

Indigenous Peoples and Real Estate Valuation

RESEARCH ISSUES IN REAL ESTATE

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Indigenous Peoples and Real Estate Valuation

edited by

Robert A. Simons

Cleveland State University, USA

Rachel Malmgren

Cleveland State University, USA

Garrick Small

University of Technology, Australia



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Editors

Robert A. Simons
Cleveland State University
Levin College of Urban Affairs
Cleveland, OH 44122
r.simons@csuohio.edu
roby@rasimons.com

Rachel Malmgren
c/o Robert A. Simons
Cleveland State University
Levin College of Urban Affairs
Cleveland, OH 44122
r.malmgren@csuohio.edu

Garrick Small
University of Technology, Sydney
School of the Built Environment
Sydney Australia
garrick.small@uts.edu.au

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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
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2007 Chair
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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.

Grants in Progress

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- Extraction of Percentages of Total Employment Occupying Office Space by Joseph Rabianski, PhD, CRE
- Unwanted, Polluted, and Dangerous: America’s Worst Abandoned Properties and What Can be Done About Them by Professor Justin Hollander Tufts University

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Contributors

Raymond T. Abdulai

School of Engineering and the Built Environment, Wolverhampton University, Wulfruna Street, Wolverhampton, WV1 1SB, UK, e-mail: R.Abdulai@wlv.ac.uk

Bioye Tajudeen Aluko

Department of Estate Management, Obafemi Awolowo University, Ile – Ife, Nigeria, e-mail: btaluko@oauife.edu.ng or btaluko@yahoo.com

Abdul-Rasheed Amidu

Department of Estate Management, Obafemi Awolowo University, Ile – Ife, Nigeria, e-mail: amidrasheed@yahoo.co.uk

Valmond Ghyoot

Department of Finance, Risk Management and Banking, University of South Africa, PO Box 392, 0003 Unisa, South Africa, e-mail: vghyoot@gmail.com

Hans R. Isakson

Department of Economics, University of Northern Iowa, Cedar Falls, Iowa 50614-0129, e-mail: Hans.isakson@uni.edu

L. Jide Iwarere

Department of Finance, Int. Business, Insurance, Real Estate, School of Business, Howard University, Washington, DC 20059, USA, e-mail: liwarere@howard.edu

Rachel Malmgren

Cleveland State University, Levin College of Urban Affairs, 1717 Euclid Avenue, Cleveland, OH 44122, USA, e-mail: r.malmgren@csuohio.edu

Isaac F. Megbolugbe

Carey Business School, Johns Hopkins University, The Edward St. John
Department of Real Estate, 100 North Charles Street, 7th Floor, Baltimore,
MD, 21201, (410) 516-3471, e-mail: imegbolugbe@jhu.edu

Issaka E. Ndekugri

School of Engineering and the Built Environment, Wolverhampton University,
Wulfruna Street, Wolverhampton, WV1 1SB, UK, e-mail: i.e.ndekugri@wlw.
ac.uk

Emmanuel Olufemi Omisore

Department of Urban and regional Planning, Obafemi Awolowo University,
Ile – Ife, Nigeria, e-mail: femsor@oauife.edu.ng or femsor@yahoo.com

Shwetha H. Pai

UGL, Equis, (India) Real Estate Private Ltd., Bangalore, India
e-mail: shwethapai@rediffmail.com

Stephen E. Roulac

Roulac Global Places LLC and University of Ulster, Coleraine, Northern
Ireland

John Sheehan

School of Construction, Property and Project Management, Faculty of Design
Architecture and Building, University of Technology

Robert A. Simons

Cleveland State University, Levin College of Urban Affairs, 1717 Euclid
Avenue, Cleveland, OH 44115-2105, USA, e-mail: r.simons@csuohio.edu,
robby@rasimons.com

Garrick Small

University of Technology, Sydney, Broadway, NSW, Australia, e-mail: garrick.
small@uts.edu.au

Shauntreis Sproles

Undergraduate Student, University of Northern Iowa, Cedar Falls, Iowa
50614-0129

Francois M. Viruly

School of Construction Management and Economics, University of the
Witwatersrand, Braamfontein 2017, Johannesburg, South Africa, e-mail:
francois.viruly@wits.ac.za

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

R.A. Simons

Cleveland State University, Levin College of Urban Affairs, 1717 Euclid Avenue,
Cleveland, OH 44115-2105, USA

e-mail: r.simons@csuohio.edu

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 Malingren, 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	Separated Blacks and Whites, kept Blacks out of urban areas		RSA government is developing system to extinguish traditional land ownership to gain all rights associated with Western ownership	Separated 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-leu 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	Communal ownership hinders rights	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 rate 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
Stephen E. Roulae	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				Communal ownership hinders rights	Metaphysical value of land	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 Determinates 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,