COMMUNAL LAND RESEARCH PROJECT

RFP/JHB/2015/003

ANNEXURE 1:

TERMINOLOGY AND DEFINITIONS

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1 INTRODUCTION

Part of the difficulty in re-thinking and reconceptualising land administration in line with the Constitution is the terminology which is generally used. We need to develop a common understanding of what we mean by various terms. One approach that is probably useful in this regard is starting with indigenous languages, without necessarily assuming the that terminology between languages has the same meaning.

2 TIERS OF GOVERNANCE STRUCTURES

Table 1: Tiers of governance structures

Scale	Structure	Comments
Province, *iphondo* – isiXhosa, *isifundazwe* – isiZulu	House of traditional leaders	
Kingdom, *isizwe* – isiXhosa & isiZulu but contentious because it also translates as "nation"	King, *ikumkani* – isiXhosa, *isilo* – isiZulu, assisted by councillors, *amaphakathi* – isiXhosa	3 kingdoms in EC, all in the Transkei, 1 in KZN, none in Limpopo
Regional Authority/Council, combined a number of Tribal Authorities / Territorial Councils of the same tribe, coincided with magisterial districts in KZN	Regional Authority/Council	8 in EC, all in Transkei, 23 in KZN, 12 in former Lebowa, 6 in former Gazankulu, and 5 in former Venda.
Traditional Authority/Council – generally, always Territorial Council – Venda	Chief, inkosi – isiXhosa and isiZulu, *magoshi* – siPedi, *tihosi* – Xitsonga, *mahosi* – Tshivenda, and traditional council, inqila – isiXhosa, *isigungu* – isiZulu	286 in EC, 281 in KZN, 140 in former Lebowa, 39 in former Gazankulu, and 28 in former Venda. About 4 or 5 traditional council areas per local municipality in KZN. The boundaries of these areas were surveyed for CLaRA if not before, creating or reviving many boundary disputes
Administrative Area. This level only exits in the Eastern Cape (EC)	Headman, historically and generally known as *isibonda*, now *inkosana*.which also means 'prince'.	These areas were surveyed in the EC for CLaRA. Administrative Areas are about the size of a few municipal wards but boundaries do not coincide
Traditional ward, village*, ilali* –isiXhosa, *isigodi* – isiZulu	Sub headman, *ibhodi* / *unozithetyana* in EC, headman, *induna*, now *inkosana*, assisted by *ibandla* in KZN, *mantona, borakgoro* - siPedi, *tindhuna, xamuganga* - Xitsonga, v*hamusanda* – Tshivenda	There are a number of homesteads, as many as 100 or more, in a village or traditional ward.
Homestead, *umzi* - isiXhosa,	Family guardian	

Scale	Structure	Comments
umuzi – isiZulu		

3 TRUST LAND OR STATE TRUST LAND VERSUS 'COMMUNAL LAND'[1]

The HDA request for proposals which led to the preparation of this report is headed "Research on Rural Land and Communal Land in South Africa". However on a close reading of the entire document it becomes increasingly clear that the focus is not on rural land in general but specifically on the areas referred to as "communal land".

"Communal land" in the sense that it is widely used in South Africa is hardly communal at all. Land use rights to residential and arable land parcels are held by heads of household on behalf of the household or custodians on behalf of an extended family. Grazing lands may be accessed in common but such access is usually determined by local conventions, established over years if not generations. Similarly, the rights to harvest and utilise common resources for building, fuel, medicinal, spiritual and other purposes are usually subject to local conventions. While the rights to residential and arable land may have been formally held under statutory rights in the form of Permission to Occupy or PTOs, these rights existed alongside customary or common law rights to the commonage and common resources.

For the same reasons, the term "communal tenure" has little explanatory value and is also misleading. The term is usually used to refer to the bundle of statutory and customary or common law land use rights described above.[2] In a recent volume of research papers prepared for the successful challenge on the constitutional validity of the *Communal Land Rights Act No.11 of 2004*, the following analysis was provided:

> *The term 'communal tenure' has always been contentious in the African context because it seems to imply collective ownership and use of all land and natural resources whereas most indigenous systems include clearly defined individual or family rights to some types of land (for example, residential areas and fields for cropping) as well as common property resources (such as grazing or woodlands) that are shared with others. On the other hand, these systems almost all involve rights of access and use on the basis of accepted group membership, and a degree of group control or supervision over how those rights are exercised. This 'relativises' individual rights to a greater degree than Western systems of private property. To help distinguish fundamentally different systems, the term 'communal tenure' has often been used to describe African land tenure. However, these are in fact mixed tenure regimes comprising variable bundles of individual, family, sub-group and larger group rights and duties in relation to a variety of natural resources.*[3]

The rules of use and access to common resources as well as the local conventions about the restrictions and transmission of residential sites is not entirely dissimilar from the restrictions placed on registered land parcels by land use and municipal zoning schemes.

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[1] This section partly repeats a passage in the proposal submitted in response to the HDA request for proposals for the preparation of this report.

[2] It may be time to drop the distinction between customary law and common law with their racial assumptions and instead to refer to an inclusive South African common law which by definition includes established customs and conventions.

[3] Ben Cousins, 2008, "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa", in Classens, A. & Cousins, B. (editors), 2008, *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act,* Legal Resources Centre & UCT Press, pages 5-6)

While the term "communal" is familiar, it should only be used with caution and with qualification. When referring to the underlying land rights, then it may be best to use other terminology. It may be technically more accurate to refer to mixed land tenure and mixed land tenure systems.

The underlying land was set aside as mission reserves, as areas reserved or scheduled in terms of the 1913 and 1936 Land Acts and which formed the basis of the reserve areas which later became Bantustans, including further land acquired for the territorial consolidation of the Bantustans. This land is sometimes misleadingly referred to as "state land" but it is not land that the state can do with as it pleases.[4] This land is held in trust by the state.[5] As trustee of this land, the state must act in the interests of the beneficiaries of this trust who are the long term occupants and users of this land and who are now recognised in law as the effective de facto owners of this land by the *Interim Protection of Informal Land Rights Act No.31 of 1996*.

Following the passage of Act 31/1996, the Minister of Land Affairs approved a policy directive titled Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land. While this directive did not explicitly talk of trusteeship, in effect and in practice it sought to put the local beneficiaries at centre stage, and not the interests of the state as owner.

Chapter II of the 1936 *Natives Trust and Land Act* established a corporate body called the South African Native Trust (SANT), later the SA Bantu Trust, finally the SA Development Trust (SADT).

The Trust was constituted under section 4 which also provided (emphasis added):

> *The Trust shall ... be administered for the settlement, support, benefit and material and moral welfare of the natives of the Union.*
> *The affairs of the Trust shall be administered by the Governor General as Trustee ...*

The Act merged a number of previous trusts, including the Natal Native Trust and the Zululand Native Trust in the new trust. Section 6 provided:

> *There shall be vested in the Trust -*
> *all Crown land [later amended to State-owned land] which has been reserved or set aside for the occupation of Blacks;*
> *all Crown [later amended to State-owned land] within the scheduled native areas, and all Crown Land [later amended...] within the released areas.*
>
> *For the purposes of sub-section (1) Crown land [later amended ...] shall not include any such land*

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[4] There has been an increasing tendency within first the Department of Land Affairs and later the Department of Rural Development and Land Reform to describe trust land as "public land" or even as "state land". A report of the Chief Surveyor-General in February 2013 was titled *Report on the survey of state land and completeness of the comprehensive state land register*, yet it deals with the survey in of the settled trust lands which it refers to as "unsurveyed state land". The report included the statement: "In addition, the exercise would lead to the survey and subdivision of vacant and communal State land for facilitation of security of tenure to millions of existing residents on State Land."

[5] Chapter II of the *Native Trust and Land Act No.18 of 1936* established a corporate body called the South African Native Trust (SANT), later the SA Bantu Trust, finally the SA Development Trust (SADT). This Trust was constituted under section 4 which also provided: "The Trust shall ... be administered for the settlement, support, benefit and material and moral welfare of the natives of the Union. ... The affairs of the Trust shall be administered by the Governor General as Trustee ..."

> *which has been reserved for public purposes … or … has been declared a demarcated forest under the Forest Act, 1913 or ... included in any Government irrigation settlement ...*

Section 10 (2) provided that the Trust could only acquire land:

> *within a scheduled native area; or*
> *within a released area; or*
> *adjoining land of which the Trust or a native is registered owner, which is situate in a scheduled native area or in a released area; or*
> *adjoining land acquired by and transferred to the Trust under paragraph (c)*

Note the different language between the earlier version of the Act and the later, amended version: "Crown land" became "State-owned land". But the crucial point is the land would thereby have "vested" in the Trust.

A report commissioned by the Department of Land Affairs in 1998 included the statement:

> *Although a variety of homeland legislation guided the Permission to Occupy (or PTO) system, all of these systems had common features being variants of Proclamation R188 legislation. These systems of land administration were generally founded on the notion of land being held in trust for black people, the Trustee initially being the State President and later the homeland governments themselves.*[6]

The term "trust land" is thus preferable to communal land, especially when discussing the position of and relationship with the state and the manner in which the state does and should deal with this land.

However this use of the word "trust" in unique. It is not the same as a private trust and has been described as something between a private trust and the notion of trusteeship in the law of sovereignty. A private trust is difficult to hold to account except through the courts. A Communal Property Association (CPA) is essentially also a private body and has some of the same risks. However the DRDLR has a duty to oversee CPAs, which it has not discharged, but which in theory provides some oversight short of resorting to court.7

The advantage of the state as trustee is that the state is subject to all sorts of administrative law requirements, allowing a variety of measures to be used to hold it to account before having to resort to the courts.

Section 1 of the *Municipal Property Rates Act No.6 of 2004* includes the following definition:

> *"state trust land" means land owned by the state-*
> *(a) in trust for persons communally inhabiting the land in terms of a traditional system of land tenure;*
> *(b) over which land tenure rights were registered or granted; or*
> *(c) which is earmarked for disposal in terms of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994)*

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[6] A McIntosh, D Atkinson, R Kingwill of McIntosh Xaba & Associates and Jan Barnard, *Land Administration in the Ex-Homelands: Past, Recent and Current Situation*, DLA Project Reference: 98/RSA/TRCG/007, page 7/114 of digital version in MSWord

[7] See the *Communal Property Associations Act No.28 of 1996*, especially sections 11-13.

The term "state trust land" is useful in order to distinguish it from land held under a private trust arrangement.[8]

Land use and land tenure rights to state trust land are usually held under various proclamations issued under first colonial, then segregationist and later apartheid legislation. The system of public administration of this land and these rights has largely been allowed to disintegrate over the past twenty years.

Since the passage of the *KwaZulu-Natal Ingonyama Trust Act No.3 of 1994* and subsequent amendments, all such state trust land in KwaZulu-Natal falls under the control of the Ingonyama Trust Board. However the legal status of the land and the long term occupants of this land is essentially the same as for the state trust land across all of South Africa.

The misleading term "communal tenure" is often used in contrast to the private property regime regulated by the *Deeds Registries Act No.47 of 1937* and the *Land Survey Act No.8 of 1997*. Mainstream discussion of land tenure has usually referred to a need for uni-directional "upgrading" of land tenure to meet the exacting requirements of these two acts. This is contrary to some mainstream international thinking including that of the World Bank which has determined that such private property regimes are often unsuitable in developing societies. Ethnographic, economic and socio-legal studies in South Africa (including a Ph.D. by a co-author of this report[9]) show that attempts to impose private property regimes in South Africa (and indeed across sub-Saharan Africa) continue to fail in the 21st century and that instead many households interpret and utilise private immovable property, i.e. land an improvements on such land, in ways consistent with indigenous notions of family title. Any land tenure reform has to be sensitive to this reality and avoid the pitfalls of mass titling but must contribute to increasing security where there is insecurity and uncertainty.

This is an issue which is discussed in more detail in 'Annexure 4: Perspectives on land rights and inheritance.'

4 OWNERSHIP, REGISTERED RIGHTS AND RECORDED RIGHTS

Registered rights have a strict legal definition in terms of section 1(xviii) of the *Land Survey Act No.8 of 1997*:

> *"registration" means the registration of any real right in or to land in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), and "registered" shall have a corresponding meaning; ...*

The following passage provides a definition of "real right" and discusses "full ownership":

> *Traditionally the most common form of title to land in the Republic of South Africa has been through full ownership of the land in question.*
>
> *Fundamentally such ownership is the most comprehensive of all real rights (being rights which are enforceable by the holder against the world at large) and confer upon the holder, inter alia, the right to use the land, the right to income derived from the land and the right to consume, dispose of and even destroy the improvements on the*

[8] In contrast the earlier *National Forests Act No.84 of 1998* and the *National Veld and Forest Fire Act No.101 of 1998* both define "state land" to include land held in trust by the Minister of Land Affairs or the Ingonyama.
[9] Rosalie Anne Kingwill, 2014, *The Map is not the Territory: Law and Custom in 'African Freehold': A South African Case Study*, University of the Western Cape.

land. Ownership is unlimited in duration and is not subject to time limit. It is an independent right and is not dependant on or derived from any other right.

....

In terms of the Deeds Registries Act "immovable property" includes (by definition) any registered lease of land which, when entered into, was for a period of not less than 10 years or the natural life of the lessee or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period amount in all to not less than 10 years. Accordingly leasehold title constitutes immovable property within the meaning of the Deeds Registries Act and as such is capable of being encumbered by mortgage bond as security for a loan or other debt. Just as land can be encumbered by mortgage bond, so can leasehold title be encumbered by [a] mortgage bond.[10]

While the term “ownership” is usually used in this context, in relation to exclusive real rights, this is in fact misleading. One can also own use rights which include leasehold rights. The holder of a PTO is also the owner of both the PTO certificate and the use and occupation rights associated with the PTO.

In fact one of the few legal academics to have written on immovable property in customary law, the late Prof. A.J. Kerr, used the term “owner” to refer to the holder of both quitrent title and Permission to Occupy or PTO.[11]

This wider interpretation and use of the notion of ownership is reflected in common parlance by the use of the term “title”, or “itayitile” which is used to refer to almost any form of landholding including a PTO certificate, what purports to be a PTO certificate or any unwritten permission to occupy a site or land parcel granted by anyone seeming to be in authority.

Given the wide and potentially confusing use of the term ownership, it is therefore suggested that a more useful terminology is to distinguish between registered rights and registered land on the one hand and recorded rights on the other. Both can be “owned”.

“Recorded rights” should be recorded at local level and reflect what have been referred to as PTOs, customary rights and other use rights and “informal” rights. Any such recorded rights must be recorded and held by a public office as public records within the three spheres of government. The system of recording must be uniform across the country and must not be incompatible with the administrative systems used by the Surveyors-General and Registrars of Deeds.

4.1 CROSSING THE DIVIDE BETWEEN REGISTERED AND RECORDED LAND RIGHTS

If the above distinction between different categories of land rights is accepted, then the question arises as to the circumstances under and manner in which a transition of rights from one category to the other occurs.

FROM RECORDED TO REGISTERED RIGHTS

[10] http://www.bowman.co.za/ 2015/09/07
[11] 1979, The Customary Law of Immovable Property and of Succession, Rhodes University Printing Unit, Chapter X

This is what is conventionally referred to as an “upgrade” of rights and the same convention has it that it is indeed an up-grade of lower order rights to higher order rights, or from permit-based rights to “full ownership”.

The argument here is different. It is that all land rights are socially, economically and politically derived and that there is thus an intrinsic equality about all land rights. However these different rights have been regarded differentially both ideologically and legally. Accepting that different social and economic situations require different land rights in turn requires some flexibility and the transition of land rights between categories to meet these different circumstances.

There are a number of obvious situations were a transition may be required. In particular where some form of land development must take place, there may be economic requirements for transition. A current and common example is where urban development and the provision of urban infrastructure requires additional land and in particular land such as state trust land over which land rights are recorded. The requirement is perhaps best illustrated by a need for suitably located land for the construction of a dam or a waste water treatment works. Assuming that the municipality has no other suitable land which is already on the registered system, then the public interest may be invoked and require the expropriation of recorded rights. The provisions of legislation such as the *Interim Protection of Informal Land Rights Act No.31 of 1996* and associated procedures must be followed. Compensation must be paid to those relinquishing recorded rights, either by contractual agreement or by expropriation. Ultimately the land parcel to which the formerly recorded rights applied is surveyed and registered in the Deeds Registry in the name of the municipality.

But there is an important distinction to be drawn here: it is not land itself which is being expropriated but rights in land. Section 1 of the *Restitution of Land Rights Act No.22 of 1994* provides the following definition:

> *"right in land" means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question ...*

A different kind of outcome may be required in the case of a transition required for private development such as the development of a tourist facility, other commercial and industrial purposes and also housing development. In these instances, a conventional approach would suggest that the municipality simply expropriate the land required and then sell it on to the private sector, allowing the market and consequent speculation, and value capture by private land holders

In such circumstances a developer may require registered rights to secure development and investment finance. However this can be accommodated by the mechanism of registered leases. This has the potential to open an ongoing revenue stream for the local municipality and limit speculation and value capture in the private sector. While this is not the conventional approach in South Africa, it is one which is widely practised in other societies including in Organisation for Economic Co-operation and Dev elopement (OECD) countries.

However there is precedent in SA legislation. The Cape Provincial *Ordinance No.33 of 1934* still applies in the proclaimed urban areas of the Transkei. Sections 35*ter* and 50 provide for some limitation of value capture due to changes in zoning:

Enhancement levy and compensation.

[47a]35*ter*. (1) In respect of every provision which is or has been prescribed by the Administrator after the commencement of the Townships Amendment Ordinance, 1969 (Ordinance 25 of 1969), in terms of section 35*bis* for a local authority's scheme in the course of preparation or awaiting approval, there shall, subject to the provisions of subsections (8), (9) and (10)—

(*a*) be an enhancement levy due to such local authority by the owner of any land of which the value is or has increased in consequence of such provision being or having been so prescribed, and

(*b*) be compensation due by such local authority to the owner of any land of which the value is or has decreased in consequence of such provision being or having been so prescribed.

The section provided that the levy under (1)(a) would be 50% of the increase, and the whole of the difference in the case of (1)(b).

Local authority may recover betterment from owners of property increased in value.

50. Where by the coming into operation of any provision contained in a scheme, or by the execution by the local authority of any work under a scheme, any property is increased in value, the local authority may, subject to the provisions of this Ordinance, recover from the person whose property is so increased in value an amount not exceeding fifty per cent. of the amount of that increase, Provided that such local authority makes a claim in that behalf within twelve months after the date on which the provision came into operation or such longer period as may be specified in the scheme, or within twelve months after the completion of the work, as the case may be.

Section 35*ter* of Ordinance 33/1934 is incorporated into the revised and updated *Land Use Planning Ordinance No.15 of 1985* which applied in the Cape Province but not the then "independent" Ciskei and Transkei.

However it is not clear if these sections have ever been applied and if not, why not.

FROM REGISTERED TO RECORDED RIGHTS

There are many instances in history and currently of transitions from registered rights to recorded rights. Under colonialism, segregation and apartheid, people were deprived of acquired real rights to land and sometimes given substituted weaker rights, including various private and public trusteeship arrangements as well as PTOs. It was for this reason that the *Restitution of Land Rights Act No.22 of 1994* provided for the restitution of "rights in land" rather than just "land". So historically we have had such a transition from registered to recorded rights.

However in many of these instances the evidence of the act of dispossession remains in entries in the Deeds Registries. So the underlying land rights are registered while the overlaid land rights such as PTOs are recorded or are informal such as those protected by *IPILRA* and have the potential to be recorded.

Similarly, perhaps as much as 6% of the surface area of SA was acquired by the SA Native Trust and its successors in name after 1936 and transferred to the bantustans. This was registered land. Once transferred to the bantustans, some was allocated to local communities under various forms of local leadership including local councils and increasingly as years went by under tribal authorities. Here again the underlying registered land still exists. It has simply been overlaid by recorded rights such as PTOs and thus far unrecorded

rights such as the informal rights protected by the *Interim Protection of Informal Land Rights Act No.31 of 1996*. Thus while the underlying land and rights to this land are registered in law, this has been overtaken in practice and fact by the recorded and informal rights to this same land.

Other registered land transferred to the bantustans was leased or even transferred to various categories of emergent farmers, many of whom were closely tied to the bantustan regime and elites. This land remains registered in law and in fact.

Without exception, the land restitution and land redistribution programmes since 1994 have resettled people and communities on registered land. Where this land has been restored or redistributed to small family units, this is usually associated with an intention to farm commercially and to make full use of any financial advantages of registered land such as mortgage finance.

However many restoration and redistribution projects across the country have involved the resettlement of large numbers of people on registered land. In KwaZulu-Natal the *amakhosi* were important drivers of the early land redistribution programme with its system of small grants of R16 000 per household. The *amakhosi* encouraged their subjects to combine to attract combined grants equivalent to the purchase price of nearby registered farmland in a deliberate and calculated attempt to expand their territorial area and number of subjects into the areas of former Natal outside of KwaZulu. While the records in the Deeds Registry indicated that this registered land is owned by a common property institution such as a communal property association, the actual administration of that land is according to local customary practice. This land has in effect if not in law been transferred from the category of (still underlying) registered rights to (possible of potential) recorded rights. In fact the enabling legislation for the financial grants for land redistribution, the *Provision of Land and Assistance Act No.126 of 1993*, provided at section 2 for the designation of registered land for settlement and that:

> *The laws governing the subdivision of agricultural land and the establishment of townships, shall not apply in respect of [this] land ... unless the Minister directs otherwise in the notice in question.*

This provision was originally drafted by the De Klerk government as part of its land reform package and appears to be a tacit admission that registered farmland was through the land redistribution programme to become land settled in some manner not usually seen on commercial agricultural land or in formalised settlements. This provision was retained when Act 126/1993 was amended after 1994.

Another example, although unintended, of a transition from registered to recorded rights to land can be found in the subsidised housing programme where housing beneficiaries originally received registered individual title but there is evidence that many people transfer rights off register, in effect creating a parallel off- register or recorded rights system.

4.2 COMPARISON OF REGISTERED AND RECORDED RIGHTS

The DRDLR needs to develop enabling legislating to establish a nationally constituted and locally administered land records system for recorded rights so as to address the legislative void found in communal areas.

This recording system needs to capture and link 1) the social unit (e.g. a individual or a household to a 2) spatial unit (e.g. a plot or geo-referenced point).

Table 2: Comparison of land registration and land record- system[12]

Aspect	Land registration system	Land record system
Enabling legislation	*Land Survey Act No.8 of 1997* *Deeds Registries Act No.47 of 1937*	Modification of and regulations to the *Interim Protection of Informal Land Rights Act (IPILRA) No.31 of 1996*
Responsibility for enabling legislation	DRDLR	DRDLR
Responsibility for administering the system	National DRDLR through the national Deeds Registry and Survey General systems with offices in provinces	Short term: DRDLR / CoGTA Long term: municipalities
Spatial location and/or boundaries	Surveyed erven, detailing boundaries	Some geo-spatial referencing such as a point or points, areas, outlines, natural boundaries
Responsibility for establishment and maintaining spatial location and/or boundaries	Registered land surveyors using technologically advanced measuring tools for centimetre accuracy. Town and regional planners. Engineers. Other specialists may be called upon for specific boundary problems.	Local officials using digital geospatial public tools such as GPS and Google Earth
Social units of people around which the system is based	Individuals, nuclear families, corporate bodies	Extended families, individuals, organised or identifiable groups of individuals
Adjudication of rights to authorise ownership and transfers	Registered land surveyors and conveyancers	Local land record officers according. This requires new guidelines, preferably legislation, for adjudication of social tenures
Custodianship of spatial records	Erven kept by provincial Surveyor General's office	Plots, points, areas kept at local municipal level
Custodianship of the identities of land rights holders	List of names recorded in Deeds Registry kept at the deeds office, as part of a national data base	List of names recorded in land record system kept at the level of the local municipality, as part of a national data base
Evidence of registration or record	Title deeds stored in the deeds office, copies to owners	Occupation and Use Rights (OUR) certificate stored in local system, copies to rights holders
Procedures for dealing with	Professional conveyancers,	Local structures as

[12] The registration system exists at the moment. The record system is a system of land administration that is recommended by this report.

Aspect	Land registration system	Land record system
disputes over social and spatial boundaries and associated rights	courts	appropriate, then escalate to CoGTA/ DRDLR. Investigate establishing an office of a land Ombudsman. Approach courts as last resort

Note that for land use management, SPLUMA draws on both the land registration and the land records systems to identify who has what rights to occupy which piece of land.

5 VARIOUS LAND ACQUISITION INSTRUMENTS

In many instances any development on land, be it communal or not, has implications on pre-existing rights. The implications could be severe or minor, depending on how one looks at them. It is sometimes inevitable that new development will often involve some form of deprivation or infringement of rights. In some cases the deprivation could take the form of expropriation, negotiated sale, leases or concessions on portions of communal land.

The crucial dilemma for strategy is that economic development means change and change means disruption. This tends to create winners and losers, with the poor at the greatest risk in the process, because they have the least power with which to leverage advantage (Phillips *et al*; 2014[13]). At the same time however, no economic development and no change will leave the communal area as they are: a poverty trap. The land may already be either occupied and or used by local people, will often mean that development will inevitably threaten the land rights and sometimes livelihoods of poor households.

5.1 NEGOTIATED SALE OF LAND (WILLING-BUYER-WILLING SELLER)

The option of acquiring the land through the sole use of negotiation is always an option in instances where the state wants to acquire land for development. IPILRA procedures are an option to consider, however, the results are never guaranteed If IPILRA procedures are used, in some circumstances government access to land only depends on a positive outcome of negotiations and a community resolution. Acquisition through a negotiated processes are onerous in respect of any type of land and they are worse or impossible in the case of communal land. After the community processes are over, the process would still depends on onerous DRDLR state land disposal processes to be concluded. This forces the state to consider other options, available at its disposal including expropriation, leases, and concession.

5.2 EXPROPRIATION

The South African Constitution has provisions which protect the right to property as a fundamental human right. Section 25(1) of the Constitution states, “No one may be deprived of property except in terms of law of general applicability”. As with other rights, the right to property is not absolute, but can be determined by law and limited to facilitate the achievement of important social purposes. Section (2) states that property may be expropriated – “(a) for a public purpose or in the public interest; and (b) subject to compensation.” The two key tests for expropriation, then become “public purpose/interest and compensation.

[13] Phillips, K. 7 Robinson, S. (2014) Integrated Wild Coast Development Programme: Strategic Synthesis. Province of the Eastern Cape and GTAC.

Within the context of communal tenure "expropriation" has been historically "an absolute no-go" by government and state agencies in general, partly because of its political overtones, not because of legislative limitations. In respect of communal land, expropriation has until recently been unheard of. There is confusion in the community of development practitioners as to how to deal with expropriation on communal land, with no one taking responsibility for what is a simply a planning procedure, similar to rezoning. Planning professionals think it is a legal process and lawyers think it is a planning procedure. Government officials and the legal fraternity have not considered expropriation in the context of communal land largely because of the misplaced thinking about communal land as being owned by the state.

Most recently the first known case of expropriation of a portion of communal land rights is in its final stages for a 14 ha parcel of land for a solid waste disposal site in Sterkspruit. While the process was initiated in 2010, it is only in 2015 that SG diagrams were registered in recognition of the expropriation. At the time of writing this, the only thing missing was registration of the portion of land in the name of Senqu Municipality.

5.3 CONCESSION

The Oxford dictionary defines a concession as a "right to use land or other property for a specified purpose, granted by a government, company, or other controlling body[14]:

5.4 SERVITUDE[15]

A servitude is a registered right that a person has over the immovable property of another. It allows the holder of the servitude to do something with the other persons property, which would not ordinarily be allowed. An example is the right of way to travel over a section of the other persons property to reach your own property. The key feature of this right is that it is registered in the deeds office, which means that any enquiry on the property from the deeds offices would unearth this servitude information. When the property is sold or purchased, the rights that are transferred are bound to the servitude terms.

There are two main types of servitudes:

- **Praedial servitude** prevails when a person has a right of use because of the fact that he is the owner of a certain property. Should s/he sell the property the servitude will move over to the new owner.
- **Personal servitude** is a right in favour of a specific individual so when that individual moves on, the servitude falls away. It does not pass on to the new owner if the property is sold.

Experience is that up until now, it has not been possible to register servitudes on communal land for a number of technical and policy-based reasons. Servitudes are an important legal instrument which the state uses in order to implement a range of rights infringements, such a placing a sewer pipeline, water pipeline, electricity power line and poles, a road etc. over the property that it does not own.

[14] http://www.oxforddictionaries.com/definition/english/concession
[15] http://www.louwrenskoen.co.za/index.php?option=com_content&view=article&id=102:26-disposit..

5.5 WAYLEAVE AGREEMENT / EASEMENT

Except for not being registered in the deeds registry system, a way leave agreement is similar to a servitude. Easements on the other hand, can be registered or not registered. The rights are conveyed from one individual to another by will, deed, or contract, which must comply with the Statute of Frauds and can be inherited pursuant to the laws of Descent and Distribution. Given the complexities of registering servitudes over communal land way leave agreements are the instruments that are generally used by the state on communal land. These are popular in institutions that run massive infrastructure programmes such the South African National Roads Agency Limited (SANRAL) and Eskom.

Unfortunately the experience is that many of these instruments are either ignored or when they are used, they are used inappropriately in the context of communal land. State institutions or parastatals often behave as if the state is the exclusive owner of the land, ignoring the IPILRA rights of those already using the land. When under question it is not uncommon for them to sign underhand deals with traditional leaders.

6 FORMS OF LAND HOLDING

6.1 RIGHT IN LAND

Means any real or personal right in land, including a right to cropping and grazing land.

6.2 FREEHOLD

Outright ownership of the property and land on which it stands. A freehold estate in land (as opposed to a leasehold) is where the owner of the land has no time limit to his period of ownership.

6.3 A LANDHOLDER/LANDOWNER

Is a holder of the estate in land with considerable rights of ownership.

6.4 PERMISSION TO OCCUPY (PTO)

This is a user right of a personal nature allowing the user either use or occupation rights over a certain rural surveyed piece of land. Therefore it is not registerable in a Deeds Registry, although registerable in several state departments, e.g. Agriculture, Local Government and Traditional Affairs, etc. Most PTO's are for occupation whereas a good few others are issued in respect of land use, e.g. irrigation rights, etc.

6.5 INFORMAL RIGHT TO LAND

An informal right to land according to the Interim Protection of Informal Land Rights Act (IPILRA) no.31 of 1996 means:

(a) the use of, occupation of, or access to land in terms of-

(i) any tribal, customary or indigenous law or practice Of a tribe;
(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in- the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936); the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971), or the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.