of the tribal portion of the overall Indian population is 6–8%.

Thus far in India the five principles of the Nehruvian Panchasheel from 1952 has been guiding the way in which the government deals with tribals. These five principles are as follows:

1. "Tribals should be allowed to develop according to there own genius"
2. "Tribals' rights in land and forest should be respected"
3. "Tribal team should be trained to undertake administration and development without too many outsiders being inducted"
4. "Tribal development should be undertaken without disturbing tribal social and cultural institutions"
5. "The index of tribal development should be the quality of their life and not the money spent."

This principles proved to be too vague, with no viable method of enforcement, so tribal people are no better off now than before. This is the impetus for the new National Policy on Scheduled Tribes. The policy outlines resolutions to solving several key problems and maintaining tribal lifestyles as follows: formal education, traditional wisdom, health, displacement and resettlement, forest villages, land alienation, intellectual property rights, tribal language, primitive tribal groups, scheduled tribes and scheduled areas, administration, research, non-governmental organizations participatory approach, and assimilation.

Several of the above topics deal with some aspects of tribal land use or land claims, but the policy for displacement and resettlement will be outlined. Displacement of tribal people has become a large problem in India, with over 55% of all displaced people in the country being tribal. The new policy aims to eliminate the displacement of tribals unless "it becomes absolutely necessary to displace Scheduled Tribe people in the larger interest…" In this case guidelines should be followed to compensated the displaced peoples.

1. Land should be given to tribals to replace land lost minimum 2 hectares (approximately 5 acres).
2. If tribals had fishing rights they should be granted new fishing rights.
3. Monetary compensation of one and a half year's agricultural wages would be granted.
4. Resettlement close to natural habitat. If this is impossible then considerably higher monetary benefits would be given.
5. Land to be provided for religious and social groups.
6. At new sites roads, electricity, potable water, sanitation, drainage, facilities for education and health care, shops, etc shall be provided Source for this case: Ministry of Tribal Affairs, 2007).

Legal Issues: Global and National Initiatives

Tribal land claims are most likely to succeed when the nation(s) where the tribes are located have recognized the tribe as an official entity, and have established a formal claims process. Thus this section will address all known national land programs to rectify past land claim issues. In a general sense, the following topics should be addressed:

- What nations have formal indigenous land claim processes since 1900? (e.g., US, Canada, South Africa, Australia)
- What are their outcomes? How many tribes won, lost, and how were the gains granted (money, land, etc.)
- What general approaches have been taken, what was the starting position in these countries regarding formal and informal land ownership, and how has this evolved over time.

In addition to national land rights adjudication outcomes, there are also International processes, including some purely legal entities like the International Court of Justice; a quasi legal/political entity such as the United Nations; and other entities such as the World Bank, which is primarily economic and also somewhat political.

This section should be legalistic in nature and guide the development of a generic system for emerging national efforts to process tribal land claims.

Prior to the statistical analysis below, the academic literature, review of the political processes, and inductive observations should yield a long list of factors that are potential determinants of successful land claim outcomes.

Statistical Analysis of Land Claims: Determinants of Various Outcomes

The desired approach to studying this problem would be to collect a large data set with all available information on tribes that have land and examine those that have filed claims. Once data have been collected and standardized, multiple regression analysis could be performed. The unit of analysis would be the tribal claim, and this could be aggregated to the national level. The dependent variable could be either the successful land claim (a logit model, using a binary yes/no variables for a successful outcome), or a regression model with the dependent variable being a continuous variable measuring funds received in settlement, or acres of land reclaimed.

The model could have the general form: (+/– for expected signs)

Successful claim (DV) = f (recent claim +, historical record +, current possession +, non-exclusive use claim +, colonial overthrow ?, small claim ?, individual rather than collective claim –, religion, continent, # layers of competing claims, world –, national +, sub-national state/local court? . . ., etc.

The following factors could potentially be independent variables, subject to data availability:

- Ancestors buried there
- Historical record of occupancy
- Plebiscite or past national decision (monarch)
- Past treaty or agreement, with now defunct entity/not internationally recognized
- Current occupation
- Treaty not property implemented
- Number of claimants, layers of occupation
- Eminent domain, e.g., a dam project
- Revolution/large government change
- Title/Deed documents, both formal and informal
- What type of possession? Nomadic, mineral rights, all rights, non-exclusive
- Age of claim, older or more recent
- Size of claim
- public land ownership % of total
- tribal land/family clan rights as % of total (as opposed to private fee simple)
- insurgency in country or war with neighbor, in last 10 years?/ever?
- Legal venue
- Prior government expropriate lands
- Moral basis (current or past suffering)
- Legal systems of ownership
- Colonial occupation, empires, etc
- Land leases common
- Language
- Other factors

Results would be presented in the usual statistical manner found in peer reviewed journals.

Conclusions and Recommendations for Future Research on Unresolved Land Ownership Claims

The effects that colonial occupation, independence, migration, inter-tribal warfare and changes in government could have on indigenous and tribal communities, and the land claims that result in these shifts have been explored. Indigenous people have lost communal property rights, rights to use the land, and their rights to keep others from utilizing their traditional lands. Places including but not limited to the United States, Nigeria, Canada, India, and South Africa, have found that tribal and indigenous issues are of importance and have developed well-established systems or are in the process of devising new policies which deal with tribal land issues. Several countries' land claims

systems have been developed to return some rights to the indigenous people, and hence it can be said that some progress is being made around the world to resolve indigenous land claims.

The model and lessons learned could potentially be applied to emerging national tribal land claims processes such as India, as well as potentially to internationally unresolved trouble spots such as

- Kashmir
- Israel/Palestine
- Northern Ireland
- Kosovo
- Kurdistan

The research could provide a model for resolving these claims realistically and potentially reduce conflicts by helping to better allow tribal land claim participants to know successful strategies that have worked elsewhere and assist those countries in developing land claim systems on likely paths for successful conclusion of these outstanding matters. It could accelerate resolution of outstanding land claim issues, and promote economic development and peace.

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Index

A
Abdulai, Raymond T., 19, 272
Aboriginal group, 86–89, 92, 95, 275
Aboriginal land councils, 135
Aboriginal Land Rights Act, 81
Aboriginal land rights movements, 80
Aboriginal land tenure systems, 89
Aboriginal people, 129
  rights of, 92
Adigun, Olayide, 290
Administration of Indian Affairs, 82
African landownership in colonial era, 25
Agbosu, L.K., 20, 26
Agreement in Principle (AIP), 88
Air rights, 50
Akwa Ibom, 12, 162
Alaska Native Claims Settlement, 81
Alchian, A.A., 20
Allocation note, 2, 29–31
Allodial interest, 19, 21–22, 24, 28, 34
Allodial and radical titles, 132
Aluko, Bioye Tajudeen, 150, 154, 233, 255
Amankwah, H.A., 149
Anderson, Terry L., 66, 68
Anglo-Australian culture, 117
Anglo-Australian law, 11, 107
Anglo-Australian property institution, 117
Anglo-Australian property law, 106, 108
Anglo-Australian tendril interests, 116
Annals of Tacitus, 153
Antwi, A.Y., 19, 205, 211, 214, 273
Apartheid
  driven policies, 44
  era, 8, 44, 46
  legislation, 44
  system, 51
Aquinas, T., 104, 226
ARA Consulting Group, 94
Aradeon, D., 151
Asante, S.K.B., 21, 26, 33
Asiama, S.O., 20
Athens and Eleusis, 153
Authorisation of compulsory acquisition, 154

B
Balanced scorecard concepts, 242
Ball, M., 106
Bannerman, S., 156
Bantu Homeland Citizenship Act, 44
Baptisms, 234
Barrington, Linda, 65
Bateson, G., 225
Beier, U., 151
Belling, F.E.A., 189, 192, 194, 272
Bell, Randal, 256
Bernstein, A., 181, 182, 185
Berry, T., 148
Biobaku, S.O., 151
Black African majority population, discrimination, 43
Black ownership, 177, 181, 184
Black population, 13, 43–44, 47
Black tribal groups, 47
Blair, H., 24
Boland, Lawrence A., 129
Bond (mortgage) financing, 55
Boydell, S., 156
Boyd, T., 106, 122
Boyle, B., 181, 183, 186
Bradley, R., 148
Braimoh, Ademola K., 215
Branney, L., 25
Brazilian Constitution, 81
Brennan, Frank, 123
Bromley, D.W., 81, 175

Bundle of rights, 8, 10–11, 14–15, 40–41, 43, 49–50, 52, 79, 89, 105, 113, 115, 128, 256
Bureau of Indian Affairs, 73
Bushman, 42

C
Canada land claims, 274–276
Canadian Center for Independent Resolution, 85, 95
Canadian Claims Policy, 85
Canadian Confederation, 82
Canadian Constitution, 84
Canadian Environment Assessment Act, 92
Canadian federal government, 10, 84, 86, 274
Canadian land claims, legal process, 86
Capital gains, 106, 125, 127
Carey Miller, D.L., 43, 175
Carmichael, D.L., 145, 146, 147
Carrying capacities and productivity, 133
Case study
  Canada land claims process, 275
  the farm Sebele, 194
  portion 1 of the farm Schilpadnest, 189
  remaining extent of the farm Kinde Estate, 190
  Tamale and Bolgatanga, 19, 27 34, 272
Casino revenues, 73
Cave, Alfred, 69
Ceccherini, E., 77, 78, 81, 84, 85, 273
Celtic tradition, 113
Center for Biological Diversity, 235–236
Certificate of occupancy, 205, 211, 215
Charter of Rights and Liberties in Canada, 78
Chieftaincy land, 149
CIA website, 41, 270
Claims analysis, 89, 92
Classic economic theory, 227
Classic property economics principle, 189
Classification of ownership, 149
Coase, Ronald H., 202
Coase theorem, 64
Coetzee, G., 176, 181, 186
Coffey, Louis, 273, 274
Colonial authorities, 8, 44
Colonization of indigenous lands, 15, 78
Comfort money, *see* Solatium
Commercial *vs*. sacred property, 234
Commission of Ontario, 84
Commonwealth countries, 153
Communal and alternative governance, 50
Communal grazing, 49
Communal landholding, 20, 25–26, 272
Communal land ownership, 2, 8, 15, 33, 56
Communal Land Rights Act (CARA), 45, 177
Communal land rights systems, 21
Communal markets, formalization of, 56
Communal ownership, 14, 20, 29, 33–34, 51, 53, 55, 256, 272
Communal Property Associations Act, 45
Communal property rights, 14–15, 278
Communal property system, 80
Communal rights, 256
Communal stock grazing areas, 49
“Compensatio”, 156
Compensation
  for crops, 157
  for loss of a limb, 111
  for residual value, 127
  for solatium, 105
Competing property rights theory, 248
Comprehensive claims process, 274
Compulsory acquisition, 153–154
Compulsory Acquisition Order, 155
Constitutional crisis, 69
Consumer Price Index (CPI), 187, 189, 195
Convergence zone, 27
Cooter, Robert, 201, 202
Cotula, L., 150, 175
Coulanges, F.D., 106
Cowan, David A., 224, 225
Creswell, J.-W., 27
Cultural theory of property, 10, 103
Cultural treason, 117, 232
Culture’s dominant theory of existence, 103
Culturist *vs*. modernist property, 223
Currency of returns, 238
Customary land law, postulate of, 33
Customary land tenure system, 34, 148, 150, 165
Customary ownership, 26, 45, 121–122, 130, 136–137, 140
  radical individualization, 25
Customary title land, 136

D
Dagomba Kingdom, 23–24
Dawes Act, 9, 69–71, 74
De Bruin, P., 178, 184
Deed registry, 8, 9, 30
De Janvry, A., 175
De Lange, L., 181
Demsetz, Harold, 20, 63, 64, 65, 67, 273
Denman, D.R., 153, 154

Denyer-Green, B.P.D., 156
Department of Interior, 70
Department of Land Affairs, 176, 179, 181, 186–187
Department of Secretary of State Act, 82
Desecration of artifacts, 228
Donahoe, Brian, 42
Donaldson, A., 182
Dorner, P., 20
Dualism, 206
Dualistic property rights system, 203
Dual theory of property, 104
Duncan-Johnstone, A., 24
Dunkerley, H.B., 154
Du Plessis, C., 181, 185
Du Toit, P., 182
Du Toit, Z.B., 181
Duvenage, H., 182, 184, 185

E
Earle, Timothy, 201, 202
Economics of land reform, 205
Eco-tourism projects, 10
Encroachment of tribal land, 53
English land law, 149
English landownership system, 34
Ensminger, J., 26
Erie and Genesee Valley Canals (Coffey), 273
Ervin, A.M., 82
Estate Surveyors and Valuers, 12
Ethnic-based national borders, 258
European colonization, 15, 78–79, 85
European land ownership, 42
European legal systems, 25
European settlement, 78, 130, 132–133
European settlers, 64–68
European settlers and Native Americans, conflicts between, 68
Exchange of property rights, 64, 232
Experiential stewardship, 250
Expropriation Act, 45
Extinguishment model, 85
Extra-legal customary expectations, 122–123, 138
Eyre-Smith, S.J., 24
Ezigbalike, I.C., 106, 130

F
Fabiyi, Y.L., 154
Fabunmi, Chief, 161
Fabunmi, M.A., 146
Fair compensation, 12, 224
Falade, J.B., 146, 147, 272
Farming technologies, 130–131, 133
Farm owners, 24, 28, 32
Faz Medieval Medina, 248
Federal Court of Australia, 108
Federal Treaty Negotiations office, 94
Female-headed families, 55
Fernando, S., 153, 156
Fiani, R., 205
Financial-culture dimensions of property, 242
First Nations, 9–10, 78, 82, 84–85, 92–95
Fischel, William, 202
Fisher, R., 26
Flores-Bórquez, M., 175
Formal private ownership arrangements, 52
Formal recognition of the native communities, 81
Fortes, R., 176, 186, 195
Frafra tribe, 27
Franko, Kantele, 235
Free market system, 54
Frobenius, L., 146, 151
Fusfeld, D.R., 106

G
Galbraith, Kate, 222
Garret, Martin, 202
Garrett tradition, 203
General Allotment Act, *see* Dawes Act
Geographic Information Systems, 184
Georgian Bath, 248
Ghana Bureau of Languages, 21
Ghana Statistical Service, 27
Ghyoot, Valmond, 189, 259, 267, 273
Ghyoot, V.G., 13, 16, 189, 191, 259, 267, 272
Gibson, Arrell Morgan, 68, 70
Gibson reports, 70
Gildenhuys, A., 177, 182
Gildenhuys formula, 188
Glanz, James, 244, 245
Gleason, J., 146
Goldberger, Paul, 228
Gold Coast, 25
Good tenure conditions, requirements of, 20
Govender, P., 179, 180, 183
Grand Canyon, 248
Grazing land, 51
Grazing rights, 52
Greyling, F., 179
Griffiths, T., 175
Grobler, G., 177, 182, 188, 189

Grossman, Herschell I., 207
Grover, R., 175
Gwanya, T., 177, 179, 180, 273
Gwich'in Agreement, 92
Gyekye, K., 33

H
Hailey, L., 26
Hallmann, F., 272
Hall, R., 186
Hambly, W., 146
Hardin, G., 34
Harjo, S.S., 148
Harrison, F., 117
Harrison, P., 26
Helfrich, K., 181, 184
Hepburn, Samantha, 132
High Population Density (HPD), 215–216
Hocking, Barbara Ann, 129
Homo economicus (economic man), 105
Hooko, D., 20
Hosios, A.J., 176, 189, 195
Hubert, J., 147
Hume, D., 104, 226, 227, 273
Humes, Edward, 235, 236
Hypocrisy, 235

I
ICC Act, *see* Indian Claims Commission Act
Inca Empire, 202
Index of tribal development, 276
Indian Claims Commission Act, 71
Indian Claims Commission (ICC), 10, 71, 81, 84
Indian Land Consolidation Act, 9, 72
Indian Property Act, management of, 82
Indian Removal Act, 9, 68–69
Indian Reorganization Act (IRA), 9, 70–71
Indian Specific Claims Commission (ISCC), 79, 84–85, 88, 95
Indigenous customary owners, 121–123, 127–137, 139–142
Indigenous customary ownership, recognition of, 123, 140
Indigenous customary rights, 15, 126
  characteristic of, 130
Indigenous landholding institutions (ILIs), 20
Indigenous Land Use Agreements (ILUAs), 110
Indigenous ownership, 10, 105–110, 112–117, 128, 228, 272
Indigenous peoples, 1, 11, 15–16, 40, 42–43, 50, 77–81, 105–107, 110, 113, 116–117, 121, 129, 134, 136, 226, 247–248, 271–272, 274
Indigenous title, nature of, 128
Indigenous tribal land claims, 270
Indigenous and tribal peoples in independent countries, 80
Individual ownership, 2, 20–21, 25–26, 29, 33–34, 42, 49, 51, 79, 149, 233
Individual Tenure Farms (ITF), 48
Informal and formal land systems, 8
Informal Land Rights Act, 45
Informal ownership, 52
Inherent Rights Policy, 92
Integrated tenure structure, 138
International Court of Justice, 277
International Labor Organization, (ILO), 80, 81
International land claims and economic agreements, 257
International valuation principles, 186
Inter-tribal warfare, 14, 255, 278
Investment objectives, 241
Investment of proprietary rights in land, 150, 157
Isakson, Hans, 232, 233, 272
Ismail, O.T., 154
Ivory Coast, 21
Iwarere, L. Jide, 205, 211, 212

J
Jacobs, S., 175
James, R.W., 149
Janse van Vuuren, A., 181, 184
Johnson, Kirk, 230
Johnson, P.E., 104, 273
Johnson, S., 151
Joubert, J.-J., 181, 186
Just and equitable compensation, 188

K
Kant, I., 112, 227
Kanu, G.N., 154
Kaplan, R.S., 242, 244
Kasanga, R.K., 20, 34
Khoisan-speaking people in Namibia, *see* Bushman
Kinde Estate valuation, 194
King Ahab of Samaria, 155

King of Dagbon, 23–24
Kingi, Tanira T., 122
Kloppers, E., 181, 182
Kotey, N.A., 20, 26, 272
Kungurtsev, Igor, 222, 223

L
La Anyane, S., 20
LaCombe, Steven, 66
La Cote D'Ivoire, *see* Ivory Coast
Lahiff, E., 186
Land Affairs budget, 181
Land-based economic activities, investment in, 20
Land claims
  in Canada, 9, 77, 79, 81–82, 85, 87, 89, 91, 93, 95, 101
  commission, 179–180, 182–184
  court, 179–180
  settlement, 87, 89
Land database, 184
Land development schemes in South Africa, characterization of, 45
Land grantors, 29
Land ownership
  Dagbon, 24
  Nigeria, 148, 203
  Tamale and Bolgatanga, 23
Land ownership arrangements, 8, 40–42, 44, 47, 52, 54
Land redistribution program, 180, 184
Land Reform (Labor Tenants) Act, 177
Land restitution, 177
  implementation of, 13, 180, 185
Land rights of grantees, recognition of the, 28, 31
Land Summit, 182–184
Land taxation, 136
Land tenure system, 13, 19, 25, 27, 33–34, 48, 89, 148, 204–205
Land transfer by force, 2, 14
Land Use Act (LUA), 13, 150, 153–154, 157–160, 164–165, 167, 202–204, 206–208, 210–211, 213–216
Land use and allocation committee, 158, 169, 203
Land use regulation, 202, 224
Larbi, W.O., 19
Lawson, Michael L., 70, 71
Layton, R., 163
Legare, A., 81, 87
León, Á .D.C., 175
Lesotho law, 49
Less Formal Township Establishment Act, 44–45
Leuvennink, J., 177, 183
Levy, Adrian, 135
Lewis, A., 20
Link between rent and market value, 105
Lipton, Eric, 244, 245
Listoken, Bavid, 68, 73
Liversage, A., 25
Locke, J., 107
Longbottom, J., 26
Louw, M., 181
Lovelock, J., 148
Low-population density areas, 215
Lucas, J.O., 151
Luchakova, Olga, 222, 223

M
McAuslan, P., 150
McChesney, Fred S., 68
McKinley, Jesse, 230
Mahama, I., 24
Manaoukian, M., 24
Manning, Chris, 225
Mantiziaris, C., 42
Margolius, J., 179
Market correction phase, 106
Market model, 208
Martin, D., 42
Massachusetts General Court, 68
Materman, Len, 234
Mattingly hypothesis, 207–208
Mattingly, Michael, 207
Max Planck Institute, 42, 272
Medium population density, 215
Meek, C.K., 26
Meikle, S., 111
Mertens, D.M., 27
Metaphoric mosaic map, 238
Miles, Mike, 49
Miller, John J., 223, 230
Mill, J.S., 104, 105, 227
Mineral Oil Act, 154
Mineral or water rights, 50
Mining rights, 52, 92
Miriuwung Gajerrong, 109
Mkhabela, M., 181
Modified rights model, 85
Mogale, Thomas, 45, 47, 56
Moral sentiment theory, 104
Mountjoy, A.B., 26
Mulder, N., 181, 183, 184, 185

Mulgan, Geoff, 225
Mumah, M.M., 147, 150
Murray Islands, 42, 107
Murray, K.C., 146
Murthy, R. Narayana, 225
Mutoro, H.W., 148
Myers, M.S., 113–116, 130, 156, 176, 186
Myrdal, G., 20

N
Naire, K., 26
Nanavut Land Claims Agreement, 92
National African Farmers Union (NAFU), 182–183
National archive, 190
National land models adjacent to South Africa, 47
National land summit on land reform, 182–184
National native title tribunal, 108, 110
National policy on scheduled tribes in India, 276
National treasury, 181
Native American land, 9, 15, 70, 72, 273
Native American tribes, 49, 68
Native ownership, 108–110, 113, 115
Native Title Act, 110, 122
Ndekugri, Issaka E., 2, 272
Nehruvian Panchasheel principles, 276
Newell, G., 43
Nies, Judith, 65
Nigerian customary land tenure system, 165
Nigerian Land Use Act, 13, 202, 204, 214
Nigerian Law Reform Commission (NLRC), 203
Nonaboriginal groups, 95
Nonaboriginal people, 94
Non-assertion model, 85
Noncompensation transactions, 163
Nonrandom sampling technique, *see* Snowball sampling
Northern regional house of chiefs, 27
Norton, D.P., 242
Nudist Vivo (NVivo) program, 29
Null hypothesis, 162

O
OASL, 30, 32
Obayemi, A., 146
O'Connor, P., 113
Odu, M., 160
Oechslin, W., 148
Office of the Administrator of Stool Land (OASL), 7, 30
Office of native claims, 10, 84
Oil Pipeline Act, 154, 158, 164
Ojo, J.R.O., 146
Olayiwola, L.M., 216
Oluwasami, B., 25
Oluwoye, J., 105
Omirin, M.M., 205, 211, 214, 273
Omisore, E.O., 146, 147, 150, 151, 152, 153
Omotola, J.A., 205
Oretuyi, S.A., 149
"Osun", 146, 151–153
Oswalt, Wendell H., 65
Ouedraogo, H., 150

P
Pai, Shwetha H., 9, 272, 274
Pareto-optimal welfare state, 207
Pastoral leaseholders, 122
Patterson, S., 178, 179
Payne, G., 26
Pelser, W., 183, 185
Permission to Occupy (PTO) certificate, 47
Petroleum Act, 154, 159, 164
Pienaar, J., 178
Pogucki, R.J.H., 33
Pope, A., 175
Positive place energy, 246–247
Posner, R.A., 26, 202
Post-apartheid government legislation, 54
Post-Columbian eras, 9, 15, 67
Post-equestrian era, 15, 66
Power, Thomas Michael, 245, 246
Prairie Farm Rehabilitation Act, 94
Pre-capitalist states, 202
Pre-colonial to post-colonial era, 215
Pre-Columbian era, 9, 65
Pre-Columbian Native Americans, 65–66
Pre-equestrian era, 15, 65–66
Pre-legislation property rights, 211
Premium-priced housing, 210
Prevention of Illegal Squatting Act, 44
Primitive Tribal Groups, 276
Private-communalistic property rights, 202
Private property ownership rights, 64
Private property rights, emergence of, 63
Privy Council, 26
Probationary period, 194
Proclaimed townships, 46

Profit-seeking property involvements, 220, 222, 242, 246
Progressive adjustment program, 128
Property culturist, 14, 16, 219–226, 232–235, 238, 249–252
  objectives of, 235
Property modernist, 13–14, 219–222, 224–226, 232, 234, 238, 249–252
Property rights evolution, 205
Property rights restructuring, 207
Property Valuers Profession Act, 196
Proto-historic Hawaiian, 202
Public land development schemes, 213
Public Lands Acquisition Act, 154
Public Lands Acquisition (Miscellaneous Provisions) Decree, 154, 158
Public Lands Bill, 25–26
Pulea, M., 272
Putfontein formula, 188

Q
Qu'Appelle Valley Indian Development Authority's (QVIDA), 94
Quiggin, J., 81
Quinn, Daniel, 221

R
R 188 denser settlements, 46–47
R 293 townships, 46
Racially Based Land Measures Act, 44, 177
Racially discriminatory
  legislation, 191
  practices, 177
Racial segregation, 43, 183
  policy of, 183
Radimilahy, C., 148
Rainbow Serpent, 107
Rakai, M.E.T., 106
Rams, E.M., 189
Ramsey, Jonathan, R., 223
Rand, A., 225
Ratcliff, R.U., 156, 186, 189, 195
Rayner report, 33
Recognition of Grantees' Land Rights, 31–32
Reconstruction and Development Program (RDP), 46, 51–52
Reeve, A., 104, 128
Regularization of existing leases, 138
Reindeer-herding peoples, property rights of, 42
Rental gap, 123–125, 127
Rental or investment property, 50
Replacement theory of damages, 155
Restitution of Land Act, 189
Restitution of Land Rights Act, 178–179
Restitution program, 185
Restitution-related transactions, 182
Revenue generating centres, 152
Ricardo, David, 106, 220, 227
Right of Occupancy, 203, 205–206, 210–214
Right-of-way agreements, 89
Risk-free investment, 194
Robben Island, 176
Robinson, Ian, 130, 133
Roe, Frank Gilbert, 67
Roman Dutch law, 43, 45
Roth, M., 175
Roulac, Stephen E., 13, 16, 220, 224, 225, 229, 231, 235, 237, 239–241, 243, 245, 247
Royal proclamation, 78, 82, 93

S
Sacred and cultural properties, preservation of, 240
Sacred places, concept, 147
Sadoulet, E., 175
Savae, T., 107
Schwartz, Nelson D., 236
Scott-Clark, Cathy, 135
Searles, S.Z., 153, 155, 273
Security of tenure, 177
Seneca Nation of Indians (SNI), 273–274
September 11, 2001 terrorist attack, 244
Settlement agreement, 85–86, 88–89, 93, 179, 275
Shah, K., 113, 115, 116, 130, 176, 186
Sheehan, J., 105, 128, 130, 150, 176, 186, 195, 272
Shiva, incarnations of, 222
Simons, R.A., 8, 9, 14, 79, 256, 272, 274
Simons, Robert A., 272, 274
Sjaastad, E., 81
Small, Garrick, 103, 105, 106, 114, 128, 130, 131, 226, 227, 228, 232, 272
Small-scale peasant proprietorship, 81
Smith, Adam, 104, 106, 226, 227, 273
Smith, L.B., 176, 189, 195
Smith's theory of property, 104
Smith, Vernon L., 65
Snowball resort, 235
Snowball sampling, 28
Socio-political arrangement, 25
Solatium, 105, 186, 195

South Africa land settlement schemes, characterization of, 41
South African apartheid laws, 40
South African Broadcasting Corporation, 180, 182–183
South African peripheral urban areas, 56
Special developmental programs, 81
Specific Claims Resolution Act, 85
Specific land claims, 275
Sproles, Shauntreis, 8, 232, 233, 272
Squatter settlements, 54
Ssekandi, R., 25
Staniland, M., 24
State Customary Land Tax (SCLT), 140–141
State Lands (Compensation) Decree, 154
Statistical analysis of land claims, 277
Statue of Liberty, 16
Stern, Esther, 129
Strategy for correcting pastoral leases, 125
Strip mining, 228
Super-normal profit, 124–125
Swan, J.A., 148
Swazi Nation Land (SNL), 48
Sydney Opera House, 248

T
Taliban's destruction of sacred Buddhist head statutes, 228
Tamakloe, E.F., 24
Tanzania Land Act, 56
Tenure Reformation, 206
Terblanché, N.S., 176
Terra nullius (empty land), 78, 116, 128–129
Theory of existence, 103–104
Theory of property, 79, 104, 107
Theory of valid claims, 85
Thompson, Brandon, 71
Thompson, Randy V., 71
Tijani, Amidu B., 233
Timiraos, Nick, 234, 235
Torres Strait Islanders, 42
Toulmin, C., 26
Town and Country Planning laws, 154
Township Establishment Act, 44–46
Traditional land ownership, 2, 8, 23, 25–27, 34, 40, 55, 256
  commentaries about, 25
  communal nature, 2
  dual nature, 33–34
  in Ghana, 21, 34
Traditional rights of an ethnic group, 81
"Trail of tears" saga, 69
Transactions on sacred places in Nigeria, 162
Treaty Land Entitlement (TLE), 93
Tribal authority, 47, 51–52
Tribal awareness, background of, 259
Tribal courts, 44
Tribal Land Act, 48
Tribal land claims, 273, 277
Tribal legal systems, 8
Tribal ownership models, 256
Tribal real estate practices, 41
Trustee deeds, 50
T-test, 162

U
Uchendu, V.C., 150
Umbeck, John, 67
Umenoto, Karen, 234
Umezuruike, Nweke O., 205
United Nations Center for Human Settlements (UNCHS), 53, 273
United Nations Commission on Human Rights, 271
United Nations Economic and Social Council, 271
United Nations Educational Scientific and Cultural Organization (UNESCO), 152, 225, 248
  World Heritage List, 152
United Nations Permanent Forum on Indigenous Issues (PFII), 271
Unresolved land ownership claims, 278
Upgrading of Land Tenure Rights Act, 44
Upliftment program, 182
Urban fringe, 8, 14, 41, 53, 55
U.S. model of real estate, 8, 40
U.S. real estate rights, 49
U.S. third army, 69
Utilitarianism, 104–105, 111, 227

V
Valuation guidelines, 186
Valuation for land restitution, 185
Valuation theory, 114, 147
Value of pastoral leaseholds, 124
Van der Westhuizen, C, 181
Van Eeden, J., 185
Van Rooyen, D., 181, 182, 185
Van Vuuren, A.J., 180, 184, 185
Van Wyk, A., 181
Venning, Nicola, 225, 248
Venn, Tyron James, 122
Venter, L., 181
Victorian/colonial era, 43

Vietnam War, 259
Virgin/vacant land, 32
Viruly, F.M., 8, 265, 267, 268, 272

W
Waikiki (center point of Hawaii tourism), 234
Water Management Amendment (Water Property Rights Compensation) Bill, 132
Welfare effects, 207
Welfare payments, 135
West African Lands Committee, 26
West African Native Law, 26
Western cultural foundations, 104
Western and customary property, 12
Western/European concepts of owner- ship, 233
Western extra-legal customary privilege, 128
Western farming technologies, 131
Western freehold market systems, 49
Western property ownership, 117
Western property rights, 1, 14–15
Western public funding (taxation), 140
Western rent theory, 134
Western understanding of property right, 112
West, H.W., 153
Whipple, R.T.M., 156
White, Martha C., 249
Widlock, Thomas, 273
Widlok, Thomas, 42
Wik people, 11, 121–122
Willet, F., 146
Wilson, P., 43, 44
Wood, A., 106
Woodman, G.R., 33, 34
Working Group on Indigenous Populations (WGIP), 271
"Work-use-ownership" principle, 66
World Bank, 20, 272, 277
World Trade Center, 244–245

Y
Ya-Na, *see* King of Dagbon
Yeboah, M.O., 20, 26, 272
Yeomen farmers, 68
Yoruba belief system, 146–147, 272
Yorubaland, royal dynasties in, 152
Yoruba people, 146, 151
Yoruba philosophy, 151
Yoruba race, 151–152
Yoruba society, 151
Yukon Indian agreement, 92
Yunupingu, G., 107, 113

Z
Zimmerman, J., 176, 186
Zoning, 49–50, 79, 154, 256
  programs, 154
  restrictions, 46