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Land Ownership and Responsibility for the Mining Environment in Ghana

ABSTRACT

The basis for a private questioning of the environmental consequences of mining is largely determined by a proprietary interest in the area affected by mining. In Ghana, that proprietorship is uncertain and in some instances unknown. This makes individual or private enforcement of environmental principles and regulations by court action tenuous. This article argues that the tedious medley of custom, colonial and post-colonial legislation has, if anything, worsened the uncertainty surrounding the ownership of mining land in Ghana. In the midst of that cloud, there is a discernible line for state expropriation of land needed for mining activities.

INTRODUCTION

In the earliest stages the land and its produce is shared by the community as a whole; later the produce is the property of the family or individuals by whose toil it is won, and the control of the land is vested in the head of the family. When the tribal stage is reached, the control passes to the chief, who allots unoccupied land at will but is not justified in dispossessing any person or family who is using the land. Later still, when the pressure of population has given the land an exchange value, the concept of proprietary rights emerges, and sale, mortgage and lease of land apart from its use is recognized. These processes of natural evolution, leading up to individual ownership, may be traced in every civilization known to history.¹

Though not beyond controversy, Lord Lugard's statement offers a window into the complex terrain of land law in Africa. The hypothesized evolutionary process of land tenure in Africa has been upset by the consequences of the colonial enterprise. The sudden move from the purely

¹ This statement is attributed to a renowned British colonial administrator in Africa, Lord Lugard. See KRISHAN MAINI, LAND LAW IN EAST AFRICA 1 (1967).
customary regulation of land use to the imposition of a colonial legal system and the ultimate modifications following the attainment of independence left Africa with complex land tenure systems. The unique history of African countries also accounts for the difficulties in apportioning and/or assuming responsibility for the protection of the environment. The picture is nowhere more conspicuous than in the regulation of land use and the protection of the mining environment in the former British colony of Ghana. Until independence in 1957, Ghana was called the Gold Coast, a name descriptive of its resources and its importance to the Europeans. Following the formal colonization of the Gold Coast by the British in 1874, a plethora of laws was passed by the colonial administration to regulate the exploitation of the country's mineral resources and incidentally, land use. These laws paid little or no attention to the environmental implications of the mining activity. The post-colonial governments have, by and large, followed the established colonial practice, at most superimposing new legislation on existing practices. The confounding mix of customary, colonial and post-colonial land regulations with regard to mining is the subject of the discussion in this article.

In the last decade over 60 multinational and national mining companies and other interested persons have been granted license by the Ghana government to prospect for and mine minerals, particularly gold. Production of gold, for example, has more than quadrupled from 288,000 troy ounces in 1986 to 1.7 million troy ounces at the end of 1995. This

2. The Portuguese were the first Europeans to get to the coast of present day Ghana in the Fifteenth Century and called the place “da mina,” meaning “the mine,” because of the phenomenal amount of gold they found the people mining, using, and selling. See JOHN W. BLAKE, EUROPEAN BEGINNINGS IN WEST AFRICA 1454-1578, at 10 (1937). In turn, the French, the Dutch, the Danes, and ultimately, the British displaced the Portuguese. See J.H. Parry, The Age of Reconnaissance, in AFRICA; FROM EARLY TIMES TO 1800, 210-215 (F.J. McEwan ed., 1969). See also WILLIAM BURNETT HARVEY, LAW AND SOCIAL CHANGE IN GHANA 5-7 (1966); RHODA HOWARD, COLONIALISM AND UNDERDEVELOPMENT IN GHANA, 27-31 (1978).

3. Examples include the Concessions Ordinance, Cap. 100 (1900), Rivers Ordinance, Cap. 226 (1903), Mining Rights Regulation Ordinance, Cap. 153 (1905), and Minerals Ordinance, Cap. 155 (1936). A number of these Ordinances are discussed in F. Nil Botchway, Towards An Environmental Legal Regime For Gold Mining In Ghana 42-62 (1994) (unpublished LL.M. thesis, Dalhousie University) (on file with the Dalhousie University Law Library).


massive boom in mining activity has brought in its wake serious questions of environmental protection, resurrecting issues such as ownership of land and responsibility for the mining environment. For instance, in 1993 there was an outbreak of buruli ulcers in the Ashanti region of Ghana.6 Scientists attribute the outbreak of the disease to unusually high acid levels in the area's water resources, which was in turn linked to mining activities in the region. It was, however, not determined conclusively whether large-scale or small-scale mining was responsible for the high acid levels of the water resources. Similar matters have arisen in the Kwabeng areas of the eastern region, as well as the western region. These issues threaten the apparent calm surrounding the exploitation of natural resources in Ghana, and are of concern to investors and researchers. This work traces the historical origins of the current environmental concerns and attempts an outline of the ownership of land, land regulation, and its relationship to the mining environment in Ghana.

One significant void in the maze of both colonial and post-colonial legislation on mining is the absence of provisions relating to the right and capacity of individuals and groups to question or challenge the environmental consequences of mining in Ghana. This article contends that though legislation does not address the point expressly, individuals are not bereft of legal causes of action to at least protect themselves from the hazards posed to the environment from mining. Additionally, this article argues that though there is a discernible case for state expropriation, that in itself does not immunize mining interests from being legally accountable in law for the environmental consequences of their mining activity. Some of the common law causes of action available to individuals or groups of persons who wish to respond to damage done to the environment by mining include trespass to land, nuisance, the principle in Rylands v. Fletcher8 and


8. In Rylands, the defendants built a water reservoir over an abandoned mine, which collapsed under the weight of the reservoir. A nearby coal mine was flooded as a result. There was no cause of action in either nuisance or negligence. The English House of Lords therefore devised a new rule thus,
negligence. To initiate an action, the party in question must have standing in law. Historically, standing has been grounded on ownership and/or possession of land, especially in the common law of tort. To this end, this article focuses on the discussion of land ownership as a foundation for an individual's or groups' cause of action to enforce responsibility for the mining environment.

The discussion is divided into three parts. The first part examines the customary law principles of land ownership in Ghana and the incidents that go with it. An understanding of these matters is necessary in order to determine who has rights over land in Ghana, who can grant land for mining purposes, and how the mining environment could be protected under such arrangements. The second part looks at the concessions regime and its impact on the environment, while the third section focuses on the legislative arrangements for acquiring land for mining purposes, which has, to a large extent, superseded the customary law system. Throughout this article, the questions being pursued include who has the right in law to question damage done to the environment by mining activity, and which body or person can be held accountable for any such damage?

CUSTOMARY LAND TENURE SYSTEM

Prior to colonial rule Ghana had varying, though not entirely dissimilar, land tenure schemes. For example, land was largely communally owned and a member of the land owning community had an inherent right to reduce to his or her occupation any part of previously unoccupied communal land. Land tenure in present day Ghana is still largely based

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the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequences of its escape.


9. Lord Simonds reasoned in the case of Read v. Lyons, [1947] A.C. 156, 183 (Appeals Cases) (Eng.) that "he alone has a lawful claim who has suffered an invasion of some proprietary or other interests in land." The interest in land requirement as a basis for action has now been modified by the English Court of Appeals in the case of Khorasandjian v. Bush, [1993] 3 All E.R. 669 (All England Law Reports). In certain circumstances such as harassment, it is sufficient if a family member is seized of a proprietary interest. For a discussion of tort law as a means of environmental protection see F. Nii Botchway, supra note 3, at 140-45, 180-202.

10. See Nerquaye Tetteh v. Malm, [1959] G.L.R. 368 (Ghana Law Reports); Oblee v. Armah, [1958] 3 W.A.L.R. 484 (West African Law Reports) (Ghana). In both cases the court confirmed the inherent and inalienable right of a member of the land owning community to reduce to his or her occupation and use any portion of the community land which is hitherto unencumbered. It is important, however, to acknowledge the overlordship of the chief.
on the customary law. However, serious inroads have been made into the customary land tenure system resulting mainly from the changing nature of the country's agricultural and mining economy. The introduction of cash crops like cocoa and coffee and the long gestation of European mining interests introduced a certain level of permanency, hitherto limited or at best transitory, into the customary land owning scheme. The advent of colonial rule included the introduction of the British legal system and land tenure terminology into the colony. This marked the genesis of the changing conceptualization and interpretation of customary land tenure in Ghana. These alterations in the customary land tenure system have been exacerbated by the legislation passed on land ownership and use, by both colonial and post-colonial legislatures. The problems caused by the resulting, somewhat confused, system of land tenure and its relationship to the mining environment are the topic of discussion in this section of the article.

The customary law concepts of land ownership are the subject of debate among scholars of the law and sociology. Some argue that African peoples do not, traditionally, have the conception of ownership of land as it is in the European sense. To them, land belongs to God and its use is granted to the people who occupy the land for the time being. The exclusiveness of right which ownership is supposed to entail to Europeans was not apparent in many African societies. In general, customary law forbade the user to exercise rights in a manner that was detrimental to the interests of the community. This meant that any piece of land granted

11. See David Kimble, A Political History of Ghana 36 (1963). See also S.K.B. Asante, Property Law and Social Goals in Ghana 1844-1966 (1975). Legal and economic historians have disagreed over certain aspects of the customary land regime such as sale of land, but are almost unanimous on the changes introduced or hastened by the colonial economy. See Allan McPhee, The Economic Revolution in West Africa 130 (1926).


13. See McPhee, supra note 11.

14. "As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with." Amudu Tijani v. Secretary to the Government of Southern Nigeria, [1921] 2 A.C. 399, 403 (Appeals Cases) (Eng.).


16. The community includes not only the living but also those yet unborn, as well as the spirits of the departed. David Kimble, supra note 11, at 17; Gerald Antoine, The Aboriginal Concept of Land: Deh Cho Land and Resource Governance, in Disposition of Natural Resources: Options and Issues for Northern Lands 47 (Monique Ross & Owen Saunders eds., 1997). Some European historians described this feature as "backward," "crude," "fetish," etc. See
under customary law for mining purposes could not be used in ways that were pernicious to the interests of the people of the community. It also meant that the person who, for the time being, occupied the land for mining purposes, could not prevent other members of the community from enjoying benefits such as rights of way, hunting, grazing, watering of animals, collection of firewood, sticks, grass, et cetera. 17

The first major point of contention regarding the customary legal conception of land ownership in Ghana, however, is whether there are ownerless lands in the country. There are two main positions on the issue. One is that propounded by Nii Amaa Ollenu, that the first principle in customary land law is that there is no land without an owner. "Every inch of land and every square inch of land is vested in somebody." 18 Various colonial administrators and anthropologists also recognized this position of the customary land tenure system. In a dispatch to then Colonial Secretary Carnavon in 1877, Sir Freeling stated that "there is no land absolutely unoccupied in the sense of being without an owner; it is either the property of the occupant of the stool or of certain chiefs and headmen." 19 Some researchers have disputed this view of the customary land law. Kludze contends that the principle that there are no ownerless lands in Ghana is "judicial customary law" and not the customary law generally. MCPHEE, supra note 11, at 130, 134, 130-60. Yet, the principle of ownership by the living, the unborn and the departed, or trusteeship for all, represents the essence of the sustainable development philosophy which is now almost elevated to international customary law status. See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (1987), and the entire text. See also, Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. ___(Sept. 25)(separate opinion of Judge Weermantry) (visited Sept. 8, 1998) <http://www.icj-cij.org>. Accord Minors Oposa v. Secretary of the Dep’t of Env’t & Nat. Res., 33 I.L.M. 173 (1994)(Philippines). In the Oposa case, the Philippines government granted licenses for timber extraction covering an aggregate area of 3.89 million hectares at a time when the forest cover of the entire country was estimated at 1.2 million hectares. The plaintiffs (minors joined by their parents) sued on grounds of inter-generational equity and right to self-preservation, and pleaded for certiorari to quash the grants. The Philippines Supreme Court held, inter alia, that the plaintiffs had standing to represent their yet unborn posterity.

17. See RUNGER MECHTHILD, LAND LAW AND LAND USE CONTROL IN WESTERN SUDAN: THE CASE OF SOUTHERN DARFUR 53 (1987). Note that land is defined at customary law to include not only land itself, but also the things on the soil which are enjoyed as naturally belonging on the land, such as rivers, streams, lakes, lagoons, woods, wild vegetation. In short, land "includes any estate or right in or over the land or over any of the other things which land denotes, for example, right to hunt, collect snails etc." N.A. OLLENU, PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA 1 (1962).

18. OLLENU, supra note 17, at 4.

19. G.E. METCALFE, GREAT BRITAIN AND GHANA: DOCUMENTS OF GHANA HISTORY 1807-1957, 389 (1994). It must be noted that it is not correct to say that the land belonged to the chief or headmen. Such leaders of the community merely held the land in trust for the entire community. See KWAMENA BENTSI-ENCHILL, GHANA LAND LAW: AN EXPOSITION, ANALYSIS AND CRITIQUE 41-65 (1964).
practiced by the people. He argues that the principle, if it exists at all, is not ubiquitous in all Ghanaian communities. He contends that there are lands in the Volta Region of Ghana, for example, which were not owned by anybody, albeit the chief of the traditional area had jurisdictional control over the lands concerned.

This debate was the basis of the first major political conflict between the colonialists and the indigenous people. A serious Executive intrusion into the customary land tenure system in Ghana was attempted in 1897. The colonial government proposed a Lands Bill to vest all "waste" lands in the Crown and to set up a concessions court to oversee the grant of concessions by the natives. This Bill generated serious political agitation. The indigenous educated elite and the chiefs teamed up to oppose it. The natives argued that there were no wastelands in the Gold Coast and that the colonial rulers aimed the Bill at expropriating indigenous lands. The Bill was shelved mainly due to its opposition that threatened the ongoing investment in gold mining.

Two issues arise from the foregoing debate. What happens when a piece of land is used in ways that could be injurious to adjoining "ownerless" lands? Could the "ownerless" land be used in ways that are harmful to the environment and to owners of adjoining lands? In response to the first question, it can be argued that since the proponents of the ownerless land theory agree that the chief or political head has jurisdictional control over lands in which there is no certain owner, and that the political head has protective powers and functions over the lands in the area, the chief therefore has the right to regulate activities done on

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21. See id. at 113-14. Perhaps this is what influenced the formulation of section 19(2)(c) of the Land Title Registration Law, P.N.D.C.L. 152 (1986) (Ghana), which provides that the state shall be registered as the proprietor of land not held by any other proprietor. The inspiration for the Land Title Registration Law may simply be pragmatism, seeing that since colonial days land transactions and government requisition have produced ownerless or quasi-ownerless lands where titles are disputed or improperly registered.

22. This led to the formation of the Aborigines Rights Protection Society (a political group) in 1897. See F.K. BUAH, A HISTORY OF GHANA 93 (1980). See also ADU BOAHEN, GHANA: EVOLUTION AND CHANGE IN THE NINETEENTH AND TWENTIETH CENTURIES 62-66 (1975); KIMBLE, supra note 11, at 330-57.


25. On the assumption that there are "ownerless" or "quasi ownerless" lands in Ghana.
“ownerless” lands that could endanger the environment and adjoining lands. Under this theory the chief or the political authorities can pursue anybody who uses his or her land in ways that are detrimental to adjoining unowned land. As to the second question, if the environmental impact of any activity is felt on land that is owned, then the landowner clearly has *locus standi* to seek remedies within the existing legal order. The landowner may seek remedies against whomever, for the time being, interferes with his or her free enjoyment of the property, even if the interference originates on unowned land. It can be concluded therefore, that whether or not a particular piece of land is owned by an individual or by a group, that land cannot be used in a way that affects the environment adversely, nor can it be made to suffer the brunt of harmful environmental consequences from the use of adjoining land.

The next principle of customary land tenure that is relevant to responsibility for environmental damage is that the stool, or chief, and his elders form a management committee that is entrusted with the responsibility for managing the entire stool property, particularly land. The Committee has the right to sue for the preservation and protection of stool land.

The stool or skin constitutes a corporation; and the occupant of the stool or skin, or the head of the tribe, together with his elders and counsellors, are trustees holding the lands for the use of the community, the tribe and the family. The stool or skin means the community or tribe as a whole being under a duty to protect the land for the quiet enjoyment of the beneficial interests therein, to mobilize all subjects or members to go to war against a foreign invader or to contribute money to fight a lawsuit against a foreign power or subject of a foreign power who disturbs the possession of a subject.²⁶

It is the stool,²⁷ represented by the chief and his elders or the family head and his elders, which has the responsibility for taking action to protect the condition of the stool or family land. This principle was resolved in the case of *Keelson v. Mensah* in which the court held that “[i]t is a well settled principle of native custom that, except in very special

²⁶ OLLENU, supra note 17, at 5-9. See generally S.K.B. ASANTE, PROPERTY LAW AND SOCIAL GOALS IN GHANA 1844-1966 (1975) (discussing the history of property law in Ghana with respect to the role of the stool); BENSTI-ENCHILL, supra note 19, at 1.

²⁷ The “stool” or “skin” is the shrine that embodies the soul and spirit of the family, community or nation and is a representation of the authority of all the members of the community. It is also the symbol of the legality or accreditation of the chief or head of family or community. See OLLENU, supra note 17, at 6. The stool is also regarded in Ghanaian jurisprudence as an artificial person as in the case of business companies. In ordinary Ghanaian parlance, the stool is a traditional chair mainly made of wood.
circumstances, only the head of the family can sue or be sued in respect of family property. It must be pointed out that the communal land interest that the political leadership manages is the highest in the hierarchical order of interests in customary land law. This interest is often described as the allodial or paramount interest or title. It is normally vested in the whole community, family or group and can only pass to another community or group. The head of the group or community who manages commonly held property is in the position of a trustee and cannot manage the land in ways that would be injurious to the interest of the entire community. The head cannot grant land for mining purposes that engender serious environmental consequences for the members of the community. He is answerable to the members of the group for the regulation of the environmental implications of mining on the communal land granted.

Apart from the allodial interest, there are lesser interests that can be held in land. These are the usufruct or customary freehold, customary tenancies and pledges. For the purposes of this discussion, the analysis is limited to the customary freehold or the usufruct, also known as the determinable interest. The usufructuary title is the highest estate that a subject of a land-owning stool or an individual member of a land-owning family can hold in the stool or family land. Some of the features of this interest, as noted previously, include the inherent right of a subject of the stool or a member of the family to go onto any uncultivated or unoccupied piece of the stool or family land and reduce it to his or her occupation and use. This interest can be determined without affecting the community’s ownership and it is inheritable and alienable inter vivos. All that the subject usufructuary is required to do is to perform customary services.

28. [1957] 2 W.A.L.R. 271 (West African Law Reports) (Ghana). The special circumstance exemptions from the Keelson rule were elaborated in the case of Kwan v. Nyieni, [1959] G.L.R. 67, 72 (Ghana Law Reports), and include where the property is in danger of being irretrievably lost and the head is either unconcerned or colludes in it. The customary law position is now altered by statute. Under the Head of Family (Accountability) Law, P.N.D.C.L. 114 (1985) (Ghana), what may appear to be a radical departure from judicial customary law, the head of family can be sued by accredited members of the family to account for his stewardship of the family property—in most cases real property.

29. See OLLENU, supra note 17, at 4-6.

30. See id.

31. See id. For the operation of this mechanism in Nigeria see D. J. BAKIBINGA, LAW OF TRUSTS IN NIGERIA 2-7 (1989).

32. See OLLENU, supra note 17, 79-107.

33. This principle is only of historical interest as the current legal practice is that the subject must seek the permission of the appropriate authorities before taking possession of any piece of the family or stool land. See Amatei v. Hammond, [1981] G.L.R. 300 (Ghana Law Reports); Land Title Registration Law, P.N.D.C.L. 152 (1986) (Ghana).

34. See the Privy Council decision in Amodu Tijani v. Secretary to the Government of Nigeria, [1921] 2 A.C. 399, 404 (Appeals Cases) (Eng.).
such as providing specified parts of game meat periodically to the allodial title holder, and generally to participate in customary rites performed for the general well-being of the community and its land. The usufructuary is responsible for any environmental damage caused by the particular use to which his land is put. He is also responsible for taking action to preserve the land under occupation from damage caused by the use to which adjoining lands are put. This means that the diversion of water, for example, in ways that flood the land of another, can occasion legal action against the person whose activities caused the flooding. At the same time, if a subject usufructuary mines gold or other minerals from the land and adjoining lands are adversely affected, the owners of the adjoining lands can take action at customary law, or in more recent times, at common law, against the miner for the damage done to the land.

Due to the historical designation of mining fields to the usufructuary under customary law and the relatively low environmental impact of indigenous gold mining, problems of ownership of land and of responsibility for the environment were very rare in the past. However, with the introduction of European mining technology, the English legal tradition and the assumption of wide powers by the modern state, issues regarding ownership and environmental responsibility have emerged. Among the questions currently asked are, Whether the holders of customary interests in the mining lands have been divested of their interests in such lands by the state and/or by virtue of their granting concessions to mining companies? Whether the traditional authorities have the legal capacity to take action against the mining concerns that damage the environment? Who takes the reversionary interest in the mining land after the mining is done? The next part of this article looks at the concessions regime and the legislation on land and mining to establish who has legal standing to sue for damage done to the environment by modern forms of mining.

35. See OLLENU, supra note 17, at 54.
36. The customary freehold or usufruct appears to be only of historical and academic significance as the Ghana Constitution negates it. GHANA CONST. art. 267(5) (1992). It is argued, however, that since a substantial part of land in Ghana has been acquired or managed under customary freehold principles, issues of land tenure would invariably continue to revolve around customary freehold or usufruct. This is so especially since the usufruct is often a derivative of the allodial interest which is not affected by the constitutional provision. It is the author's view that the authors of article 267(5) did not sufficiently think through the provision. Authoritative judicial pronouncement must be awaited.
CONCESSIONS AND RESPONSIBILITY FOR THE MINING ENVIRONMENT

The last quarter of the nineteenth century and the first quarter of the twentieth century are often described as the concession era in what was then the Gold Coast. Three main "gold rushes" occurred during this period, during which more than 25,000 square miles were given as concessions to approximately four hundred mining interests. Most of the concession agreements established between the chiefs and European mining concerns had expansive terms. For example, in one concession the following provision existed: "the concession confers rights of mining for gold, precious stones and minerals of all and every description and kind whatsoever and rights subsidiary and auxiliary thereto." Given the background of British-Ashanti military conflicts, a few bottles of rum by the concessionaire were enough to serve as consideration for such economically important contracts of very long duration. The boom in the concession market led to frauds that provided a recipe for conflicts as there was virtually no control over the granting of concessions, nor over the exercising of rights conferred thereby. This formed the basis for the conclusion that the "indiscriminate granting of Concessions will lead to serious complications in the future unless rules and regulations are established for the guidance of the Europeans and natives." In 1900 the colonial legislature passed the Concessions Ordinance. The Ordinance acknowledged that the land of the colony was the property of the indigenous people. The Crown made no overt claim to land in the colony except what it had purchased or acquired for public use. The Crown’s claim presupposed that the freedom to contract between the indigenous landowners and concessionaires with regard to the mining land was preserved. However, the Ordinance created a concessions court that was authorized to authenticate native grants of land for mining. Indeed, no grant of rights in or over land was valid unless the court had certified its


41. As Sir Freeling contended, the natives would not give mining land willingly "even if large payment were made." Metcalfe, supra note 19, at 388. Therefore, in many instances force was used to "acquire" the land.

42. Walker, supra note 24, at 60 (quoting Civil Commissioner Higgins).
The conditions spelled out in the Ordinance for ascertaining the validity of the grant included the following: the grants had to be between two parties represented by the appropriate person who also understood its terms; the grants must have adequate consideration and must not have been obtained by fraud; all the grants' terms and conditions had to be performed completely; and the grants must reasonably protect the customary rights of the people with respect to agricultural cultivation, firewood collection, hunting and snaring of game.

Though the Ordinance was aimed at regulating the concessions regime in the Gold Coast, it did little to clarify and settle the precise rights and responsibilities of both the concessionaires and the indigenous grantors in respect to the regulation and protection of the mining environment. The requirement that the grant should be in writing (in the English language) was dictated mainly by European mining interests. An overwhelming majority of the natives and their chiefs were not knowledgeable in the English language and had little appreciation of the effect of their grants being reduced into writing in the English language. As Ndulo observed,

These documents . . . were fairly technical even by modern standards. It was therefore unlikely that any African chief at the time could have comprehended the meaning of words such as 'latitude' or indeed the meaning of mineral rights as distinguished from land rights. And since these tidy European concepts have no counterparts in customary law, it is probable that no amount of interpreting could have made the chiefs appreciate the significance of the documents. Hence there is reason to suspect that most of the concessions were obtained by deception.

The few indigenous lawyers who appreciated the meaning and effect of the grants often colluded with the chiefs and mining interests to exact wide terms of concession from the indigenous people. It will thus

43. *See Hayford, supra* note 23, at 198-207. In some ways this is similar to land title registration as under the Land Title Registration Law, P.N.D.C.L. 152 (1986) (Ghana).
44. *See Newbury, supra* note 39, at 583; *Hayford, supra* note 23, at 206.
46. *See Newbury, supra* note 39, at 584. For an example of tactics the concessionaires used, Ndulo quotes a Palace official as saying that:

One day a Mr Sharpe turned up with a paper which he asked me to get Mushili to sign. I read the paper through and found that it made over the mineral and land rights of the country to the company. I said I will take it to the Chief, but I think he is going to be very angry when I translate it to
be observed that of their volition, and acting in ignorance . . . of the character and extent of the public rights with which they were parting . . . the chiefs of the Gold Coast have in the past thirteen years alienated an area which actually exceeds the total area of the colony itself."

The Concessions Ordinance also failed to require the terms and conditions of the grants to include any provisions relating to protection of the environment, nor did it indicate the courses opened to the indigenous people by which to take steps to prevent damage to the mining environment. The Ordinance's use of "proper persons" to the concession agreement referred mainly to the proper native vested with authority to grant land. This, as noted above, could mean the chief and his elders or the person holding the usufructuary interest. Due to improper understanding of indigenous land tenure schemes, most of the concessionaires relied on chiefs who, though having political jurisdiction over the specific areas, did not have proprietary rights over the lands they granted. This weakened and confused the capacity of individual natives and sub-groups to take action to protect the mining environment because the person who granted the concession on the land might not have the right to sue in respect to that land.

The Concessions Ordinance did provide for time limitations on grants, however. A concession could not be granted for more than ninety-nine years, and its area could not be larger than five square miles. Nevertheless, these requirements were subverted in practice. "The clause restricting area [was] readily evaded by people getting grants in different names and then amalgamating . . ." Indeed, if the creation of the concessions court and the restriction in the size and duration of the

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him. Mr Sharpe told me not to translate it and asked me to just get him to sign it. I told him that as a Christian I could not do such a thing. Sharpe agreed to the document being read, I read it to Mushili, the Chief was very angry and expelled Sharpe from the country.

NDULO, supra note 45, at 34. In the Chidda Concession Enquiry, the chiefs opposed the grant of a certificate of validity on grounds of fraud, misrepresentation and deceit. The Chidda Concession Enquiry No. 5 (Cape Coast, Mar. 1901) reprinted in HAYFORD, supra note 23, app. A at 289.


49. See NEWBURY, supra note 39, at 584. Before the Ordinance came into force, concessions of a hundred square miles were granted to the Ashanti Goldfields Company. KIMBLE, supra note 11, at 23-24. MCPHEE, supra note 12, at 159. The Ashanti Goldfields Company is a leading player in the international metals business and is currently registered on the New York, Ghana and London Stock Exchanges.
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Concessions were meant to prevent rampant alienation of land for mining, they had little impact. In the thirteen years between 1900-1913 a total area of 25,108 square miles of land was alienated.  

An outstanding omission of the Ordinance was the failure to clarify and distinguish between "native rights" and the rights of the concessionaires in the granted area. The provision protecting customary rights in respect to cultivation, collection of firewood and hunting did not mean that the indigenous people had the right to stay or to live in the concession area. On the contrary, it restricted them in their occupation and use of the land. Yet the law's lack of clarity resulted in the continuous occupation of parts of the concession area by the natives. It can thus be said that by means of "concessions" the natives became aliens on the lands they transferred to mining interests. Those who stayed on the land stayed at the sufferance of the concessionaires. Whether they could challenge the environmental effects of mining on the concession land was a question even more uncertain. Therefore, the people were virtually bereft of any standing founded on proprietorship to question the environmental ramifications of the use to which the concessions were put, in this context, mining. Given the natives' incapacity to sue over environmental degradation, it was left to the government to protect the people and the land. Yet during this period "the most serious feature . . . [was] the failure of the government to protect the present and future generations of natives in their public rights."

The Concessions Ordinance of 1900 was replaced by the Concessions Ordinance of 1939. The 1939 Ordinance had almost the same features as the 1900 one. The 1939 definition of a concession, however, excluded any lease, concession or assignment of rights or title or interest in minerals within a town or village. This aggravated the confusion regarding the rights of the occupants of the land and those of the mining interests. The exclusion of towns and villages led the people to believe that the grant of concessions did not affect their interests and rights in other land that remained, for the time being, occupied. In fact, considering the small size of towns and villages in Ghana during the colonial period, it was an

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50. See Newbury, supra note 39, at 594. Approximately one thousand square miles involved the alienation of surface rights.


53. This included the requirement of writing in English, proof of the validity of the concession before the High court (then Supreme Court), etc. See Hayford, supra note 23.

54. See Concessions Ordinance of 1939, Cap. 136, § 2 (Ghana).
illusory compromise to exclude those areas from the concession areas.\textsuperscript{55} It
does appear that, with the exclusion of villages and towns from concession
areas, the rights of the indigenous people over the concession area were
nearly severed, and with them went the capacity to sue for the degradation
caused by mining on the concession land. If anything, the indigenous
peoples' right to sue was limited to the towns and villages. Moreover, the
Ordinance did not apply to the largest mines, such as Ashanti Goldfields
Company and the Castle Gold Mining Syndicate.\textsuperscript{56}

In addition to the exclusion of towns and villages from conces-
sions, the 1939 Concessions Ordinance prohibited the certification of
concessions that granted or purported to grant rights to remove the
indigenous people from their habitations within the area of such conces-
sion.\textsuperscript{57} The question left unanswered was what were the rights of the
natives on such concessions? While the question cannot be clearly
answered, consolation can be found in the fact that irrespective of the
agreement by the parties in the concession agreement, the concessions
court had the power to modify, alter or vary the terms of a concession. The
court could also impose such conditions as it deemed fit with respect to the
grant of certificates of validity. The Governor also had discretion to extend
the limits prescribed for concessions or to cancel concessions already
granted to non-British subjects if he considered the grant prejudicial to
public safety interests.\textsuperscript{58} Nevertheless, there is no record of the exercise of
the powers of the court, nor of the Governor's use of his discretion to state
the rights of the natives to protect themselves against mining's environ-
mental effects, or to impose environmental obligations on the concession-
aires.

The effect of a certificate of validity granted by the court was that
it was good and valid from the date of its issue against any person claiming
adversely thereto. It was also effective in respect to the whole area of land
contained within the boundaries stated in such certificate, irrespective of
any discrepancy between such area and the area indicated by the notice
and plan previously published. Additionally, it was conclusive evidence of

\textsuperscript{55} Obuasi, the biggest mining town in Ghana, was allegedly made up of about 100
houses with a population of perhaps less than 1,000 people. The entire population of Ghana
before 1960 was less than six million. M.M. Huq, THE ECONOMY OF GHANA 40 (1989). In 1998
it is estimated at 18 million. Ghana Embassy, Washington, DC. (visited Sept. 17, 1998)

\textsuperscript{56} See Concessions Ordinance of 1939, Cap. 136, § 50 (Ghana).

\textsuperscript{57} See id. § 13(8).

\textsuperscript{58} See id. §§ 22, 28. For an example of the use of Executive power of intervention in
concession proceedings, see Concession Enquiry No. 2384 (Sekondi), Sentum Bonsa Timber Lands
Concession Maatschappij de Fijnhouwhandel N.V. (Fynhout) v. Minister Responsible for Lands, [1963]
1 G.L.R. 471 (Ghana Law Reports).
the satisfaction of all the requirements of the Ordinance under which it was granted. It could not be impeached by any person for lack of notice of the boundaries nor any other reason, except fraud proven against the holder of the concession. This aspect of the Ordinance was affirmed in Gliksten W/A Ltd. v. Appiah. The court, per Amissah J.A., held that "section 32(1) and (2) of the Concessions Ordinance, Cap. 136 was so sweeping in their conferment of rights on a concessionaire that, fraud apart, his title was good against the whole world and took precedence over the holder of customary rights." This negated any pretensions that the Ordinance was aimed at protecting the rights of natives in a concession area. Gliksten's holding leads to a somewhat disturbing conclusion, that the indigenous person occupying land in the concession area, despite his or her receipt of rent for the concession and the apparent protection of customary and religious sites and rights, was virtually powerless to take action to protect the land in the concession area from the environmental consequences of mining activities.

In June 1962 the Concessions Act was passed which substantially repealed the Concessions Ordinance of 1939. Though it did not affect the then existing concessions, it provided that the terms of such concessions could be varied by agreement between the parties subject to the consent of the Minister. Additionally, the Minister could on his own initiative call for the cancellation of any existing concession on any of the following grounds: whenever the Minister was satisfied that there had been a breach of a term of the concession; whenever the holder of a concession unreasonably withheld consent to a variation of the concession's terms which in the Minister's opinion had become oppressive due to a change in economic conditions; whenever the land specified in the concession had not been developed or used in accordance with the grant's objective; whenever the legally enforceable limits for the area of the concession had been exceeded. Again, despite the Minister's discretionary power, there is no record of the variation or cancellation of any terms on the ground that the exercise of rights under the said concession was prejudicial to the safety of the physical environment, or that the concession agreement divested the

62. See Concessions Ordinance of 1939, Cap. 136, § 35(1), (2) (Ghana).
64. See id. § 2(a).
65. See id. § 3(1).
natives who owned that land of any power(s) to challenge the environmental effects of mining on the land. The Act was explicit, however, on the circumstances or conditions that could call for the variation of the terms of the concession, and it stated, *inter alia*, that changes in economic conditions or the nationality of the concessionaires could be the basis for concession modification.  

The Act, like the Ordinance, provided for the payment of rent by every holder of a mining concession, but, unlike the Ordinance, it did not specify who, ultimately, was to receive the rent. If the person to whom the rent had to be paid had been specified in the Concessions Act, it would have helped clarify the legal rights and relations between the concessionaires and the indigenous grantor(s). Be that as it may, the Concessions Act fails to indicate any conferment of rights or vestiges of ownership to the indigenous grantor in the concession area, at least to enable him or her to question environmental degradation on the mining land.  

The lack of specific legal protection for indigenous people appears to have presented little difficulties to either those who administered the law or to the mining interests. One reason was that most of the mining ventures in the colonial and early post-colonial period were underground operations and could, to a large extent, co-exist with significant human settlements on the same concession area. This coexistence was important because any movement of the indigenous people from the concession area would have awakened the people to the largesse of the concessions they granted, and this would have been prejudicial to the mining interests. Furthermore, the issue of ownership and the exercise of incidents thereto did not surface largely because it did not form the foundation for any immediate benefit or query as to the exercise of rights in the concession. As the people become more environmentally aware, and as they become more cognitive of English legal principles and processes, issues concerning land ownership and responsibility for the mining environment are bound to come to the fore.  

Attempts have been made to reform the land tenure schemes in Ghana since the country attained independence. These efforts imposed a

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66. *See id.* § 3(1), (5).
67. *See id.* § 10(1). *See also Concessions Ordinance of 1939, Cap. 136, §§ 27, 35(1), (2) (Ghana).
68. The political history of Ghana since colonial rule has, expectedly, affected the legal development of the country. In particular the titles given to legislation have changed with almost every governing regime. Colonial legislation (1874-1957) was generally called an Ordinance or a Cap. Constitutional governments called the legislation they passed Acts (1957-1966, 1969-1972, 1979-1981 and 1993-present). Military juntas variously called their legislation Decrees (1966-1969, 1972-1979) and Laws (1981-1992). Unlike the Civilian governments, the Military regimes used their respective collective names as the short title for the laws they
myriad of laws, many of which were not well designed, on the pre-existing legal arrangements. The extent to which these laws confront the issues of land ownership and responsibility for the mining environment is the subject of discussion in the next section.


The difficulties of pursuing remedies against environmental damage are due to the maze of legislative arrangements regulating the grant of land for mining and the concomitant operation of common law principles on the issue. This section examines the statutory arrangements for access to mining land, the obligations of the mineral rights holder and the statutory options open to the victim of environmental degradation caused by mining.

The early 1960s have been described as a watershed era in the enactment of legislation on land in Ghana.69 Most of these statutes effected significant modifications in the land tenure system as a whole. Moreover, in 1986 a new legal regime for mining in Ghana was adopted that relied on the pre-existing land tenure system as far as its provisions on land ownership and use are concerned.70 The Minerals and Mining Law of 1986 has a number of significant provisions which affect land tenure and the responsibility for environmental degradation on mining land.

Under section 2 of the Minerals and Mining Law, the President may acquire any land or authorize the occupation and use of any land that is required to secure the development or utilization of a mineral resource under any applicable law. The applicable law refers mainly to the Administration of Lands Act, Act 123 (1962), and the State Lands Act, Act 125 (1962).71 Under the Administration of Lands Act, there were three

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69. An unprecedented ten statutes on land were passed during the period. See generally, Asante Ansong, Compulsory Land Purchase and Compensation, 8 REVIEW OF GHANA LAW 28 (1976) (providing an overview of legislation passed from 1962 to 1976).


71. These statutes are substantially modified by Ghana’s 1992 Constitution, arts. 265-68.
options available to the President. Section 1 of the Administration of Lands Act vested the administration of stool lands in the President. The President could, under the authority of administering the land, determine that it is proper for the land to be granted for mining or other purposes. To avoid complications and abuses of the land trust relationships, the President, when granting stool lands, would initially issue an Executive Instrument declaring the stool land in question, as vested in him, in trust. He could take this step if it appeared to him that it was in the public interest to do so. After the publication of the instrument, it will be lawful for the President to execute any deed or do any act as a trustee in respect to the land specified in the instrument. The President can therefore grant any land covered by the instrument to any mining company for mining purposes.

A more sweeping provision and one that gives the President the power to grant stool land without necessarily being held responsible for the consequences of the grant is section 10 of the Administration of Lands Act. It provides:

The President may authorize the occupation and use of any land to which this Act applies for any purpose which, in his opinion, is conducive to the public welfare or the interests of the State, and may pay into the appropriate account out of moneys granted by vote of Parliament such annual sums as appear to him, having regard to the value of the land, and on the other hand, to the benefits derived by the people of the area in which the land is situated from the use of the land, to be proper payments to be made for the land.

A similar provision exists in section 1 of the State Lands Act, Act 125 (1962), amended by the National Liberation Council Decree 234 (1969), for the acquisition of both stool and other lands. In land acquisition the President follows a simple procedure. First, he authorizes the occupation

72. Formerly, no stool lands could be granted without the consent of the Administrator of Stool Lands appointed by the President. Ghana’s 1992 Constitution changed this requirement, however. Presently, all stool lands are vested in the appropriate stools in trust for the people in the area. Nevertheless, Article 267(3) of the 1992 Constitution requires the consent of the Lands Commission for any disposition or development of any stool land.

73. See Ghana Const. art. 20(1)(a) (1992); Administration of Lands Act, Act 123, § 10 (1962) (Ghana); and State Lands Act, Act 125, §§ 1, 2 (1962) (Ghana).

74. Administration of Lands Act, Act 123, § 10 (1962) (Ghana); and State Lands Act, Act 125, §§ 1, 2 (1962) (Ghana).

75. The President would act as a trustee for and on behalf of the stool concerned. See, e.g., Administration of Lands Act, Act 123, § 10 (1962) (Ghana). The interests of the stool subjects, for example their right to a clean environment, could therefore not be jeopardized in the exercise of the powers of a trustee. If that happened, the stool subjects represented by their elders could sue the President for breach of trust.
and use of the land, then he publishes a notice in the gazette giving details of the land, the use to which it is intended to be put and any payments to be made in respect of the use of the land. When any person suffers special loss as the result of an occupational authorization under section 1 of the State Lands Act, he shall be paid such compensation as the Minister, or, on appeal, a tribunal may determine.

It is submitted that the public interest condition for the presidential authorization of the occupation of land is broad enough to cover the authorization of land for mining purposes. The revenue generated by the government from mining activity (mainly taxes) goes into the consolidated fund and is used for the benefit of the country.

The provisions of the two Acts imply that all previous rights to lands acquired by the state and authorized by the President to be occupied and used for mining are extinguished. The previous holders of any rights in such land have only one right reserved for them, the right to compensation. The compensation is to be based on the value of the land, which may or may not take into account the mineral resources of the land. It is doubtful that the computation of the compensation would include the value of mineral reserves because all minerals in their raw form anywhere in Ghana are vested in the President in trust for the people. Therefore, the compensation will likely be for the value of the land only.

A second important variable to be considered in the calculation of compensation is the benefit derived by the indigenous people from the use of the land. There is no indication of what benefits are contemplated by the Act or of how the value of such benefits is to be computed. One thing, however, is clear, the adverse environmental effects from the concessionaire's use of the land are not a crucial factor. Apparently, section 10(3) favors mining interests. It provides that where any person suffers special loss as a result of the authorization, he or she shall be paid such compensation as the Minister or, on appeal, a tribunal of three members appointed under the Act shall determine. The application for the compensation must be made within three months of the publication of the gazette notice of the authorization. Obviously, the Act assumes that any "special loss" could be determined up-front, and could be paid for with money. It is an incontrovertible fact that the environmental consequences of mining manifest after
the development of the mine, and almost always take place after the three months prescribed for petitioning for compensation have passed. For people who bear the brunt of such environmental damage, their loss may not qualify as special, so they may not be entitled to any compensation.

Furthermore, people entitled to compensation may not have legal standing to claim it. This is because under section 17 of the Administration of Lands Act:

[a]ll revenues from lands subject to this Act shall be collected by the Minister and for that purpose all rights to receive and all remedies to recover that revenue shall vest in him and, subject to the exercise of any power of delegation conferred by this Act, no other person shall have power to give a good discharge for any liability in respect of the revenue or to exercise any such right or remedy. 80

All said and done, strict application of the Administration of Lands Act and the State Lands Act deprives the previous land owner or holder of any right that confers the capacity to pursue legal action for mining's environmental damage to concession lands authorized by the President. 81

It must be pointed out, however, that the owners or occupiers of land outside the acquired area could pursue legal action against the user of the land authorized to be occupied by the President. Where the activities on granted land adversely affect the use and enjoyment of the rights of the owner or occupier of adjacent land not acquired by the President, legal action is indeed permissible. 82 This point is important because the environmental ramifications of mining know no boundaries and could affect lands many miles away. 83

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80. Administration of Lands Act, § 17(1). Revenue is defined in section 17(2) of the Act to include all rents, dues, fees, royalties, levies, tributes, payments, whether in the nature of income or capital, from or in connection with lands subject to the Act. For an example of confusion over authority or power to collect revenue in respect to mining land see PEOPLE'S DAILY GRAPHIC, Sept. 12, 1997, at 1.

81. Under section 5 of the State Lands Act, the President may grant leases and licenses in respect to any land acquired under the Act. The President literally usurps the rights of the previous owner of the land so acquired and could hold the lessee or licensee responsible for any environmental damage on the land, for example, where such damage affects the reversionary interest in the land.

82. Section 6 of the State Lands Act defines "other damage" as damage sustained by any person having a right or interest in the land or in the adjoining land at the date of the declaration. See also § 4(1) of the Act.

The two statutes on compulsory acquisition of land by the state were modified significantly by the 1992 Constitution. Under Article 20(ii) of the Constitution, no property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the state. There is a broad exception to this rule for acquisitions necessary in the interest of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property to promote public benefit. Unlike the previous statutory regime, the reasons for the acquisition must be clearly stated. The public benefit clause is, however, similar to the orientation of the two previous statutes and it constitutes enough authority to acquire lands for mining activities. At the same time, the public safety and public health provisions could entitle the state to compulsorily take over lands already granted for mining activity if such activity is found to endanger the health or safety of the people in the area. However, if the state compulsorily acquires land for mining activity it is unlikely that the state will be held responsible for the environmental consequences of mining. This is especially so where, as has been the practice, the state grants such land to separate and independent entities for mining purposes. Likewise, if the state takes over mined lands on grounds of public safety or health, the state may not be amenable to a suit on grounds of sovereign immunity. This may complicate the pursuit of the company or person whose activities engendered the threat.

Generally, where land is compulsorily acquired under the Constitution, prompt and fair compensation must be paid. This implies that all rights of the previous holders of any interest would be subsequently extinguished. They cannot sue or be sued in regard to any damage to that land. In the case of land acquired for mining purposes under the customary or colonial and post-colonial laws, a reversionary interest may still remain with the previous owners. In that case, their right to sue for damage done to the land by mining activities can be said to have been suspended during the time when the mining is in progress and when the mining company has lawful possession of the land. At any rate, if environmental damage is such that it affects the owner's reversionary interest, then he may have standing to bring an action in court. In either case, if they resettle on land not subject to the acquisition, they, as noted

85. See Ghana Const. art. 20(b) (1992).
above, could maintain an action if the resettlement site is endangered by the mining activities of the land compulsorily acquired.88

Any land that was vested in the government of Ghana on behalf of and in trust for the people of Ghana, and any other lands acquired in the public interest before the Constitution came into force, are regarded as public lands and vested in the President for and on behalf of the people of Ghana.89 Such public lands are to be managed by the Lands Commission in co-ordination with the relevant public agencies.90 As noted earlier, legal liability for activity on the public lands which adversely affects the peaceful enjoyment of another person’s land may lie with the government. However, if the government grants leases or licenses to some person or company, that person or company would be held legally responsible for its activities.

Ordinarily, the government grants mining leases to corporate bodies and partnerships.91 Since such bodies have legal personalities of their own they would be responsible for their activities. However, under the Small Scale Gold Mining Law there is no incorporation requirement for a license to mine for gold on a small scale.92 Furthermore, there is no provision in the Law authorizing the government to acquire land compulsorily for small-scale mining.93 The issue that arises therefore is who is responsible for the environmental damage caused by small-scale mining? It is submitted that the small-scale miners are responsible individually and/or collectively for the environmental consequences of their mining activities that affect people outside the designated mining area. This conclusion is appropriate because, as individuals, small-scale miners have full legal capacity to sue and be sued.94 Furthermore, though the small-scale

88. Under Article 20(3) of the 1992 Constitution, when a compulsory acquisition or possession of land by the state involves displacement of any inhabitants, the state is to resettle the displaced inhabitants on suitable alternative land with due regard for their economic well being and social and cultural values. See also GHANA CONST. art. 20(6) (1992).
89. See GHANA CONST. art. 257 (1992).
93. Under section 77 of the Minerals and Mining Law, the Minister may simply designate areas for small-scale mining. Section 12 of the Small Scale Gold Mining Law provides for compensation to be paid by the miner to anybody who suffers any loss as a result of small scale mining on that person’s land.
94. Small Scale Gold Mining Law, §§ 2, 4-5.
miners have limited possession of the mining land, they do not mine as agents of the government or, for that matter, any corporate body.\textsuperscript{95}

Another issue is whether the owner of the land granted for small-scale mining can sue for the degradation of the land. The small-scale miner is granted the license by the Minerals Commission and the Minister for a limited period, and is to pay compensation to the owner of the land.\textsuperscript{96} It is not clear whether the receipt of the compensation extinguishes all the interests and/or rights of the owner. To clarify the status of small-scale mining lands the question becomes who holds the reversionary interest in land granted to somebody other than the owner for small-scale mining? It does not appear to be the intention of the Small Scale Gold Mining Law to acquire land compulsorily for small-scale mining. The designation of an area for small-scale mining and the grant of licenses to mine on such lands does not amount to compulsory acquisition by the state; it is an authorization of possession of the land by the state.\textsuperscript{97} The 1992 Constitutional provisions on compulsory acquisition, however, cover land possession, and so the constitutional requirements must be satisfied.\textsuperscript{98} If the constitutional requirements are satisfied, it is submitted that the rights of the owner whose land is granted for small scale mining may be, at a minimum, suspended so that he or she cannot in the interim sue to protect the land from damage arising from the mining activity. In accordance with Article 20(6) of the Constitution, the land should be offered first to the previous owner after the mining is ceased.

An additional factor to consider is the impact of the Minerals and Mining Law in the areas of land ownership, possession and environmental responsibility. The key issue here is the extent of the mining company's power over the land covered by the mining lease. Whereas section 2 of the Minerals and Mining Law provides that the President may acquire any land and authorize its occupation for the development or utilization of mineral resources, section 18(5) states that the mineral right granted by the Minister shall be deemed a requisite and sufficient authority over the

\textsuperscript{95} Small-scale diamond mining in Akwatia may be legally distinguished since the small-scale miners mine on Ghana Consolidated Diamonds' [hereinafter GCD] land and are more or less agents of GCD.

\textsuperscript{96} See the Minerals and Mining Law, § 77, and the entire text of the Small Scale Gold Mining Law.

\textsuperscript{97} Notwithstanding the possible payment of compensation to the landowner by the miner. See GHANA CONST. art. 20 (1992); Minerals and Mining Law, § 2; Small Scale Gold Mining Law, § 12.

\textsuperscript{98} See GHANA CONST. art. 20(1) (1992). The requirements include adequate notice detailing the reasons and necessity for the acquisition, legislation making provision for prompt and fair compensation, right of access to the courts for redress, the use of the land only for the purpose for which it was acquired, etc. See id. art. 20.
respective land granted. It can be argued that the President's right to acquire land for mining purposes under section 2 of the Minerals and Mining Law is merely permissive and discretionary and therefore the reading of section 18(5) leads to the conclusion that the grant of a mineral right arms the mineral right holder with authority not otherwise proscribed by law over the mining land. This conclusion is reinforced by the provision in section 24 and 25(1) of the Minerals and Mining Law which states that rental charges, royalties, fees, rents or other payments which fall due in respect of any mineral right or otherwise shall be a debt due to the Republic. It logically follows that the rights of the previous owner of the mining land are extinguished even if his or her land is not acquired expressly, because rents, and to some extent royalty payments, are important features of any lessor-lessee relationship. If the state authorizes the occupation of the land for mining purposes and the Republic is entitled to rents and royalties, what then is the position of the previous owner of the land in question? His or her only recourse would be to seek compensation from the state. If the previous owners' rights are indeed extinguished, the mining company cannot be sued by a private person for the environmental degradation caused by the mining activity on the land occupied with state authorization under the Minerals and Mining Law. The company could, however, be pursued for damage done to lands other than those occupied for the mining activity.

The power and responsibilities of the mineral right holder over the mining area are further complicated by the limitations in the Minerals and Mining law regarding the surface rights of the original occupants of the mining land. The Law provides that "the holder of a mineral right shall exercise his rights under this law subject to such limitations relating to surface rights as the Minister may prescribe." This provision implies that the mineral right holder may have his or her mining activities restricted in the way(s) in which it affects the land surface. That restriction is to come from the Minister only, not the previous owners or occupiers of the land.

99. See ROBERT MEGARRY & M. THOMPSON, MEGARRY'S MANUAL OF THE LAW OF REAL PROPERTY 308 (1993). Though authorities such as Megarry suggest that the absence of rent is not fatal to a lessor-lessee relationship, I would contend that its presence is a defining feature of such a relationship.

100. See Minerals and Mining Law, § 71. Since the minerals in their raw state are vested in the State, it has the right to receive the royalties that are paid in respect of the minerals and not the land. The government, however, has conceded to the request for payment of royalties to the traditional leaders. See PEOPLE'S DAILY GRAPHIC, Aug. 31, 1993, at 1. The legal basis for the payment of royalties to the Chiefs is not certain. It is also not clear why the law provides for the payment of rents "and other payments" to the State. See Minerals and Mining Law, §§ 24, 25(1).

101. Minerals and Mining Law, § 70.
The law also provides that the rights conferred by the mineral right shall be exercised in a manner consistent with the reasonable and proper conduct of the mining operations so as to affect as little as possible the interest of any lawful occupier of the land. The interests of the lawful occupier include the right to graze livestock upon the land, hunt game, gather firewood for domestic purposes, observe rites in respect of groves and other sacred areas, and to cultivate the surface of the land subject to the mineral right, in so far as such rights do not interfere with the mineral operations in the area. Additionally, the original owner or lawful occupier of the land in the mining area can erect any building or structure, but may do so only with the consent of the holder of the mining lease. If the mineral right holder unreasonably withholds such consent, the Minister's consent could be sought.

The foregoing provisions demonstrate quite clearly that the government is the head lessor and apparently both the mineral right holder and the "lawful occupier" hold their rights at the sufferance of the government. Support for this conclusion is drawn from clause 1 of the Sample Mining lease which reads, "The government hereby grants to the company mining rights to ALL that piece of land described in the schedule hereto . . . together with mines, beds, seams, veins, channels, strata of gold and other associated mineral substances." It is the government that grants the lease and determines the incidents of the lease. Moreover, it is the government that determines what a "lawful occupier" may or may not do on land that has mineral rights granted to a third party. Even where some rights are reserved for the "lawful occupier," such rights are secondary to the mineral operations and largely determined by the government. It appears that the owner or occupier of the land whose mineral rights have been leased may lose all his or her rights to the land by the payment of compensation by the mining company at the insistence of the government. Such compensation makes up for any disturbance of the rights of a land owner and for any damage done to the surface of the land, buildings, works, livestock, crops, trees et cetera, in the area of the mineral operations.

Another indication of the assumption of state control over the land subject to the mineral right is the fact that all rents, royalties and other payments in respect to the use of the land for mining purposes by the

102. See id.
103. See id. §§ 70(3), (4). See also MINERALS COMMISSION, SAMPLE PROSPECTING LICENSE cls. 2(d), 3(b) & SAMPLE MINING LEASE cls. 1(e) (on file with the University of Ghana Law Library).
104. See Minerals and Mining Law, §§ 70(1), (3), (4).
105. See id; SAMPLE PROSPECTING LICENSE, supra note 103.
company are to be paid to the government.\textsuperscript{106} Section 25(1) of the Minerals and Mining Law states that "royalties, fees, rents or other payments which fall due in respect of any mineral right or otherwise under the provisions of this law shall be a [debt] due to the Republic."\textsuperscript{107} If all the attributes of ownership of the mining land are given to the government then it is not unreasonable to conclude that the lawful occupier of the land could not maintain an action for environmental damage merely because he owned that land. The state could initiate an action for environmental damage to the mining land, especially when such damage affects its reversionary interest. The state may also take action if such damage is interpreted as violating the terms of the mining lease.

\textbf{CONCLUSION}

It is clear from the foregoing discussion that compared to the customary owner of land, the state, under the legislation discussed, has become the owner of minerals. As a consequence, the state arrogates to itself the right, over and above that of landowner, to grant mining rights in any such land. The state's superior right and interest over such land is confirmed by the fact that it is entitled to rent and royalties from the mining activity. It also controls the activities on mining land and defines the rights of customary landowners in the lands leased for mining. Therefore, the state has standing to sue where mining interests cause damage to the environment. Although the landowner is not explicitly usurped of rights of ownership and standing to sue by the state's right to lease his land to mining interests, his capacity to sue where the mining activity affects his interests in lands acquired or leased by the state is uncertain.

Ghana is currently experiencing what has been described as another gold rush and a boom in mining generally. Since 1986 over sixty mining companies have been granted licenses to mine for precious minerals, particularly gold.\textsuperscript{108} Many of the new mines are surface mines,\textsuperscript{107}

\textsuperscript{106} Section 24 of the Minerals and Mining Law provides for the payment of all rental charges to be prescribed by regulations, but does not say to whom it is to be paid. See also Sample Mining Lease, supra note 103, at cl. 2.

\textsuperscript{107} The Administration of Lands Act has a similar provision in section 17. The two provisions appear to be in conflict with Article 267 of the Constitution, which provides for the establishment of a Stool Account for each stool into which all rents, dues, royalties and other payments from the Stool lands are to be paid. The collection of all such revenues and payments are to be made by the Administrator of Stool lands appointed under the Constitution. It must be noted that almost all the mining areas are under the jurisdiction of various stools.

\textsuperscript{108} See Proceedings of the Mining Seminar, supra note 4.
necessitating the re-location of settlements and towns. The need for explicit legal provisions defining ownership of land in Ghana has become more urgent. To avoid the real possibility of instability in the mining sector resulting from land disputes, it is necessary that rights of ownership and use of land be made unequivocal. Once the rights of landowners are defined, the capacity to pursue an action for the environmental damage caused by mining activities would, hopefully, be made more precise.