

Land Tenure, Boundary Surveys, and Cadastral Systems



George M. Cole and Donald A. Wilson



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Land Tenure, Boundary Surveys, and Cadastral Systems

para los estudiantes del Colegio, ayer, hoy y mañana

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Introduction

Since the dawn of history, land has been the primary source from which Man has taken the things that he needs for existence and for progress, for life in the lower margin and for luxury. Land still brings forth the grain, fruit and meat that feed him; the flax, cotton and wool that clothe him; the wood, stone and iron that house him. It supplies the fuels that warm him—the fuels that, transformed by his arts into energy, serve him in a thousand ways.

Charles Abrams (1979)

Mankind has always had a special relationship with the land, and with good reason, since it is a primary key to our existence. As suggested in the previous quote, land serves as the basic platform for life and source of nourishment, shelter, and energy for mankind. It also serves as the basis of income for humans. Reflecting that essential nurturing role, land has often been called “Mother Earth.”

As a result of the special relationship with and dependence on land, humans have long had a tendency to claim exclusive rights over tracts of land that they occupy, either jointly with other members of a tribe or community or as individuals. That tendency to claim a parcel of land as one’s own and to defend it from others appears to be a natural tendency since it may also be observed with many other animal species. As an example, most people have observed a dog marking its territory. As another example, persons living in some parts of the United States have possibly experienced being threatened by mockingbirds defending the territory around their nest. Such actions are really not that far-removed from that of marking the corners of a land parcel with concrete monuments or the filing of a deed to the land at the county land records office. Both involve methods of defending a claim to land.

Early in recorded history, humans refined the process of defining and marking the limits of claimed lands by use of boundary surveys and landmarks. Based on such surveys, methods have been developed to uniquely describe parcels of land, which provides the basis for land being used as a commodity that can be bought, sold, traded, or used as equity. In addition, humans have refined the process of defending land claims by use of a legal system in lieu of a physical defense. This was eloquently recognized by philosopher John Locke (1698/1952) as follows:

I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone

which permits me to forget my natural weakness. Tis only through protection of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

In most advanced societies today, a key element of that legal defense is the recordation or registration of land claims in a central database, or cadastral system. That recordation process provides public notice of a claim to a specific parcel of land and thus allows utilization of the legal system for defense of the claim.

Together, the processes of how land parcels are held; how they are defined, measured, and described to allow economic transactions; how they are marked to allow their use and defense; and how they are legally protected have allowed for the orderly possession and use of land. In doing so, these processes have also provided the basis for the advanced economy of most developed nations. For those living in societies with such property systems, those processes are often taken for granted and have become an almost invisible part of the landscape. Nevertheless, because of the importance of land to all aspects of human life, as well as the key role that it has in the economic system, the processes are essential to the orderly operation and economic well-being of society and therefore deserve careful study. That is the objective of this writing.

Very often, these processes—land tenure, boundary surveying, and cadastral systems—are considered separately. Nevertheless, they are very much interrelated, and none of these processes may be completely understood without an understanding of the others. This is especially true considering the advent of georeferenced cadastral maps reflecting the location of land parcels relative to many other components of the physical and legal infrastructure. Therefore, the interrelationship of these processes is a central concept that will be found throughout this writing.

The objective of this book is to provide an introduction to land tenure, cadastral systems, and boundary surveying, including an understanding of the interrelationship of these areas and their role in land tenure and real property law. Although intended as a basic text for college-level surveying courses, this book should also be of significant value to cadastral mappers, real property attorneys, land title professionals, and others involved with land transactions.

When used as a text for a course in the subject matter, it is suggested that the course instruction include several practical exercises to supplement the text material. For example, students should perform a title search for a parcel of land. In addition, information should be obtained using a fiscal cadastre. Other exercises should include obtaining and using Public Land Survey plats and field notes from a state repository. Practical exercises in writing and interpretation of legal descriptions and the actual participation in boundary surveys should also be included for a complete learning experience. Recommended additional reading in that chapter's topic is provided at the end of each chapter.

Land Tenure

2.1 Territoriality

Territoriality is usually considered to be the attachment to and defense of a specific geographic area. Although often considered a characteristic of mankind, the identification of an area for exclusive use is a well-documented practice among many species of animal life. The examples provided in the Introduction involving the "marking" of territorial boundaries by dogs and the defense of nesting areas by mockingbirds illustrate two of many examples of territoriality by species other than humans. In addition to birds and dogs, territoriality has been observed in many other species. A number of mammals claim exclusive territories and mark the boundaries of those areas with self-produced scent in the form of urine or musk on stumps, tree limbs, or rocks. Among some social animals such as the primates, there is a tendency for territory to be claimed by groups rather than individuals. Organized bands of monkeys and apes often occupy and defend territories as a group.

Therefore, territoriality is apparently a natural tendency since many examples of territoriality may be observed among various species of animal life. In many cases, this tendency takes the form of a territory being claimed and defended by an individual or close family unit. In other cases, territory is claimed and defended in common by an expanded tribal group.

Among humans, groups of people have been seizing land from other groups as far back as historical records exist. Even early cave-dwellings societies have been reported to have individual partitions within their caves. Among the early hunting/gathering societies, land was probably not considered a commodity as in most contemporary societies. Nevertheless, a particular area of land was often associated with a tribe or group of people who lived upon it and defended it. Among Native Americans, for example, a tribe usually claimed a wide area common to all members, which was defended against intruders. In addition, individual occupancy of garden patches within that territory was respected in some areas. Some groups, such as the Sitkans of Alaska, divided productive areas of the coastline among families and used cornerstones and stakes to demarcate the boundaries of those

individual tracts. As other examples, the Montagnais tribe of Canada is reported to have produced good maps of their territory by carving on pieces of birch bark. Where urban societies or formal agriculture developed, both requiring intensive land use, recognition of individual rights over territory generally developed as opposed to tribal or group rights.

Thus, territoriality appears to be a natural pattern among many species of animal life, including humans. Furthermore, exclusive claim to land appears to be a universal trait of human culture and a part of the basic fabric of human society.

2.2 Land Tenure and Its Development

In human society, territoriality is manifested by the process of *land tenure*. That term may be very simply defined as the process of holding land.* Slightly more detailed, it may be said to be the relationship, whether defined legally or customarily, among people, as individuals or groups, with respect to land. Land tenure is an institution, that is to say, it is rules invented by societies to regulate behavior. The rules of tenure define how property rights to land are to be allocated with societies. It is an essential part of most legal systems and is an important part of social, political, and economic structure. Because of that multidimensional nature, it has important social, technical, economic, legal, and political aspects.

Reportedly, the earliest urban society, as well as earliest formal agriculture, developed about 8000 BC. Our knowledge of land tenure during that period is limited, but it is presumed that some sort of individual or group exclusive rights to land were recognized due to the nature of land use by those societies.

In the early stages of civilization, most forms of land tenure were collective. When people began to cultivate or otherwise intensely use the land, individual rights began to be recognized. With intensive use, it became more important to delineate and defend the areas involved to protect one's investment in the land. Eventually, this led to the development of ways to describe the land and legal systems to protect interests in land other than with physical defense, as well as to allow for the use of land as a commodity.

Definite evidence of private ownership of land and sales of privately owned land parcels in various societies has been found for periods as early as 2700 BC (Powelson 1988). That evidence is in the form of textual information on tablets in Southern Mesopotamia. No evidence exists of an organized

* The origin of the word *tenure* is the Latin verb *tenere*, which means to hold or comprehend. It is also seen in the Spanish verb *tener* or French *tenir*, meaning "to have."

system of land distribution or of concepts such as title deeds, but land was apparently claimed and occupied by those who would take it and hold it.

Egypt provides another example of an early society developing sophisticated land tenure practices. The oldest documented evidence of such a system is dated approximately 2350 BC. The land system in that country, even then, had laws requiring a document to be drawn up on papyrus, signed by three witnesses, and stamped with an official seal when transferring ownership of land. Furthermore, that system accounted for lands by use of a central registry in the office of the vizier, the pharaoh's prime minister. That registry also was used for recordation of wills and other documents affecting land ownership similar to the process in use in advanced societies today.

An interesting example of the relative complexity of early land transactions is one conducted by the prophet Jeremiah, which may be found in *Holy Bible* as follows (Jeremiah 32: 9–14, *Holy Bible*, Revised Standard Edition)

And I bought the field at An'athoth from Han'amel my cousin, and weighed out the money to him, seventeen shekels of silver. I signed the deed, sealed it, got witnesses, and weighed the money on scales. Then I took the sealed deed of purchase, containing the terms and conditions, and the open copy; and I gave the deed of purchase to Baruch the son of Neri'ah son of Mahsei'ah in the presence of Han'amel my cousin, in the presence of the witnesses who signed the deed of purchase, and in the presence of all the Jews who were sitting in the court of the guard.

I charged Baruch in their presence, saying, Thus says the Lord of Hosts, the God of Israel: Take these deeds, both this sealed deed of purchase and this open deed, and put them in an earthenware vessel, that they may last for a long time.

As may be seen, the transaction involved many of the same elements used today, including the requirement for witnesses to the transaction, public notice of the sale, and the preservation of the deed in a safe place such as a sealed vessel as was the custom of those days.

During the dynasty of Ptolemy (305–31 BC), a relatively advanced land information system was developed in Egypt that contained precise information on even small plots of land, including the legal status of the land, its dimensions, its location, the holder of the land, the state of its irrigation, and the type of crops grown on it.

It may be seen from the foregoing examples that having exclusive rights to land is a long-established practice of mankind. Furthermore, it may be seen that many of the practices associated with land ownership today, such as considering rights to land as a commodity that can be traded, the creation of formal land title deeds to represent land in transfers of ownership, the maintenance of a central registry of deeds to land, the recordation of other documents affecting rights to land such as wills, and even land information systems, are also long-established and essential components of human society.

As various societies have evolved, various degrees of private rights to land were recognized. At times, in some regions, land ownership became consolidated under a sovereign power. At other times in history, individual rights to land were recognized. Nevertheless, the general tendency in most urban or agrarian societies, especially in more recent times, has been to move toward individual land ownership rights with the demise of feudalism.

2.3 Modes of Interests and Tenure in Land

Practices and laws regarding land tenure vary considerably among nations. Nevertheless, there are some common principles. Generally, most systems provide for several levels of interest in land, some of which may intersect one another and exist simultaneously. For example, under common law, *fee simple* is the most complete ownership interest one can have in real property, other than the rare *allodial title*, when real property is owned absolutely free and clear of any superior landlord or sovereign. Yet, even land held in fee simple may be subject to overlapping interests, such as when the property is leased or rented by its owner to another party. Generally, when there is more than one interest in property, the interests are considered to be in one of the following classifications:

Overriding interests: when a sovereign power (e.g., a nation or community) has the powers to allocate or reallocate land through expropriation or similar practice

Overlapping interests: when several parties are allocated different rights to the same parcel of land (e.g., one party may have lease rights, and another may have a right of way). Examples of overlapping interests are in abundance. An obvious one is the land, burdened by a highway easement, further burdened by slope and sight easements, which in turn are burdened by overhead and underground utilities, along with telephone and cable lines. In major metropolitan areas, easements are stacked on top of one another, some being surface, while others are subsurface and above surface (air space)

Complementary interests: when different parties share the same interest in the same parcel of land (e.g., when members of a community share common rights to grazing land, community wells, and the like)

Competing interests: when different parties contest the same interests in the same parcel (e.g., when two parties independently claim rights to exclusive use of a parcel of agricultural land. Land disputes arise from competing claims)

Many different forms of land tenure can be found within a given society. *Rights in common*, especially for many agricultural uses, may be held in trust for the citizens. *Private tenure* is where rights to land are assigned to a private entity, which may be an individual, a husband and wife, a corporation, or other groupings. *Communal tenure* is when rights are assigned to a community or group where any member of that group has the right of use. *Open access tenure* is when rights are assigned to no one in particular and no one can be excluded. *Governmental tenure* is when rights are assigned to some authority in the public sector. For any of these types of land tenure, rights may include exclusive rights or more limited rights such as leasehold. Multiple rights may be held by several different persons or groups with differing rights in the same parcel of land frequently held by different parties. Thus, *tenure* is a broad and multidimensional concept. In common language, this has given rise to what is known as "the bundle of rights."

Rights in land may be simplified by categorization into use rights, control rights and transfer rights. Rights may also be classed as formal or informal. Formal property rights are those acknowledged by the state and which may be protected through legal means. Informal property rights lack official recognition and protection.

Property rights may also be illegal under some circumstances. Often, illegal property holdings arise because of inappropriate laws. In other cases, property may be classed as extralegal. These are situations that are not against the law but are also not recognized by the law. It is important to distinguish between statutory rights, or "formally recognized rights," and customary rights, or "traditional rights." Custom, or customary rights, may play an important role in identifying rights of a group of people established over a long period of time. Customary rights in land involving indigenous societies are usually created following their traditions and through the ways in which community leaders assign land use rights to the members of the community. They are often rights developed through ancestral occupation and use by ancestral societies.

There are a variety of modes of land ownership and tenure. Some involve individual ownership and others involve collective ownership, which may take the form of membership in a cooperative or shares in a corporation, which owns the land (typically in fee simple, but possibly under other arrangements). There are also various hybrids, such as in some communist states, where government ownership of most agricultural land is combined in various ways with tenure for farming collectives.

Allodial title—Allodial title is a system in which real property is owned absolutely free and clear of any superior landlord or sovereign. True allodial title is rare, with most property ownership in the common law world (Australia, Canada, Ireland, New Zealand, United Kingdom, and United States) being in fee simple. Allodial title may be conveyed, devised, gifted, or mortgaged by the owner, but it may not be distressed and restrained for

collection of taxes or private debts or condemned by the government through eminent domain proceedings.

Common areas in colonial states—In the Pennsylvania case of *Brucker v. Burgess and Town Council of Borough of Carlisle*,* the court found some of the evidence confusing, and incomplete in its wording, but stated that ancient rights as established in favor of the public continue; however, in the absence of more complete definition, uses may change over time to meet the needs of the community.

Two things in this case are noteworthy. The first is the court's statement that "there is no doubt that the mere fact of the use of (the Square) by the public for now more than 200 years is sufficient to raise a conclusive presumption of an original grant for the purpose of a public square; such is an ancient and well established principle of the law. Nor can it be denied that, where such a dedication has been established and the public has accepted it, there cannot be any diversion of such use from a public to a private purpose, and it is also true that, where a dedication is for a limited or restricted use, any diversion therefrom to some purpose other than the one designated is likewise forbidden" (citing several cases).

The second item of note is the dissenting opinion (of two of the judges) which states, in part

Evidence of dedications and titles based upon ancient documents or events arising out of antiquity cannot possibly be as strong or clear as would be required in matters arising or titles created in modern times; and we must not lightly strike down rights or public uses which have existed for more than a century. Counsel for the Borough frankly admits that if the Borough can change or destroy this market place it can also change or destroy the church which was built on this same public square and like the market place has been used for more than 200 years. This church and this market place were dedicated by Thomas Penn in 1751; and this dedication and use as a market place were thereafter frequently ratified. The Borough merely contends that there exists today no clear evidence that this square was the 'spot' which was dedicated for these purposes.

We are living in exciting and rapidly changing times. We rode from the horse and buggy age to the automobile age and then flew too rapidly to the airplane age and the atomic age. The tremendous changes which have occurred and are still daily occurring have necessarily produced uncertainty, unrest and confusion—not only in the minds of men, but in many phases of man's life. As a consequence, 'change' is on every man's lips, and unrest and uncertainty in many a man's heart. In the craving for change, in the restless quest for a Utopia of riches and ease, haven't we too often forgotten the things of the spirit, as well as the history of our Country and the immemorial customs of our people? Haven't we rushed frantically and heedlessly after false goods—material prosperity and

* 376 Pa. 330; 102 A.2d 418, Pennsylvania (1954)