



THE ALLOCATION OF PUBLIC REAL ESTATE FOR TRADITIONAL PEOPLES AND COMMUNITIES

A DESTINAÇÃO DE BENS IMÓVEIS PÚBLICOS PARA OS POVOS E COMUNIDADES TRADICIONAIS

EL DESTINO DE LOS BIENES INMUEBLES PÚBLICOS PARA LOS PUEBLOS Y COMUNIDADES TRADICIONALES

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ABSTRACT

Public administration has been instigated regarding the need to allocate public real estate to traditional peoples and communities, in order to regularize the use and occupation of these spaces. Considering this, the promulgation of standards addressing this social demand is ongoing, although they are not mentioned in mainstream administrative law doctrines. This situation makes the search for information on the performance of public agencies an important alternative amid the scarcity of legal studies explaining how public administration can act in response to this social demand. This article presents the outcome of bibliographic and documentary research, using primary and secondary sources to analyze the methods of allocating public real estate to traditional peoples and communities. The main objective is to explain the procedures carried out by the federal public administration and contribute to updating the approach to this subject, especially in administrative law. It is important to highlight that the research starts from the production of geographic space (traditional territory) to its formalization before public administration. Therefore, given the dynamic between society and nature, it explains how it is possible to articulate social demand and administrative mechanisms for land regularization.

Keywords: Federal public administration; Geographic space; Land regularization; Management of public real estate; Traditional use and occupation.

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RESUMO

A administração pública tem sido provocada sobre a necessidade de destinar bens imóveis públicos para os povos e comunidades tradicionais, no intuito de regularizar o uso e a ocupação desses espaços. Diante disso, continua em curso a publicação de normas que tratam dessa demanda social, em que pese elas não serem mencionadas em doutrinas majoritárias do direito administrativo. Esse fato faz com que a busca por informações sobre a atuação dos órgãos públicos seja uma alternativa frente à escassez de estudos jurídicos que expliquem como a administração pública pode agir diante dessa demanda social. Assim, este artigo apresenta o resultado de uma pesquisa bibliográfica e documental, que utilizou fontes primárias e secundárias para analisar as formas de destinação de bens imóveis públicos para os povos e comunidades tradicionais. O objetivo é explicar quais são os trâmites realizados pela administração pública federal, e contribuir com a atualização da abordagem sobre esse tema, sobretudo no direito administrativo. Importa ressaltar que a pesquisa parte da produção do espaço geográfico (território tradicional) para sua formalização perante a administração pública. Portanto, diante do que está posto pela dinâmica entre sociedade e natureza, explica como é possível articular demanda social e mecanismos administrativos de regularização fundiária.

Palavras-chave: Administração pública federal; Espaço geográfico; Gestão de bens imóveis públicos; Regularização fundiária; Uso e ocupação tradicional.

RESUMEN

La administración pública ha sido provocada sobre la necesidad de destinar bienes inmuebles públicos a pueblos y comunidades tradicionales, con la intención de regularizar el uso y la ocupación de esos espacios. Frente a esto, sigue en curso la publicación de normas que tratan esta demanda social, aunque no sean mencionadas en doctrinas mayoritarias del derecho administrativo. Este hecho hace que la búsqueda de información sobre la actuación de los órganos públicos sea una alternativa ante la escasez de estudios jurídicos que expliquen cómo puede actuar la administración pública ante esta demanda social. Así, este artículo presenta el resultado de una investigación bibliográfica y documental, que utilizó fuentes primarias y secundarias para analizar las formas de destino de bienes inmuebles públicos a pueblos y comunidades tradicionales. El objetivo es explicar qué trámites realiza la administración pública federal y contribuir con la actualización del abordaje sobre este tema, sobre todo en el derecho administrativo. Importa resaltar que la investigación parte de la producción del espacio geográfico (territorio tradicional) hasta su formalización ante la administración pública. Por tanto, frente a la dinámica entre sociedad y naturaleza, explica cómo es posible articular demanda social y mecanismos administrativos de regularización agraria.

Palabras clave: Administración pública federal; Espacio geográfico; Gestión de bienes inmuebles públicos; Regularización agraria; Uso y ocupación tradicional

INTRODUCTION

The advance in publishing regulations regarding the allocation of public real estate to traditional peoples and communities (PCTs) has not been matched by administrative law doctrines, despite the existence of hundreds of administrative processes initiated by public agencies. Therefore,

seeking information about the actions of public agencies is an alternative in the face of the scarcity of legal studies explaining how public administration can act in response to this social demand.

Even though the territorial rights of traditional peoples and communities have constitutional support and are provided for in Federal Decree No. 6,040 of 2007², when dealing with the management of public real estate, major doctrines usually do not mention the allocation of these assets to these social groups. As a rule, the territorial rights of indigenous peoples, expropriation for social interest purposes, and urban land regularization are the examples of social demands presented.

Given this, the research sought to identify regulations concerning the allocation of public real estate to traditional peoples and communities, and, based on them, to explain the procedures carried out by public administration. Therefore, the research focused on analyzing the experiences of federal public agencies, considering that public administration occurs at various levels and that the federal level ends up guiding the others.

Thus, initially, a survey of regulations was carried out on the Legislação Portal (Legislation Portal), linked to the official website of the Presidency of the Republic, and then in the legislation collection of the official website of the Chamber of Deputies. Based on the regulations found, it was necessary to carry out other surveys, this time in the databases of the public agencies mentioned in the regulations initially found: the Secretariat of Federal Heritage (SPU), the National Institute of Colonization and Agrarian Reform (INCRA), and the Chico Mendes Institute for Biodiversity Conservation (ICMBio).

To support the analysis of the regulations, both administrative law and civil law doctrines, as well as research addressing the territorial rights of traditional peoples and communities, were used as theoretical frameworks. Therefore, the research has a multidisciplinary character, both due to gaps in legal doctrine and the imperative need for articulation between various fields of knowledge to enable understanding of the topic.

In this sense, it is important to emphasize that the research starts from the production of geographic space, in this case, traditional territory, to its formalization before public administration. Therefore, considering what is presented by the dynamics between society and nature, how is it possible to articulate social demand and administrative mechanisms for land regularization?

Traditional peoples and communities are considered in this article with the same breadth provided for in Federal Decree No. 6,040 of 2007³. That is, the territorial rights of one or another

² Establishes the National Policy for the Sustainable Development of Traditional Peoples and Communities - PNPCT.

³ “Traditional Peoples and Communities: culturally differentiated groups that recognize themselves as such, which possess their own forms of social organization, occupy and use territories and natural resources as a condition for their

specific social group will not be addressed, because besides being diverse, there is no exhaustive list defining which social groups are traditional.

It is important to note that until the writing of this article, the regulation of Federal Decree No. 6,040 of 2007 had not been published, regarding specific administrative procedures for the land regularization of traditional territories. This pending issue contributes to the invisibility of the territorial rights of traditional peoples and communities and to uncertainty about the administrative paths that can be followed.

In the first section of the article, I discuss how the allocation of public real estate is fundamental for state management, balancing economic, social, and cultural interests. In this sense, I highlight the need for land regularization and the challenges faced by public administration in managing a vast and complex heritage.

Next, in the second section of the article, I show that the Secretariat of Federal Heritage – SPU, the National Institute of Colonization and Agrarian Reform – INCRA, and the Chico Mendes Institute for Biodiversity Conservation – ICMBio have developed legal-administrative instruments to regularize the use and occupation of public properties by traditional peoples and communities. However, conflicts persist due to the overlapping of land categories, the fragility of some instruments, and the tendency to prioritize individual titling.

1 THE ALLOCATION OF PUBLIC REAL ESTATE AS A MANAGEMENT STRATEGY

Public assets (*bens públicos*) are those belonging to any of the federative entities (Union, States, Federal District, or Municipalities), their autonomous agencies (*autarquias*), or public foundations. Thus, by integrating the public domain, these assets can be used by public administration for various purposes, observing their classification⁴. There are also natural assets that, by constitutional determination, are indisputably of the Union, according to Article 20 of the Federal Constitution (Brazil, 1988).

Doctrine usually classifies public assets into assets for common use (*bens de uso comum*), assets for special use (*bens de uso especial/privativo*), and domain assets (*bens dominicais*). This classification stems from interpretations of Articles 98 and following of the Civil Code (Brazil, 2002), which deals with public assets, as verified:

cultural, social, religious, ancestral, and economic reproduction, utilizing knowledge, innovations, and practices generated and transmitted by tradition (Art. 3 of Federal Decree No. 6,040/2007).

⁴ Review Law No. 9,636/1998.

Art. 98. Public assets are those of the national domain belonging to legal entities of public internal law; all others are private, regardless of the person to whom they belong.

Art. 99. Public assets are: I - those for common use by the people, such as rivers, seas, roads, streets, and squares; II - those for special use, such as buildings or lands intended for the service or establishment of federal, state, territorial, or municipal administration, including those of their autonomous agencies; III - domain assets, which constitute the patrimony of legal entities of public law, as an object of personal or real right of each of these entities. Sole Paragraph. Unless the law provides otherwise, assets belonging to legal entities of public law that have been given a private law structure are considered domain assets (Brazil, 2002).

In summary, assets for common use by the people are those that can be used by anyone without the need for authorization. In turn, assets for special use are those that public administration has allocated for the provision of public services or granted exclusive use to third parties through authorization, permission, or concession⁵. And domain assets are those that integrate the public patrimony but have not received a specific allocation, which is why the transfer of their ownership is admissible in this case. Regarding the classification of public assets, Di Pietro (2023) teaches:

O critério dessa classificação é o da destinação ou afetação dos bens: os da primeira categoria são destinados, por natureza ou por lei, ao uso coletivo; os da segunda ao uso da Administração, para consecução de seus objetivos, como os imóveis onde estão instaladas as repartições públicas (...); os da terceira não têm destinação pública definida, razão pela qual podem ser aplicados pelo Poder Público, para obtenção de renda; é o caso das terras devolutas, dos terrenos de marinha, dos imóveis não utilizados pela Administração, dos bens móveis que se tornem inservíveis. (Di Pietro, 2023, p. 758)

Assets for common use by the people and assets for special use, "because they are destined for collective use or because they are allocated for the direct or indirect use of the Administration, to achieve its ends" (Di Pietro, 2023, p. 759), are unavailable (*indisponíveis*). Therefore, they are inalienable⁶ (*inalienáveis*), which consequently also makes them imprescriptible (*imprescritíveis*) and non-attachable (*impenhoráveis*)⁷.

However, domain assets are available (*disponíveis*), as they are those that have not received an allocation, have not been affected to a purpose. As they integrate the public patrimony, it is common to find in administrative law doctrines that their function is to ensure revenue for the State.

Regarding this, Abe (2013) teaches that public administration must seek the realization of primary and secondary public interests: those provided for in the Brazilian legal system to effectuate common or special use; and those for economic exploitation and generation of income or revenue, respectively. Thus, based on this order of priorities, the financial function of domain assets would be

⁵ Review Law No. 9,636/1998.

⁶ Its ownership cannot be transferred to another's patrimony, as occurs, for example, in sale, donation, or exchange.

⁷ Nevertheless, the protection of inalienability can be relativized in certain cases, when there is de-affectation (*desafetação*) of the asset by administrative will, in accordance with legal precepts. Thus, the unavailability (*indisponibilidade*), inalienability (*inalienabilidade*), and imprescriptibility (*imprescritibilidade*) of the components of the public domain will last as long as such assets remain affected to a public destination" (Santos 2023, p. 32)

attenuated:

Encontra-se mitigada a concepção de que os bens dominicais constituem categoria jurídica dotada de uma função patrimonial ou financeira, destinada a assegurar rendas para o Estado, por meio de locação, aforamento, concessão e alienações, pois os bens dominicais devem ter uma destinação pública compatível com os objetivos constitucionais. (Abe, 2013, p. 100)

At the federal level, the main norms dealing with the management of public real estate are Decree-Law No. 9,760 of 1946, which provides for Union assets; and Law No. 9,636 of 1998, which provides for the regularization, administration, emphyteusis, and alienation of real estate owned by the Union. Thus, based on the interpretation of these norms, administrative law doctrines list the following possibilities for the use of these assets by private parties: assignment (*cessão*), permission of use (*permissão de uso*), and special concession for housing purposes (*concessão especial para fins de moradia*) (Law No. 9,636/1998, Art. 18 et seq.)⁸; rent (*aluguel*), emphyteusis (*aforamento*), assignment (*cessão*), fee tail (*enfiteuse*)⁹, and concession of real right of use (*concessão de direito real de uso*) (Decree-Law No. 9,760/1946, Art. 64 et seq.).

For this article, it is also important to highlight Decree-Law No. 271 of 1967, which deals with urban subdivision (*loteamento urbano*), developer responsibility, and the granting of use and airspace. This is because, like the previously cited norms, the said decree was updated by Law No. 11,481 of 2007, which in this case included the possibility of granting use¹⁰ for land regularization purposes to preserve traditional communities and their means of subsistence (Law No. 11,481/2007, Art. 7).

Given the above, it is verified that public assets can be used by private parties through an administrative act authorizing such use. However, public assets can also be alienated, i.e., have their ownership transferred to third parties. For this, it is first necessary to observe the provisions of the Civil Code (Brazil, 2002), namely:

Art. 100. Os bens públicos de uso comum do povo e os de uso especial são inalienáveis, **enquanto conservarem a sua qualificação**, na forma que a lei determinar.

⁸ The special concession for housing purposes (*concessão de uso especial para fins de moradia*) aims to grant the use of public property located in an area with urban characteristics and purposes, as a way to promote the constitutional right to housing (art. 6, CF/88)" (Santos, 2023, p. 65).

⁹ In technical language, emphyteusis (*aforamento*) or fee tail (*enfiteuse*) is the real right of possession, use, and full enjoyment of another's property that the holder (emphyteuta or tenant-in-chief) can alienate and transmit hereditarily, but with the obligation to pay a perpetual annual fee (quit-rent or *foro*) to the immediate lord (*senhorio direto*). Characteristic of emphyteusis or fee tail is, therefore, the simultaneous exercise of domain rights over the same property by two persons: one, over the direct domain - the State; the other, over the useful domain (*domínio útil*) - the private emphyteuta, in the case of public assets" (SANTOS, 2023, p. 73).

¹⁰ It is the contract by which the Administration transfers, for a fixed term or indeterminate period, as a resolvable real right (*direito real resolúvel*), the remunerated or gratuitous use of public land to be used for specific purposes (...)" (Mello, 2023, p. 826).

Art. 101. Os bens públicos dominicais **podem ser alienados**, observadas as exigências da lei (Brasil, 2002, grifo meu).

The management of public assets implies not only the formalization of their uses and related economic transactions. It is necessary to remember that, while a given public asset belongs to a federated entity, its autonomous agencies, or foundations, it is necessary for public administration to monitor its use and compliance with the conditions established for the user of the asset.

To illustrate the complexity of the topic, I cite the report of the Federal Court of Accounts (*Tribunal de Contas da União - TCU*) regarding the survey of federal real estate patrimony, managed by the Secretariat of Federal Heritage (SPU)¹¹. According to the document, published in the first half of 2024, the management done by the SPU is inefficient, and the agency's structure cannot manage the 742,000 (seven hundred and forty-two thousand) properties under its management, valued at approximately R\$ 1.35 trillion.

Therefore, regarding public real estate, the category that interests this article, it is important to emphasize the importance of allocating them to a purpose or regularizing situations of use. This is because such management acts enable the establishment of partnerships that should contribute to public administration in the conservation of these assets or in generating revenue. Furthermore, for Abe (2013), allocating public real estate is a duty of public administration:

Embora a Administração Pública possua a discricionariedade para definir qual o melhor momento para emitir o ato, não tem o poder de escolher não agir, ou se omitir indefinidamente, especialmente quando os fatos acontecidos na realidade (motivo) tornam necessário o exercício da competência. O Poder Público não pode deixar de dar destinação aos imóveis públicos, se omitindo dolosamente e indefinidamente diante de circunstâncias (motivos) que exigem a prática de providências administrativas, sob pena de essa omissão acarretar a responsabilidade do Estado (...) (Abe, 2013, p. 98).

Regarding the realization of the territorial rights of traditional peoples and communities, public administration has acted in cases where traditional territory coincides with areas of public properties. For this, the possibilities of using public assets by private parties have been observed for the creation of specific legal instruments. This is verified with the Term of Authorization for Sustainable Use (TAUS - *Termo de Autorização de Uso Sustentável*) and the Contract for Concession of Real Right of Use (CCDRU - *Contrato de Concessão de Direito Real de Uso*), instruments used by public administration to guarantee the permanence of traditional peoples and communities in territories located on public properties.

¹¹ Available at: https://pesquisa.apps.tcu.gov.br/documento/acordao-completo/*/KEY%253AACORDAO-COMPLETO-2637572/DTRELEVANCIA%2520desc%252C%2520NUMACORDAOINT%2520desc/0. Accessed on: October 10, 2024.

The issue is that even recognizing the existence of traditional territories, as a rule, public administration does not renounce the ownership of assets for common use and assets for special/private use. That is, considering a hierarchy of rights, in practice those of traditional peoples and communities would not be above those of federated entities, their autonomous agencies, or foundations, which act in the public interest.

To further complicate this discussion, it is important to note that, at another time, the affectation of domain real estate to make them for special use was a strategy to preserve local communities and their territories. This was observed mainly between the 1980s and the early 2000s, due to the legislation available at the time.

Thus, sustainable use conservation units and settlements were created, for example, possibilities that remain in force but have been reconsidered by traditional peoples and communities. In this sense, with the publication of Federal Decree No. 6,040 of 2007, these social groups have advocated for the land regularization of traditional territories through possibilities that guarantee the management of the area exclusively by them, even if with the aid of public policies.

As mentioned earlier, insofar as public administration authorizes or regularizes the use of public real estate by private parties but without transferring ownership, it falls to the public agency responsible for managing that asset to monitor its use. Because of this, recognizing the existence of traditional territory located on public property allocated to another purpose implies shared management as long as it remains affected to that purpose.

The issue is that the ways of life of traditional peoples and communities are not always in accordance with the rules established by public administration. Therefore, this overlap of traditional territory with public property, when ownership of the latter is not transferred to the traditional people or community, commonly generates conflicts.

For this reason, there are initiatives by traditional peoples and communities seeking recognition of the supremacy of their territorial rights over administrative law and notarial and registry law. In this sense, if successful, they hope that, regardless of the classification of the public asset, public administration will take the appropriate measures to transfer the property's ownership to the interested social group.

2 EXPERIENCES OF FEDERAL AGENCIES IN MANAGING PUBLIC REAL ESTATE OVERLAPPING TRADITIONAL TERRITORIES

In the process of regularizing the use of public property, the classification of this asset will

indicate which legal instrument can be executed between public administration and the traditional people or community. As mentioned earlier, if the traditional territory is located on a real estate asset for common use or special use, agreements or contracts will be signed that authorize the use and/or occupation of the property but do not transfer ownership to the social group. However, if the real estate asset is domain (*dominial*), and therefore has not been affected to a specific purpose, its ownership can be transferred.

Given this, this chapter will present the experiences of the Secretariat of Federal Heritage (SPU), the National Institute of Colonization and Agrarian Reform (INCRA), and the Chico Mendes Institute for Biodiversity Conservation (ICMBio) with the regularization of the use and/or occupation of public properties by traditional peoples and communities. Thus, it is important to emphasize that these actions start from the classification of public real estate and from what administrative law dictates regarding the formalization of the use and/or occupation of these assets by private parties.

Highlighting this starting point is essential because the traditional territory claimed by the traditional people or community may be larger than the area under the management of public administration. This is why the expression "regularization of the use and/or occupation of public real estate" has been used throughout the article, and not "regularization of traditional territory located on public real estate," since they may coincide entirely or not.

2.1. Secretariat of Federal Heritage (Spu)

The National Policy for the Management of Union Heritage (PNGPU - *Política Nacional de Gestão do Patrimônio da União*) was established within the Secretariat of Federal Heritage (SPU) ¹² through SPU Resolution No. 03 of December 6, 2010, which guides the planning and actions of this agency. In addition to a series of principles and guidelines, this norm introduced the concept of the socio-environmental function of Union heritage, as well as the express guidance to carry out land regularization "in areas occupied by low-income populations" (SPU Resolution No. 03/2010, Art. 6, item II).

In this sense, SPU Ordinance No. 89 of 2010 was published, which "regulates the use and utilization of Union properties in favor of traditional communities" (SPU Ordinance No. 89/2010, Art. 1), aiming to enable rational and sustainable use on the maritime and riverfront. For this purpose,

¹² Currently linked to the Ministry of Management and Innovation in Public Services.

the Term of Authorization for Sustainable Use (TAUS - *Termo de Autorização de Uso Sustentável*) is the instrument to be used by SPU to formalize the use of these areas by traditional communities.

It is important to note that in 2017 Federal Law No. 9,636 of 1998 was amended to include the authorization of sustainable use as one of the forms of allocating Union properties¹³, namely:

Art.10-A. A autorização de uso sustentável, de incumbência da Secretaria do Patrimônio da União (SPU), ato administrativo excepcional, transitório e precário, é outorgada às comunidades tradicionais, mediante termo, quando houver necessidade de reconhecimento de ocupação em área da União, conforme procedimento estabelecido em ato da referida Secretaria.

Parágrafo único. A autorização a que se refere o caput deste artigo visa a possibilitar a ordenação do uso racional e sustentável dos recursos naturais disponíveis na orla marítima e fluvial, destinados à subsistência da população tradicional, de maneira a possibilitar o início do processo de regularização fundiária que culminará na concessão de título definitivo, quando cabível (Brasil, 1998).

The Term of Authorization for Sustainable Use (TAUS - *Termo de Autorização de Uso Sustentável*), according to SPU Ordinance No. 89/2010, is a transitory and precarious instrument, created to formalize¹⁴, the permanence of traditional communities "in floodable areas, watercourses belonging to the Union, of incontestable domain" (Costa, 2021, p. 03). Regarding areas of incontestable domain, Article 2 of SPU Ordinance No. 89/2010 follows the provisions of Article 20 of the Federal Constitution (Brazil, 1988). Furthermore, the TAUS can be converted into a concession of real right of use (CDRU - *concessão de direito real de uso*), according to Article 11 of the same Ordinance.

Still regarding SPU's competences to proceed with the land regularization of occupations located in Union areas, it is important to emphasize that SPU can act indirectly or directly. Specifically, regarding traditional peoples and communities, SPU shares actions with other agencies (indirect action), except in cases where the territorial demands of these social groups are not under the responsibility of others (direct action). In this regard, the following information can be found on the official federal government website:

As ações podem ser compartilhadas com outros órgãos, como por exemplo, o caso de Quilombolas (atua em conjunto com o Incra - Portaria Interministerial MP/MDA nº 210/2014; dos indígenas (atua com a FUNAI); das comunidades tradicionais que ocupam unidades de conservação (alinha-se com Ministério do Meio Ambiente – MMA e Instituto Chico Mendes de Biodiversidade – ICMBIO - Portaria Interministerial MP/MDA nº 436/2009); sendo essas destinações majoritariamente indiretas.

Existe, porém, aquelas comunidades tradicionais que não estão sob a tutela de nenhum órgão e acabam tendo sua pauta de regularização tratada pela SPU, como é o caso dos pescadores,

¹³Disponível em: <https://www.gov.br/gestao/pt-br/assuntos/patrimonio-da-uniao/destinacao-de-imoveis/regularizacao-fundiaria>. Acesso em: 2 ago. 2025.

¹⁴ Art. 3º, inciso I, do Federal Decree nº 6.040/2007.

ribeirinhos e caiçaras. Nesses casos a SPU atua na regularização fundiária direta (Brasil, 2022).

Considering the objective of guaranteeing traditional peoples and communities their territories and access to the natural resources they traditionally use, it is important to mention that Union properties can be allocated through other instruments. Besides TAUS and CDRU, Federal Law No. 9,636 of 1998 deals, for example, with the donation of Union real estate, namely:

Art. 31. **Mediante ato do Poder Executivo** e a seu critério, poderá ser **autorizada a doação** de bens imóveis de domínio da União, observado o disposto no art. 23 desta Lei, a:

- I - Estados, Distrito Federal, Municípios, fundações públicas e autarquias públicas federais, estaduais e municipais;
- II - empresas públicas federais, estaduais e municipais;
- III – fundos públicos e fundos privados dos quais a União seja cotista, nas transferências destinadas à realização de programas de provisão habitacional ou de regularização fundiária de interesse social;
- IV – sociedades de economia mista direcionadas à execução de programas de provisão habitacional ou de regularização fundiária de interesse social;
- V – beneficiários, pessoas físicas ou jurídicas, de programas de provisão habitacional ou de regularização fundiária de interesse social desenvolvidos por órgãos ou entidades da administração pública, para cuja execução seja efetivada a doação; ou**
- VI – instituições filantrópicas devidamente comprovadas como entidades beneficentes de assistência social e organizações religiosas (Brasil, 1998, grifo meu).

It is also necessary to consider land regularization of traditional territories in the Legal Amazon (*Amazônia Legal*), an area comprising the States of Acre, Amapá, Amazonas, Mato Grosso, Rondônia, Roraima, Tocantins, Pará, and the portion of Maranhão west of the 44th Meridian.¹⁵ According to Federal Law No. 11,952 of 2009, which provides for "the land regularization of occupations occurring on lands located in Union areas, within the scope of the Legal Amazon" (Law No. 11,952/2009, Art. 1), traditional territories shall be regularized observing specific regulations, according to Article 4, § 2:

Art. 4º Não serão passíveis de alienação ou concessão de direito real de uso, nos termos desta Lei, as ocupações que recaiam sobre áreas:

(...)

§ 2º As terras ocupadas por comunidades quilombolas ou tradicionais que façam uso coletivo da área serão regularizadas de acordo com as normas específicas, aplicando-se-lhes, no que couber, os dispositivos desta Lei (Brasil, 2009).

Furthermore, Article 8, item I, determines that if a conflict between local communities and private individuals is identified during the land regularization process, the former shall have priority. It is important to note that this norm considers the concept of local communities adopted in Article 3 of Federal Law No. 11,284 of 2006 (Brazil, 2006), thus encompassing traditional peoples and

¹⁵ Art. 2º of Complement Law nº 124, de 3 de january de 2007.

communities, namely:

Art. 3º Para os fins do disposto nesta Lei, consideram-se:

(...)

X - comunidades locais: populações tradicionais e outros grupos humanos, organizados por gerações sucessivas, com estilo de vida relevante à conservação e à utilização sustentável da diversidade biológica; (...) (Brasil, 2006).

In turn, Federal Decree No. 10,592 of 2020, "regulates Law No. 11,952 of June 25, 2009, to provide for the land regularization of rural areas located on Union lands, within the scope of the Legal Amazon, and on lands of the National Institute of Colonization and Agrarian Reform, through alienation and concession of real right of use of properties" (summary). This norm was amended by Federal Decree No. 11,688 of 2023, especially regarding the composition and competences of the Technical Chamber for Allocation and Land Regularization of Federal Public Rural Lands.

Thus, following the amendments, Federal Decree No. 10,592 of 2020 provided that one of the purposes of said Technical Chamber is to deliberate on the allocation of federal public lands, through a Resolution of its members. The Technical Chamber is coordinated by the Ministry of Agrarian Development and Family Agriculture (MDA - *Ministério do Desenvolvimento Agrário e Agricultura Familiar*) and composed of the public agencies and entities listed in Article 11, § 1.

2.2. National Institute of Colonization and Agrarian Reform (Incra)

Environmentally differentiated settlement projects (*projetos de assentamento ambientalmente diferenciados*) are modalities created in response to the demands of traditional populations¹⁶. Thus, initially, the extractivist settlement project - PE (*projeto de assentamento extrativista*) was created, transformed into an agro-extractivist settlement project (PAE - *projeto de assentamento agroextrativista*) and included in the National Agrarian Reform Plan through INCRA Ordinance No. 268 of 1996, whose use concession should be "under a communal regime," therefore collective. That is, the PAE represented an advance because the State recognized that the standard model of rural worker settlement project was not suitable for traditional peoples and communities.

Over time, other modalities were created, and currently, besides the agro-extractivist settlement project (PAE), there are also the sustainable development project (PDS - *projeto de desenvolvimento sustentável*) and the forest settlement project (PAF - *projeto de assentamento*

¹⁶ Normative Instruction No. 136 of November 13, 2023, uses the term *populações tradicionais* (traditional populations) in its Article 3, item I, but the concept is the same as that of *povos e comunidades tradicionais* (traditional peoples and communities) set forth in Federal Decree No. 6,040/2007.

florestal). These modalities are provided for in Article 2 of Normative Instruction No. 129 of December 15, 2022, which provides for the "administrative procedures for the creation by the National Institute of Colonization and Agrarian Reform - Incra of settlement projects and environmentally differentiated settlement projects."

According to the presentation made available by INCRA at the seminar *Marcos Regulatórios e Regularização Fundiária dos Povos e Comunidades Tradicionais no Brasil: Retrospectivas e Desafios*¹⁷ (Regulatory Frameworks and Land Regularization of Traditional Peoples and Communities in Brazil: Retrospectives and Challenges), 408 (four hundred and eight) agro-extractivist settlement projects - PAE have been created, with 97% of them located in the northern region and 3% in the northeastern region. Regarding sustainable development projects - PDS, 135 (one hundred and thirty-five) have been created, with 61% of them located in the northern region. Furthermore, 06 (six) forest settlement projects - PAF have been created, all located in the northern region.

The aforementioned regulation provides that the Regional Superintendencies are responsible for initiating the administrative process for the creation of settlement projects on rural public lands under INCRA's management and lists a series of documents that must support it. Therefore, as in the case of a conventional settlement project, the creation of an environmentally differentiated settlement project can arise from a situation where the public authorities verify non-compliance with the social function of property.

Despite the creation of settlement project modalities more suitable to the ways of life of traditional peoples and communities, there have been controversial normative changes. This is the case of Federal Law No. 13,465 of 2017, which amended provisions of various norms on land regularization, among them Federal Law No. 8,629 of 1993, by including § 14 in Article 18, to provide that the ownership title or CDRU cannot be granted to a legal entity. Regarding this change, Monteiro et al. (2019) state:

A proibição de titular pessoas jurídicas nos assentamentos, referendada pelo Acórdão nº 625/2018 do Tribunal de Contas da União, faz com que estas comunidades tenham suas formas específicas de organização negadas. Isso estimula os conflitos internos, o desrespeito

¹⁷ The Seminar *Marcos Regulatórios e Regularização Fundiária dos Povos e Comunidades Tradicionais no Brasil: Retrospectivas e Desafios* (Regulatory Frameworks and Land Regularization of Traditional Peoples and Communities in Brazil: Retrospectives and Challenges) took place on November 23 and 24, 2023, at the Office of the Attorney General of the Republic (*Procuradoria Geral da República*) in Brasília/DF. The event was jointly organized by the Ministry of Agrarian Development and Family Farming (MDA), the Ministry of the Environment and Climate Change (MMA), the Ministry of Racial Equality (MIR - *Ministério da Igualdade Racial*), the 6th Chamber of Coordination and Review of the Federal Public Ministry (*6ª Câmara de Coordenação e Revisão do Ministério Público Federal*), and the National Council of Traditional Peoples and Communities (CNPCT - *Conselho Nacional de Povos e Comunidades Tradicionais*).

aos Planos de Uso debatidos coletivamente, levando ao aumento da violência no campo e a negação dos direitos territoriais destas comunidades (Monteiro *et al.*, 2019, p. 57).

That is, community associations, for example, could no longer represent the traditional community in signing the contract for concession of real right of use (CCDRU), creating a certain dispersion regarding community political organization. Furthermore, the possibility of signing the CCDRU under a communal regime was extinguished, and, unlike conventional settlements, ownership titles are not issued subsequently in these cases. Along with this, "in the last ten years over thirty thousand individual contracts have been issued by the federal government in environmentally differentiated settlement projects" (Monteiro *et al.*, 2019, p. 57), factors that reinforce the perception that the State prioritizes individual titling over collective titling, even in environmentally differentiated settlements.

In this sense, Benatti and Silva (2022) report that INCRA issued a series of use concession contracts in environmentally differentiated settlements without consulting the representative entities of traditional communities. The number of contracts issued in the Legal Amazon between 2010 and 2021 would have been as follows: "Pará - 381; Amazonas - 5,991; Acre - 766; Maranhão - 27; Mato Grosso - 1; Amapá - 19" (Benatti and Silva, 2022, p. 93).

According to Monteiro *et al.* (2019), the CDRU is the main instrument used for the land regularization of traditional territories, but it has a precarious character and can be revoked. Comparatively, the recognition of the right to property for Quilombola communities is indicated as the one that would guarantee greater security to the community regarding its territorial right (Monteiro *et al.*, 2019).

Art. 18. A **Reserva Extrativista** é uma área utilizada por **populações extrativistas tradicionais**, cuja subsistência baseia-se no extrativismo e, complementarmente, na agricultura de subsistência e na criação de animais de pequeno porte, e tem como objetivos básicos proteger os meios de vida e a cultura dessas populações, e assegurar o uso sustentável dos recursos naturais da unidade.

§ 1º A Reserva Extrativista é de **domínio público, com uso concedido às populações extrativistas tradicionais** conforme o disposto no art. 23 desta Lei e em regulamentação específica, sendo que as áreas particulares incluídas em seus limites devem ser desapropriadas, de acordo com o que dispõe a lei. (...)

Art. 20. A **Reserva de Desenvolvimento Sustentável** é uma **área natural que abriga populações tradicionais**, cuja existência baseia-se em sistemas sustentáveis de exploração dos recursos naturais, desenvolvidos ao longo de gerações e adaptados às condições ecológicas locais e que desempenham um papel fundamental na proteção da natureza e na manutenção da diversidade biológica. (...)

§ 2º A Reserva de Desenvolvimento Sustentável é de **domínio público, sendo que as áreas particulares incluídas em seus limites devem ser, quando necessário, desapropriadas**, de acordo com o que dispõe a lei.

§ 3º O uso das áreas ocupadas pelas populações tradicionais será regulado de acordo com o disposto no art. 23 desta Lei e em regulamentação específica (...) (Brasil, 2000, grifos meus).

The management of conservation units is carried out by the Chico Mendes Institute for Biodiversity Conservation (ICMBio), linked to the Ministry of the Environment and Climate Change (MMA - *Ministério do Meio Ambiente e Mudança do Clima*)¹⁸, and the main instruments used are the Management Plan (*Plano de Manejo*), the Commitment Agreement (*Termo de Compromisso*), the Contract for Concession of Real Right of Use (CCDRU - *Contrato de Concessão de Direito Real de Uso*), and the Management Agreement (*Acordo de Gestão*) (Rios Paula, 2022, p. 324-326).

The presence of traditional peoples and communities in federal Conservation Units is a concrete and common fact in various states of Brazil (BRASIL/MPF, p. 16, 2014). The issue generates conflicts especially when this presence is permanent, involving the establishment of residence and/or use of natural resources in strictly protected conservation units. In these cases, Article 42 of Federal Law No. 9,985 of 2000 establishes that resident traditional populations must be relocated by public authorities, even if the presence of these social groups predates the creation of the conservation unit.

However, "a set of researches conducted in the most diverse areas of knowledge have demonstrated the viability and interest in protecting and maintaining these peoples in their traditional territories, even when located within Strictly Protected Conservation Units" (Brasil/MPF, 2014, p. 20). This is what a map prepared by ICMBio on the Legal Amazon revealed, as the concentration of protected areas is, for the most part, located in territories occupied by traditional communities (Brasil/MPF, 2014, p. 21).

According to Rios Paula (2022), Technical Information No. 03/2021-COGCOT/CGSAM/DISAT/GABIN/ICMBio, dated February 22, 2021, addresses the issue of territorial overlaps and presents the following survey:

Até o momento, conforme dados do levantamento realizado em 2013 e 2014 foram identificados 124 casos de sobreposição entre UC de proteção integral e territórios de povos e comunidades tradicionais. Desse total, 24 envolvem indígenas, 11 quilombolas, 36 comunidades tradicionais e 53 agricultores familiares. (...) Atualmente, encontram-se vigentes 20 (vinte) TC envolvendo indígenas, quilombolas, comunidades tradicionais e agricultores familiares que tiveram todo ou parte de seus territórios de vida transformados em unidades de conservação da natureza. A tabela denominada "Termos de Compromisso Vigentes em 2021" (SEI

¹⁸The instruments are governed by the following normative acts: Normative Instruction No. 26 of July 4, 2012 - Establishes guidelines and regulates the procedures for the elaboration, implementation, and monitoring of commitment agreements (*termos de compromisso*) between the Chico Mendes Institute and traditional populations residing in conservation units where their presence is not admitted or is inconsistent with the management instruments. / Normative Instruction No. 29 of September 5, 2012 - Regulates, within the scope of the Chico Mendes Institute, the guidelines, requirements, and administrative procedures for the elaboration and approval of a Management Agreement (*Acordo de Gestão*) in a federal Sustainable Use Conservation Unit with traditional populations. / Normative Instruction No. 7 of December 21, 2017, which establishes guidelines and procedures for the elaboration and revision of management plans for federal nature conservation units.

8447183) contém a relação dos termos de compromisso vigentes, seus respectivos processos administrativos, objetivos e atividades permitidas e restringidas. (ICMBio *apud* Rios Paula, 2022, p. 299).

To address conflicts arising from the overlap between traditional territories and strictly protected conservation units, some solutions have been presented by public agencies and researchers. Among them are de-affectation (*desafetação*), recategorization (*recategorização*), and dual affectation (*dupla afetação*) of the properties where strictly protected conservation units are located, or the removal of populations.

In the same vein is the understanding of the Specialized Federal Prosecutor's Office with ICMBio (*Procuradoria Federal Especializada junto ao ICMBio*), which in LEGAL OPINION N. 00175/2021/CPAR/PFE-ICMBIO/PGF/AGU expressed itself on the need to reconcile the activities of traditional populations with the objectives of strictly protected conservation units. Regarding the measures that can be adopted, partial suppression/partial de-affectation (*supressão parcial/desafetação parcial*), dual affectation, and recategorization were listed (Rios Paula, 2022, p. 323-324).

According to the Opinion, the alteration of the conservation unit's boundaries must be carried out by specific law, "§ 6 of Article 22 of Law No. 9,985 of 2000 does not apply, i.e., it cannot be done by a normative instrument of the same hierarchical level as the one that created the unit" (Rios Paula, 2022, p. 323-324). The same would apply to recategorization, as it signifies a reduction in the environmental protection regime (Rios Paula, 2022, p. 324).

3 FINAL CONSIDERATIONS

This research analyzed the regulations concerning the allocation of public real estate to traditional peoples and communities, with the aim of explaining the procedures carried out by federal public administration in response to social demand. Based on this, the research can contribute to updating the approach to this topic, especially within administrative law.

The results demonstrate that regulations addressing this social demand have been published; therefore, the claims of traditional peoples and communities have been prompting changes in public administration. Given this, it falls upon administrative law doctrines to consider these regulations and the experiences that have been built by public agencies in managing their real estate assets.

It is important to keep in perspective that the possibilities for allocating public real estate to traditional peoples and communities are under construction. Therefore, the actions of SPU, INCRA, and ICMBio exemplify how federal public administration was acting in the specific context when the

research was conducted. In this sense, there are still regulations to be made, such as the regulation of Federal Decree No. 6,040/2007 regarding the establishment of administrative procedures for the land regularization of traditional territories.

Although regulation is necessary for public administration's action, it is worth mentioning that the territorial rights of traditional peoples and communities' conflict with those of other groups. Therefore, conducting an administrative process may not be sufficient to implement what has been regulated. This is verified, for example, in cases where traditional peoples and communities demand the de-affectation (*desafetação*) of properties allocated for the creation of strictly protected conservation units: on one side is the demand for recognition and land regularization of the traditional territory, and on the other, the demand to maintain these spaces allocated for the implementation of environmental policies.

The simplest situations would be those where the traditional territory overlaps with a domain real estate asset (*bem imóvel dominical*), without allocation. However, even then, it is common for other interests to exist regarding these locations, both from the State and from private individuals, a situation that can interfere with the implementation of what the regulations provide.

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