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David Benavides

Ryan Golten

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DAVID BENAVIDES & RYAN GOLTEN*

Righting the Record: A Response to the GAO's 2004 Report *Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*

ABSTRACT

In 2004, the U.S. General Accounting Office (GAO) issued a Report entitled Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico (GAO Report), in which it analyzed whether the federal government violated any legal duties to community land grant heirs in New Mexico following the signing of the Treaty of Guadalupe Hidalgo. The GAO Report concluded that the government fulfilled any duties it may have had to grantees and heirs, and that potential remedies for the massive land losses were up to Congress as a matter of public policy rather than as a matter of legal obligation.

The following analysis, commissioned by the New Mexico Attorney General as a legal and historical response to the GAO Report, critiques the GAO's analysis and conclusions regarding a number of legal issues, including the federal obligations under the Treaty of Guadalupe Hidalgo and international law, the extent to which community land grants were properly confirmed by the United States, the legal and historical implications of these misconfirmations, and the breach of constitutional due process guarantees in the confirmation process.

* David Benavides is director of the land and water rights project for New Mexico Legal Aid. He received his B.S. from the University of New Mexico and his J.D. from the University of New Mexico School of Law. Upon graduation from law school, Benavides was awarded a Skadden, Arps Public Interest Law Fellowship to work on land and water rights in northern New Mexico. He has assisted land grants in retaining their common lands against various legal threats. Ryan Golten is an attorney with New Mexico Legal Aid's land and water rights project, where she represents acequias and land grants in protecting their land and water rights and exercising local decision-making authority over these community resources. Ryan received her B.A. from University of Michigan and J.D. from the University of New Mexico School of Law. Ryan clerked for Chief Justice Edward Chávez on the New Mexico Supreme Court in 2004-05. The authors would like to acknowledge the contributions of historian Mark Schiller and University of New Mexico School of Law students Kristina Fisher and Amanda Garcia, whose research assistance made this report possible.

The issue of the federal government's role in the loss of New Mexico's land grants is a significant one. This response to the GAO Report aspires to deepen the discussion and illuminate areas that merit Congress's consideration. Hopefully this analysis will help pave the way for meaningful redress for New Mexico's land grant communities, which have suffered terrible losses since the signing of the Treaty of Guadalupe Hidalgo.

INTRODUCTION

Much has been said and written about the land grant confirmation process in New Mexico under the Treaty of Guadalupe Hidalgo (Treaty). In 2004, the federal government published a long-awaited study assessing whether the federal government fulfilled its obligations under the Treaty and the U.S. Constitution, in light of the massive losses of community land grant lands in New Mexico following the Treaty.¹ The Government Accounting Office (GAO) concluded that the federal government fulfilled its duties under the Treaty and Constitution, and that any remedy for the land losses was up to Congress as a matter of policy. This response is an attempt to address that conclusion and the GAO's analysis.

Our critique of the GAO Report is divided into the following topics: (1) the GAO's analysis of the duty owed under the Treaty of Guadalupe Hidalgo and its interpretation of the congressional actions implementing that duty; (2) the fact that most community grants were not confirmed as they existed under Mexican and Spanish law and the disastrous effects of those misconfirmations; (3) the GAO's mistaken reliance on a since-reversed state district court decision in the case of *Montoya v. Tecolote*,² and the notion that wrongful confirmations could be collaterally attacked in state court; (4) the fact that many post-confirmation land losses were direct results of the improper nature of confirmations, rather than attributable simply to the actions of land grant heirs themselves; (5) an analysis of the cases and circumstances in which grants were improperly rejected and discouraged from being pursued; and (6) an analysis of the lack of due process under the federal confirmation process.

1. U.S. GEN. ACCOUNTING OFFICE, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO (2004) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d0459.pdf>.

2. The district court was reversed by the New Mexico Court of Appeals in *Montoya v. Tecolote Land Grant*, 2008-NMCA-014, 143 N.M. 413, 176 P.3d 1145, cert. quashed as improvidently granted, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

This response does not pretend to be the final word on the legal history of land grants in New Mexico though it is certainly one of the most extensive legal analyses that has been done to date. We do not pretend to address all of the topics and arguments exhaustively, as our purpose is to critique the GAO Report where we disagree with its analysis and conclusions, and to identify areas meriting further research.

Certainly the topic of the federal government's role in the loss of New Mexico's land grants, particularly in terms of common lands, is a significant one. Our hope is to deepen the discussion and illuminate important points for Congress's consideration. More than anything, we hope to pave the way for meaningful redress for New Mexico's land grant communities, who have suffered terrible losses since the signing of the Treaty of Guadalupe Hidalgo.

I. THE TREATY OF GUADALUPE HIDALGO AND THE DUTY OWED

In its 2004 report, the GAO concludes the Treaty of Guadalupe Hidalgo was not self-executing, and consequently the federal government had no legal duty to land grantees to recognize land grants to the extent they would have been recognized by Mexico. In doing so, the GAO ignores the more nuanced historical question of whether Congress in fact intended, through the Treaty and subsequent legislation in 1854 and 1891, to protect land grants to the extent they would have been recognized by Mexico at that time. Arguably, Congress did intend to do so, as suggested by U.S. Supreme Court decisions during the first half of the nineteenth century. Later courts may have misinterpreted Congress's intent or misapplied congressional directions surrounding the Treaty and subsequent legislation, as pressure increased to settle and market western lands. If so, Congress has the prerogative to legislatively overrule such cases and restore its intent as articulated in the Treaty and Acts of 1854 and 1891. This discussion was entirely overlooked by the GAO and bears serious consideration.

A. Self-Executing Treaties and the Early Evolution of Supreme Court Decisions

According to the GAO, the Treaty of Guadalupe Hidalgo was not self-executing, and therefore Congress had discretion to craft a process for confirming land grants without any legal duty to do so as Mexico would have done.³ Under this view, because there was no legal duty established by the Treaty, no legal rights could have been violated except for under the

3. GAO REPORT, *supra* note 1, at 99.

U.S. Constitution, and any concern that the Treaty was breached would have been a matter for Mexico to raise in an international forum.⁴ According to this view, however unfortunate or inequitable the federal process may have been, any flaws short of due process violations raise purely political rather than legal questions.⁵

There are a number of problems with this reasoning, beginning with the GAO's summary conclusion that the Treaty was not self-executing and therefore did not provide any legal duty or individual rights. As the GAO explains, whether a Treaty is self-executing depends on whether it "requires implementing legislation before becoming effective."⁶ If a treaty does not require implementing legislation, individual rights are protected under the treaty itself and will be recognized by courts of law on that basis without further actions by Congress.⁷ However, whether a treaty requires such implementing legislation is not as clear-cut as the GAO suggests.⁸ No distinction was made between self-executing and non-self-executing treaties until the case of *Foster v. Neilson*,⁹ where the Court began attempting to delineate a hierarchy between federal treaties and statutes.¹⁰ *Foster* held the 1819 Treaty of Cession between the United States and Spain, which governed the ceded territory of West Florida, did not "operate[] of itself without the aid of any legislative provision" because of its provision that Spanish land grants made prior to a specified date "shall be ratified and confirmed," essentially requiring some act of Congress before creating binding rights.¹¹

Four years later, however, the Court reversed itself in *United States v. Percheman*,¹² holding that the same provision was in fact self-executing as to land grants that would have been entitled to recognition under Spain. The Court construed the treaty at issue in light of the rules and practices among nations that are sufficiently well-established as to be considered legally binding without any express treaty or act, also known as "customary international law" or the "law of nations."¹³ Applying the customary international law of the time, the Court explained that land titles belonged

4. *Id.* at 98-99.

5. *Id.*

6. *Id.* at 99.

7. See *United States v. Percheman*, 32 U.S. 51, 89, 91-92 (1833).

8. See Christine Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 220 (1996).

9. *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

10. See Klein, *supra* note 8, at 218-19.

11. *Foster*, 27 U.S. at 314-15.

12. 32 U.S. 51, 89 (1833).

13. See *Paquete Habana*, 175 U.S. 677, 708-12 (1900).

to individuals, not the sovereign, and were to be unaffected by changes in sovereignty:

A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him; lands he had previously granted, were not his to cede...The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.¹⁴

Applying principles of treaty construction, the Court rejected any construction of the Treaty that would have required a perfect title to be subject to investigation and confirmation by this government or be forfeited, since any such construction would run counter to this law of nations.¹⁵ Congress, it stated, could not have intended to subject otherwise perfect grants "valid under the Spanish government, or by the law of nations, to the determination of [the federal] commissioners."¹⁶ The Court held the language of the Florida treaty should have been translated to state that perfected grants "shall remain ratified," rather than "shall be ratified" by some affirmative act.¹⁷

Other U.S. Supreme Court decisions in the first half of the nineteenth century followed *Percheman* in emphasizing the customary international legal principle that perfect titles under a former sovereign retained their valid and perfect status under the new sovereign.¹⁸ Since that time, customary international law has been held to be binding on U.S. courts in the absence of clear treaty language or domestic law to the contrary.¹⁹

14. *Perchman*, 32 U.S. at 87.

15. *Id.* at 86-89.

16. *Id.* at 91-92.

17. *Id.* at 88-89.

18. See *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857) (stating that, after the change in sovereignty, "private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged...This is the principle of the law of nations."); *United States v. Wiggins*, 39 U.S. 334, 350 (1840) (stating that titles perfected under a foreign sovereign were "intrinsically valid...and...need[ed] no sanction from the legislative or judicial departments of this country."); accord *United States v. Arredondo*, 31 U.S. 691 (1832).

19. See GAO REPORT, *supra* note 1, at 78; *Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations...It would take some explaining to say now that federal courts must avert

For the following several decades, including following the Treaty of Guadalupe Hidalgo, the Supreme Court closely followed its analysis in *Percheman* when construing treaties of concession and property rights in light of customary international legal principles.²⁰ However, in the later part of the nineteenth century, the Court abruptly departed from this reasoning in *Botiller v. Dominguez*,²¹ the case relied upon by the GAO for its conclusion that the Treaty of Guadalupe Hidalgo was not self-executing. In *Botiller*, the question was whether, under the Treaty, Congress could require otherwise perfected land grants in California to be presented to the land claims commission within two years or else forfeited.²² The Supreme Court reversed the decision of the California Supreme Court, which had construed the Act of 1851 in light of the Treaty and underlying law of nations, holding that Congress could not have intended a perfected land grant from the Mexican government to be lost for failure to present the claim within the two-year deadline.²³ In reversing, the Supreme Court omitted any discussion of customary international law in existence at the time of the Treaty. Instead, it concluded that Congress's two-year deadline for filing claims, whether perfect or imperfect, was a reasonable administrative requirement not in conflict with the Treaty's private property provisions.²⁴ Further, it stated that, if Congress violated the terms of the Treaty, this was strictly a matter of international law.²⁵

Botiller marked a dramatic shift from the reasoning in *Percheman* and other treaty construction cases up to that point suggesting the Treaty provisions were self-executing as to perfect grants. It also signaled the Court's increasing willingness to defer to Congress on matters involving the settlement of western lands, even when such decisions arguably went against its earlier pronouncements involving treaty rights.²⁶ Surprisingly, *Botiller* did not even mention *Percheman*, a decision decided only a decade before the negotiation of the Treaty of Guadalupe Hidalgo and still good law at the time.

Perhaps even more surprisingly, in relying on *Botiller* the GAO did not mention this notable omission or the long line of cases leading up to the Supreme Court's shift in *Botiller*. Nonetheless, in describing the history of

their gaze entirely from any international norm intended to protect individuals.") (internal citations omitted).

20. See, e.g., *Wiggins*, 39 U.S. at 350; *Leitensdorfer*, 61 U.S. at 177; *United States v. Moreno*, 68 U.S. 400 (1863).

21. *Botiller v. Dominguez*, 130 U.S. 238, 244 (1889).

22. See *id.* at 246-47.

23. *Minturn v. Brower*, 24 Cal. 644, 662-63, 672 (1864).

24. *Botiller*, 130 U.S. at 250.

25. *Id.* at 247.

26. See Klein, *supra* note 8, at 222-23.

the Treaty and the circumstances of its negotiation and signing, even the GAO acknowledges: "Then, as now, international law generally required a successor sovereign to recognize the property rights of a former sovereign's citizens to the same extent provided under the laws and practices of the prior sovereign."²⁷ Even later Supreme Court cases emphasized these same international law principles when considering the validity of land grants under the Treaty, albeit inconsistently.²⁸

Having omitted any critique of *Botiller*, the GAO recounts a history of the Treaty as if the negotiators and Congress at the time did not believe they were bound by the fundamental principle of international law announced in the *Percheman* line of cases. Like the first, this second omission merits scrutiny.

B. The Signing of the Treaty of Guadalupe Hidalgo

As explained by the GAO, after the initial phase of negotiation, the Senate deleted Article X of the Treaty, which specifically protected land grants to the same extent as if the territory had remained under Mexico:

All grants of land made by the Mexican government, or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited within the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty.²⁹

The first part of the Article was similar to language in the 1819 treaty with Spain later held in *Percheman* to be self-executing as to perfect grants.³⁰ However, the U.S. commissioners explained to Mexico that Article X was

27. GAO REPORT, *supra* note 1, at 27-29.

28. See, e.g., *Ely's Adm'r v. United States*, 171 U.S. 220 (1898) (emphasizing duty under Treaty and law of nations to recognize grants to the extent Mexico would have) and related discussion below.

29. *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569, 588-90 (1891) (emphasis added).

30. See GAO REPORT, *supra* note 1, at 28, 175; *United States v. Percheman*, 32 U.S. 51, 87-88 (1833).

deleted because of its provision allowing imperfect grants in Texas extra time to satisfy their grant conditions. Nonetheless they assured the Mexicans that Articles VIII and IX “secured property of every kind belonging to Mexicans, whether held under Mexican grants or otherwise.”³¹ President Polk provided the same explanation for the deletion of Article X, emphasizing that other language in the Treaty protected land grants to the extent they would have been recognized under Mexico:

The objection to the Xth article of the original treaty was not that it protected legitimate titles, which our laws *would have equally protected without it*, but that it most unjustly attempted to resuscitate grants which had become mere nullities, by allowing the grantees the same period after the exchange of the ratifications of the treaty, to which they had been originally entitled after the date of their grants, for the purpose of performing the conditions on which they had been made.³²

This explanation was reiterated in the Protocol of Querétaro (Protocol), in which the Mexicans reiterated their understanding that the deletion of Article X was not intended to annul land grants and that such grants would retain their “legitimate titles.”

The American government by suppressing the Xth article of the Treaty of Guadalupe did not in any way intend to annul grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.³³

Because the U.S. Senate never voted on the Protocol, and it was not included in the ratified Treaty documents, it is disputed whether the Protocol was intended to be part of the Treaty. While Mexico considered the Protocol binding and relied on its assertions to preserve and protect land grants, the U.S. position is that the Protocol is not in any way binding.³⁴

Certainly there is no clear answer for why Article X was deleted. On the one hand, officials including the President appear to have wanted to

31. GAO REPORT, *supra* note 1, at 30; see RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO 44, 48 (1992); *Interstate Land Co.*, 139 U.S. at 588-90 (attributing elimination of Article X to U.S. refusal to recognize imperfect land titles).

32. See *Interstate Land Co.*, 139 U.S. at 589 (emphasis added).

33. GAO REPORT, *supra* note 1, at 31, 178 (quoting Second Provision, Protocol of Querétaro).

34. *Id.* at 31-32. See MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 29-30 (1994) [hereinafter EBRIGHT].

remove Article X because of concerns about the inchoate titles in Texas, as described above. Others, more interested in land speculation and clearing the way for manifest destiny in the West, may have wanted to exclude Article X because of its similarity to the language of the 1819 Treaty discussed in *Percheman* involving perfect titles. Once this language was deleted, it was easier to argue the Treaty was not self-executing, even as to perfect claims, so that Congress could unilaterally determine the scope of the Treaty's protections, despite the fact that such a construction was arguably contrary to principles of customary international law as discussed above.

The scope of the Treaty's land grant protections in the absence of Article X, and the legal significance of the Protocol, continue to be matters of legal debate.³⁵ Certainly after *Botiller* it became increasingly difficult to argue that the Treaty provided substantive rights to those it was initially intended to protect. This argument was made more difficult by the ways in which courts narrowly interpreted the federal legislation designed to implement the Treaty in New Mexico.

C. The Court's Narrowing Implementation of the Federal Legislation

As described by the GAO, following the Treaty, Congress established the Office of the Surveyor General to settle land grant claims in the Territory of New Mexico. The Act of 1854 directed the Surveyor General to "ascertain the origin, nature, character and extent of all claims to land under the laws, usages, and customs of Spain and Mexico" and to recommend such claims to Congress for confirmation or rejection.³⁶ The Surveyor General was then instructed to report to the validity of these claims "under the laws, usages, and customs of the country before its cession to the United States."³⁷ Twice, the Act expressly directed the Surveyor General to examine land grants as the Spanish and Mexican governments would have, adding that the purpose of the Act was to "confirm bona fide grants and give full effect to the treaty."³⁸ There appears to have been little dispute at the time that Congress, in enacting the 1854 legislation, intended to recognize land grants to the extent that they would have been recognized under Spanish and Mexican law.³⁹ The GAO

35. See, e.g., *id.* at 35.

36. Act of July 22, 1854, ch. 108, § 8, 10 Stat. 308, 309 (establishing the Offices of Surveyor-General in New Mexico, Kansas, and Nebraska).

37. *Id.*

38. *Id.*

39. See GAO REPORT, *supra* note 1, at 56 (acknowledging the Department of the Interior's instructions to the Surveyor General to recognize grants in New Mexico "precisely as Mexico would have done").

concluded, however, that Congress had a different, and significantly narrower, purpose in enacting the Act of 1891.⁴⁰ Following years of delay, resulting in part from the halt in land grant confirmations during the Civil War and the large backlog of claims, and in part from the concern regarding fraudulent land speculation after the confirmation of a number of large private grants, Congress established the Court of Private Land Claims (CPLC) to resolve the numerous pending claims not yet resolved under the Surveyor General process.⁴¹ The CPLC proceedings and appeals to the Supreme Court were to be conducted “as courts of equity,” and were to be “guided” by the Treaty of Guadalupe Hidalgo, international law, and the laws of Mexico.⁴² Unlike the Act of 1854, however, the 1891 Act omitted the specific reference to custom and usage as a source of law. Instead, it instructed the CPLC to approve land grants “lawfully and regularly derived” under the laws of Spain and Mexico in accordance with Treaty provisions and principles of international and Mexican law.⁴³

Although the 1891 legislation did not include equity as a distinct source of law, in contrast to the earlier legislation in 1851 and 1854 governing California and New Mexico land grant claims, proceedings were to be conducted “as courts of equity.” As the GAO acknowledges, the scope of the courts’ equity jurisdiction was unclear under the language of the 1891 Act.⁴⁴ Nonetheless, the fact that courts were to evaluate claims in accordance with international law and Treaty provisions, and “according to the practice of the courts of equity,” suggests courts were bound to honor titles to the extent they would have been recognized by Spain or Mexico, and to temper the “lawfully and regularly derived” directive with equitable considerations.

Indeed, some cases arising under the Act of 1891 applied principles of equity, the Treaty provisions, and the laws of nations to confirm grants with various technical infirmities. For instance, in *Ely’s Administrator v. United States*, the U.S. Supreme Court held that the granting official had authority to issue the grant in light of the customary practice of doing so, even when the laws in place at the time were ambiguous as to his authority.⁴⁵ The Court emphasized the duty that existed under the Treaty and law of nations to recognize titles to the extent that Mexico would

40. Act of Mar. 3, 1891, ch. 539, 26 Stat. 854.

41. See GAO REPORT, *supra* note 1, at 54–76; EBRIGHT, *supra* note 34, at 45.

42. Act of Mar. 3, 1891, ch. 539, § 7, 26 Stat. 854 at 857.

43. *Id.* at 857, § 7 (directing the CPLC to evaluate claims “according to the law of nations, the stipulations of the Treaty...and the laws and ordinances of the Government from which it is alleged to have been derived”); see GAO REPORT, *supra* note 1, at 78.

44. GAO REPORT, *supra* note 1, at 81–82.

45. *Ely’s Adm’r v. United States*, 171 U.S. 220, 223–24, 240 (1898).

have,⁴⁶ as well as the courts' equitable powers under the 1891 Act to look behind the technical rules to ascertain the proper boundaries of a Mexican grant.⁴⁷ In so doing, the Court underscored the following fundamental equitable principals:

It must be remembered, in this connection, that, by section 7 of the act creating the court of private land claims, it is provided "that all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States." Therefore in an investigation of this kind that court is *not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico.* It was doubtless the purpose of congress, by this enactment, to provide a tribunal which should examine all claims and titles, and that should, *so far as was practicable in conformance with equitable rules,* finally settle and determine the rights of all claimants.⁴⁸

Likewise, in *United States v. Chaves*,⁴⁹ a case involving the Cubero Grant, the Supreme Court upheld a CPLC decision that oral evidence could be used in place of written documents to prove the existence of a valid land grant, based in large part on the laws of nations and Treaty obligation to confirm grants that would have been valid under Mexico.⁵⁰

These cases cast into doubt the GAO's assertions that Congress in the Act of 1891 precluded any consideration of equity and principles other than the strict letter of the law as it existed under Mexico.⁵¹ Contradictory decisions during the CPLC era point less to any clear statement about Congress's intent in the 1891 legislation than to the lack of clarity in the statute regarding the role of equity, as well as an adversarial system in which the increasingly technical arguments of government lawyers, responding to pressure to keep as much land as possible in the public domain for settlement and speculation, were able to prevail.⁵² The obvious

46. *Id.* at 223 ("It was undoubtedly the duty of Congress...to recognize and establish every title and right which, before the cession, Mexico recognized as good and valid").

47. *Id.* at 240.

48. *Id.* (emphasis added).

49. *United States v. Chaves*, 159 U.S. 452, 456 (1895).

50. See *EBRIGHT*, *supra* note 34, at 50-51.

51. See *GAO REPORT*, *supra* note 1, at 113-23 (relying on cases such as *United States v. Sandoval*, 167 U.S. 278 (1897), *Hayes v. United States*, 170 U.S. 637 (1898), and others that applied the earlier, technical holdings of *United States v. Vigil*, 80 U.S. 449 (1871), and *United States v. Cambuston*, 61 U.S. 59 (1857)).

52. See, e.g., *EBRIGHT*, *supra* note 34, at 45-50, 136-39.

due process concerns regarding such a system are discussed in Part VI below.

Despite notable exceptions, the U.S. Supreme Court increasingly rejected otherwise perfect grants based on technicalities that arguably would not have resulted in rejection under Mexico and may have been inconsistent with the Treaty and/or the law of nations. Reversing its analysis in earlier decisions such as *United States v. Chaves* for instance, the Court in *Hayes v. United States* relied exclusively on the “lawfully and regularly derived” language in rejecting a grant made by the territorial deputation in 1825, before regulations were in place that may have prohibited such an entity from making grants in New Mexico.⁵³ The Court disregarded that this appeared to be the customary practice of the time, implicitly sanctioned by Mexican government, and also ignored the fact that earlier courts had looked beyond similar technicalities under each of the federal acts for New Mexico and California land grants where a grant otherwise appeared to be valid.⁵⁴

Similarly, later cases tended to more narrowly interpret the 1891 Act as disallowing confirmations based on copies of grant documents where the originals had been lost or destroyed.⁵⁵ Such holdings have been much criticized by legal scholars for being overly technical, in addition to being remarkably out of touch with the official custom and practice on the New Mexican frontier.⁵⁶ Because there were no official notaries in the New Mexico territory, for instance, in many cases where original papers were lost or destroyed, descendants of the original grantees sought and received copies of the original document, along with a certification that the copy mirrored the original, from the highest local government official.⁵⁷ By

53. *Hayes*, 170 U.S. at 643–48.

54. *E.g.*, *Ely’s Adm’r v. United States*, 171 U.S. 220, 224 (1898) (just three years earlier, reaching the opposite conclusion as *Hayes* under similar facts); *Fremont v. United States*, 58 U.S. 541, 561–62 (1854) (upholding validity of Grant, even when territorial official dispensed with strict legal requirements in making grant, based on evidence of such customary practice in Territory); *cf.* *Crespin v. United States*, 168 U.S. 208, 217 (1897) (rejecting Grant on its facts, but recognizing that some grants made by otherwise unauthorized officials received approval of Mexican government); *see Klein, supra* note 8, at 228, n.206.

55. GAO REPORT, *supra* note 1, at 121–23 (discussing the Town of La Cieneguilla and Embudo grants, in which Supreme Court held that, where the original grant documents had been lost, copies of grant documents were insufficient to confirm the grant under the 1891 Act). However, as even the GAO acknowledges, even as late as the 1890s the CPLC continued to confirm land grants where original grant papers were missing. Such cases included the La Majada, Cubero, Santa Cruz, Black Mesa, and Town of Bernalillo land grants. *See* GAO REPORT, *supra* note 1, at 121–22, tbl. 26. In the case of the Santa Cruz Grant, the decision came even after the Supreme Court’s seemingly contradictory decision in *Hayes*.

56. *See id.* at 46–47, 137; John R. Van Ness, *Spanish American vs. Anglo American Land Tenure and the Study of Economic Change in New Mexico*, 13 SOC. SCI. J. 45, 48 (1976).

57. *See* EBRIGHT, *supra* note 34, at 130.

rejecting perfect land grants that had complied with such sanctioned practices, these decisions were arguably contrary to the statute and the laws of Mexico. These decisions also appear to run counter to the principle of statutory construction that acts of Congress should be construed to the extent possible not to violate international law and norms.⁵⁸

However, rather than criticize these cases as being arguably contrary to the Treaty, the law of nations, and Congress's intent in the 1891 statute, the GAO accepts the holdings from cases such as *Hayes* and *Sandoval*, explaining that Congress must have intended to omit any consideration of equity from the 1891 legislation. Although the GAO concedes that the implementation of the 1891 legislation resulted in unfortunate and even inequitable land losses⁵⁹ it concludes the result was perfectly legal.⁶⁰ The GAO ignores the possibility that some decisions misinterpreted or improperly disregarded the Treaty and Act of 1891, or that these increasingly technical decisions resulted in sufficient inequities to cause Congress to reevaluate the propriety of such decisions.⁶¹

The language of both the 1854 and 1891 Acts suggests that Congress intended to confirm New Mexico land grants as Mexico would have, consistent with international law and the history of the Treaty. If this was the case, it is within Congress's purview to correct the Court's misinterpretation. Certainly such remedial legislation is worth Congress's consideration.

D. Federal Remedies

The GAO's conclusion that the Treaty was not self-executing clearly merits scrutiny. Given the legal context of the time, Congress may well have intended the Treaty to be consistent with the customary international legal principle that lands that would have been valid under Mexico were required to be recognized to that same extent under the new sovereign. Contemporary courts recognize that, even where treaty provisions themselves are not clearly binding, domestic law should be interpreted and applied to be consistent with legal norms articulated by the treaty.⁶²

58. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (internal quotations and citations omitted); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

59. See GAO REPORT, *supra* note 1, at 7, 9.

60. See *id.* at 97, 99.

61. The one exception is the case of *United States v. Sandoval*, 167 U.S. 278 (1897), where the GAO suggests that Congress, if it disagrees with the decision, may want to consider legislatively overruling this decision. See *id.* at 161.

62. See *Lobato v. Taylor*, 71 P.3d 938, 947 (Colo. 2002) (stating that "[i]t would be the height of arrogance and nothing but a legal fiction" to interpret a nineteenth-century land grant document "without putting it in its historical context," informed by international law

This analysis calls into question the holding from *Botiller* and suggests, a century later, that Congress may want to consider reviewing and possibly overruling this decision through affirmative legislation. The GAO Report fails to critique and analyze not only the *Botiller* decision, but any obligations the United States may have based on the intent and spirit of the Treaty, particularly in light of existing customary international law. Such an omission should be corrected and brought to light.

II. GRANTS IMPROPERLY COUNTED BY THE GAO AS "CONFIRMED"

In its discussion of confirmed land grants, the GAO inadequately addresses the fundamental problem of lands grants not being awarded correctly, using statistics and drawing conclusions that fail to evaluate the extent to which erroneously confirmed land grants led to land loss. Further, based on an incomplete and at times flawed historical and legal analysis, the GAO erroneously determined that improper confirmations could be corrected in the courts, and that many of the losses of confirmed grant lands were due to the acts or omissions of land grantees and heirs themselves.

The GAO identifies as two of the primary long-standing concerns that prompted its report the facts that (1) many valid community land grants were denied confirmation, and (2) even where there was confirmation of valid grants, many were confirmed to the wrong person.⁶³ While the GAO's stated purpose is to assess these concerns, its assessment is surprisingly incomplete. Concluding that a substantial number of land grants were confirmed, and suggesting the federal government largely succeeded in its obligation under the Treaty, the GAO largely ignores and fails to provide similar data relating to the large numbers of community land grants that were confirmed *improperly*, i.e., not as Mexico would have done, based on errors in the confirmation process and a failure to apply the proper legal standards. The GAO also fails to acknowledge the effect of these wrongful confirmations in causing massive dispossession of land grant heirs without any legal recourse in the courts, based on much-criticized Supreme Court decisions that Congress never acted to rectify. This Part discusses the incomplete and sometimes misleading way in which the GAO treated this problem of incorrectly confirmed community grants.

A. Historical Context of Community Land Grants

as well as Mexican law and custom).

63. GAO REPORT, *supra* note 1, at 8-10.

In emphasizing the number of community grants that were confirmed, even if they were confirmed improperly as private grants or tenancies-in-common, the GAO first seems to overlook the essential quality of a community land grant which distinguishes it in critical ways from a private land grant or from a tenancy-in-common landholding pattern. In general, land grants were either private grants (also called "individual grants") or community grants.⁶⁴ Spanish and Mexican granting documents did not use the distinguishing terms "community" or "private" grants, so both types of land grant claims were brought into the confirmation process without these labels.⁶⁵ Under Spanish and Mexican land law and legal custom, the two types of grants differed significantly in terms of ownership patterns within the boundaries of the grant, use patterns, whether lands could be sold, and decision making in general.⁶⁶ In confirming land grants under the federal process following the Treaty, federal officials were charged with familiarizing themselves with these Spanish and Mexican laws and customs.⁶⁷

A community land grant was a very distinct type of land ownership pattern in New Mexico from an individual grant. Under Spanish and Mexican law, community land grants were designed to directly provide the necessary resources to sustain an entire community.⁶⁸ The key land ownership feature for community grants was *true common lands*, meaning lands that were not privately owned but were community-owned and freely used by all grant residents.⁶⁹ A small portion of the lands within community grants were private, e.g., house lots and privately-owned irrigated lands, but those private lands were surrounded by much larger expanses of common lands, to which all land grant residents had free access and which were critical to successful small-scale farming and stock-raising activities

64. See EBRIGHT, *supra* note 34, at 24.

65. See *id.* at 25.

66. See *id.* at 24–25.

67. Written instructions from the General Land Office in 1854, just after the Office of the Surveyor General was established, directed that "[a]mong the 'necessary acts' contemplated by the law and required of you, is, that you shall: (1st) Acquaint yourself with the land system of Spain as applied to her ultra-marine possessions, the general features of which are found—modified, of course, by local requirements and usages—in the former provinces and dependencies of that monarchy on this continent." GAO REPORT, *supra* note 1, at 193–99. The instruction further clarified that "[i]t is obligatory on the government of the United States to deal with the private land titles and the 'pueblos' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far and no further. This is the principle which you will bear in mind in acting upon these important concerns." *Id.*

68. John R. Van Ness, *Hispanic Land Grants: Ecology and Subsistence in the Uplands of Northern New Mexico and Southern Colorado*, in LAND, WATER, AND CULTURE: NEW PERSPECTIVES ON HISPANIC LAND GRANTS 157–61 (Charles L. Briggs & John R. Van Ness eds., 1987).

69. See *id.*; see also EBRIGHT, *supra* note 34, at 24–25.

upon which the local economy was based.⁷⁰ Land grant boundaries were deliberately designated so as to encompass the various ecological zones that would contain the whole array of critical resources.⁷¹ The common lands could not be sold but were to be held in perpetuity by the land grant in its corporate capacity as a quasi-public entity.⁷²

In contrast, an individual land grant was regarded as private land in its entirety. Private grants were the private property of the grantee, and their use, ownership, and marketability were purely private decisions.⁷³ All decisions regarding the grant, e.g., who could enter and use the grant, or the sale of any portion of the grant, were the grantees' decision alone.

Although the GAO Report focuses specifically on *community* land grants and the concerns related to the federal confirmation process established under the Treaty, the GAO did not appear to regard it as a failure of the confirmation process when community land grants were awarded to individuals or as tenancies-in-common, or where common lands were otherwise privatized, despite these critical differences in land tenure. On the one hand, the GAO acknowledges that grantees' heirs are concerned that many community land grants were not confirmed to the "rightful owners," meaning that community lands grants were confirmed in ways that did not preserve the community-owned nature of the common lands.⁷⁴ However, the GAO then fails to analyze these concerns in any meaningful way. Such an analysis is critical to an understanding of the failures in the federal confirmation process.

B. Erroneous Confirmations of Community Grants to Individuals as Private Grants

70. *See id.*

71. Researchers have identified the different resources available from the privately held lands (e.g., irrigated agricultural products) versus those available from the common lands (e.g., forest products, summer pasture, wild game), and have described how the land grant residents made use of these different resources at different times over the course of a year. *See* Van Ness, *supra* note 68, at 141-214. *See also* JOHN VAN NESS, *HISPANOS IN NORTHERN NEW MEXICO: THE DEVELOPMENT OF A CORPORATE COMMUNITY AND MULTICOMMUNITY* (1991). These studies have concluded that for land grant communities and community members to survive in the non-cash economies prior to the mid-twentieth century, it was essential that they have access to the common land resources which interplayed with the resources of their own private inholdings to produce a complete resource base for successful small-scale family farming and stock-raising activities. For this reason, a "correct" confirmation of a community land grant was more than simply the historically valid thing to do, it was critical to the preservation of the common lands in a form necessary for the communities to survive.

72. *See id.*

73. *See* EBRIGHT, *supra* note 34, at 24.

74. GAO REPORT, *supra* note 1, at 8.

In a number of cases, community land grants were improperly confirmed as individual grants. This was done when the confirmatory documents used language assigning ownership of the grant to the heirs, assigns, and legal representatives of some named individual, rather than to “the Town of _____.”⁷⁵ This confirmatory language became the legal basis for the individual’s claim to the entire grant.⁷⁶ Typically the individual who was awarded the grant was the *poblador principal*, whose name appeared prominently in the Spanish and Mexican granting documents as the person petitioning for the grant.⁷⁷ It was not uncommon that a single person (or a small number of people) would initiate the petition to the Spanish or Mexican government for a community grant on behalf of themselves and a larger number of settlers.⁷⁸ The grant would be awarded mistakenly to that individual if the U.S. official reviewing those documents erroneously overlooked references to the purpose of the grant as one of establishing a settlement, or references to other settlers joining the *poblador principal*, or other evidence of a community grant.⁷⁹

The most well-known case of this was the Tierra Amarilla Grant. Published legal histories of this Grant demonstrate that this was a land grant given for the purposes of founding a settlement, but that confirmation of the Grant was sought by Francisco Martinez, solely in his name, as an heir of Manuel Martinez, the *poblador principal*.⁸⁰ The granting documents related that the Grant was given by the Mexican government in 1832 to “the related petitioners and the rest which may join together” with the directive that “the pastures, watering places and roads shall be free according to the custom prevailing in all *settlements*.”⁸¹ Histories such as Ebright’s demonstrate that the Surveyor General overlooked important features of the granting documents indicating it should have been regarded as a community grant.⁸² Similarly, in the case of the Juan Bautista Valdez Grant, the Grant was confirmed to Juan Bautista Valdez despite the fact that nine

75. See H.N.D. Land Co. v. Suazo, 44 N.M. 547, 545–48, 105 P.2d 744, 746–49 (1940) (describing confirmatory act in the name of Manuel Martinez, rather than to the town or community of Tierra Amarilla); cf. Reilly v. Shipman, 266 F. 852, 858–59 (8th Cir. 1920) (upholding the Anton Chico Grant as a community grant in light of the confirmatory language to the inhabitants of the town of Anton Chico).

76. See, e.g., Reilly v. Shipman, 266 F. 862 (8th Cir. 1920) (language in confirmatory document is determinative in questions as to in whom title to a land grant is vested).

77. See, e.g., MALCOLM EBRIGHT, THE TIERRA AMARILLA GRANT: A HISTORY OF CHICANERY (1993) [hereinafter EBRIGHT, THE TIERRA AMARILLA GRANT].

78. *Id.* at 5.

79. *Id.* at 34.

80. See, e.g., *id.* at 14–20.

81. *Id.* at 12 (emphasis added).

82. EBRIGHT, THE TIERRA AMARILLA GRANT, *supra* note 77, at 14–16.

other named individuals were put in possession of lots on the Grant as part of the act of possession by the Spanish granting official.⁸³

The most important consequence of any mistaken confirmation of a community grant to an individual was the legal conversion of the common lands of the land grant to ownership by a single individual as private property. Spain and Mexico never intended that such common lands be privately held.⁸⁴ Of course, private ownership meant that the individual owner could sell the former common lands, something that would not have been permitted to happen to community grant common lands under Spain or Mexico.⁸⁵ Even if it did not happen immediately, ultimately the lands would pass to an owner who would enforce his or her private rights by selling the common lands or by excluding or fencing out the residents who depended on the common lands for their livelihoods.

This is precisely what happened with the Tierra Amarilla Grant, which was the subject of a long line of legal decisions involving a series of non-residents, beginning with Thomas B. Catron, who had purchased the interests of the Francisco Martinez heirs and claimed thereby to own all 594,515 acres of the Grant. Each time the Tierra Amarilla Grant residents asserted their rights to the common lands the court based its denial on the U.S. confirmation language which vested ownership of the Grant in Francisco Martinez.⁸⁶ Thus, the mistaken confirmation resulted in a radical and legally enforceable change in ownership of lands that were clearly intended by Spain and Mexico to be freely open to land grant residents in perpetuity.

The GAO Report does not provide any real analysis of this problem. The Report simply recounted the general facts relating to the awarding of the Tierra Amarilla Grant and the unsuccessful attempts by the heirs to recover their rights to the common lands.⁸⁷ Although the Report notes the concern of grant heirs over confirmations that were not made to the rightful owners, the Report fails in any way to assess the validity of that concern or attribute the loss of the Tierra Amarilla Grant common lands to the incorrect confirmation of the Grant as a private grant.

83. Decision of the Court of Private Land Claims, June 1898, Juan Bautista Valdez Grant, PLC 179, roll 50, frames 474-76 (on file with the N. M. State Records Ctr. and Archives, Santa Fe, N.M. (NMSRCA)).

84. See Van Ness, *supra* note 68, at 157-61; EBRIGHT, *supra* note 34, at 24-25.

85. EBRIGHT, *supra* note 34.

86. See *Martinez v. Rivera*, 196 F.2d 192 (10th Cir. 1952); *Flores v. Bruesselbach*, 149 F.2d 616 (10th Cir. 1945); *Payne Land & Livestock Co. v. Archuleta*, 180 F. Supp. 651 (D.N.M. 1960); *Martinez v. Mundy*, 61 N.M. 87, 295 P.2d 209 (N.M. 1956); *H.N.D. Land Co. v. Suazo*, 44 N.M. 547, 105 P.2d 744 (N.M. 1940).

87. GAO REPORT, *supra* note 1, at 105.

Rather, the GAO attempts to characterize the loss of lands in cases such as these as a “post-confirmation” problem brought on by grantees themselves.⁸⁸ In its general discussion of the concerns over misconfirmations, the GAO concludes – incorrectly – that at least some of those incorrect misconfirmations could be corrected by present-day court action, and that the federal government had thereby provided a remedy by which such misconfirmations could be corrected and the lands finally awarded in the proper ownership.⁸⁹ In general, the GAO sidesteps any in-depth evaluation of the source and scope of this problem.

C. Erroneous Confirmations of Community Grants as Tenancies-in-Common, Which Privatized Otherwise Community-Owned Lands

Another way in which land grant common lands underwent a radical redefinition in ownership by the U.S. government was when they were erroneously converted from community-ownership to a type of private ownership called a tenancy-in-common. Once the common lands were erroneously privatized in this way, private “shares” or “interests” in the common lands came into existence and became the object of speculative activities by non-residents of the grant. This privatization of the common lands also led in some cases to the loss of the entire common lands through a type of lawsuit called a partition suit.

Partition suits derive from Anglo-American law, and are filed when a tract of undivided private land is held jointly by a number of co-owners and one co-owner wants to “cash out” his or her share of the land, but the co-owners cannot agree on a buy-out. In this event, the individual can force the entire parcel of land to be sold at a public auction, and each co-owner gets his or her proper share of the proceeds of the sale. It is a fairly drastic measure, because the suit can force the sale of the land out from under all the remaining co-owners at the instigation of a single co-owner, even if all the other co-owners want to remain owners of the land and do not want it to be sold. A common scenario for a partition suit is when a tract of family land has been passed from the parents to all the siblings, and each sibling has a fractional share of the undivided piece of land. If one sibling wants to “cash out”, and if they cannot come to any agreement whereby that sibling gets bought out by another, the one sibling can force the sale of the land by filing a partition suit. This type of jointly-owned private land is said to be a “tenancy-in-common.”⁹⁰

88. See *infra* Part IV.B.

89. The invalidity of this conclusion is further explored later in this article. See *infra* Part III.C.

90. See BLACK'S LAW DICTIONARY 1506 (8th ed. 2004).

The common lands of community land grants should never have been subject to a partition suit because they were not tenancies-in-common under Spanish and Mexican law; they were not private lands held by distinct co-owners. They were lands owned by the land grant itself as a public corporate body.⁹¹ This distinction is critical. Land grant common lands were analogous to a city-owned park. If there are 100 residents of a city, there is no right in any resident to assert that he or she “owns” 1 percent of the park, the way a family member might own a share of the family land. Legally, the city owns it, and the residents only have the right to use the park. Because city-owned lands are not tenancies-in-common no one can file a partition suit to have them partitioned. There is only one owner – the city. Similarly, Spanish and Mexican land grant common lands were owned by the land grant itself in its corporate capacity. The residents had the right to use them, but had no ownership over them.⁹²

In New Mexico the fatal act that led to the partitioning of community land grant common lands occurred when the U.S. government erroneously created a tenancy-in-common by confirming the grant to a group of individuals rather than to the community land grant itself. This did not happen in every instance, but it happened in a significant number of them.⁹³ Often, the government erroneously awarded the grant to the original settlers named in the grant documents. In doing so, the government created a tenancy-in-common that had never existed by dissolving the community ownership of the grant and completely privatizing the common lands.⁹⁴ Certain heirs were now suddenly the private owners of a fractional share in the common lands. As such, the common lands, or shares of them, could be sold to non-residents. A single heir or a buyer of an heir’s share of the co-tenancy could now sue to partition the land grant and force the sale of what had been the common lands without the consent of the other heirs. These processes and transactions would have been legally impossible under the community-ownership pattern created by Spain or Mexico at the inception of the land grant. In the city-park analogy described above, it was as if the U.S. government had decreed that all city residents now owned 1

91. See Daniel Tyler, *Ejido Lands in New Mexico*, J. OF THE WEST, July 1988, at 21, 21–29 [hereinafter Tyler, *Ejido Lands*].

92. See Van Ness, *supra* note 68; Daniel Tyler, *The Spanish Colonial Legacy and the Role of Hispanic Custom in Defining New Mexico Land and Water Rights*, COLONIAL LATIN AM. HIST. REV., Spring 1995, at 149, 149–65 [hereinafter Tyler, *Spanish Colonial Legacy*]; See also Tyler, *Ejido Lands*, *supra* note 91.

93. See *infra* Part II.E, at Table 1.

94. Up to that point the only private lands within the grant would have been each resident’s own irrigated lands and house lot. Conversion of a community grant to a tenancy-in-common did not change the status of those private lands, but privatized the remainder of the grant by giving a fractional share to each named grantee.

percent of the park and could do with their 1 percent whatever they wanted, including filing a partition suit and forcing the sale of the park to the highest bidder.

1. *Tenancies-in-Common: A Federal Invention for Community Land Grants*

No community land grant ever should have been confirmed or patented as a tenancy-in-common, as there was no support in prior law or customary practice for the notion that such common lands were tenancies-in-common under Spain or Mexico. The confirmation of community grants as tenancies-in-common was a monumental error on the part of the U.S. confirmation process which led to disastrous consequences for land grant heirs in nearly every case in which it occurred. That the GAO failed to recognize this in any meaningful way is an omission that must be clarified in considering possible remedies for the loss of land grants in New Mexico.

The fact that community land grant common lands were truly communal lands, and were not held as private fractional shares, was an elemental aspect of Spanish and Mexican property law at the time of the change in sovereignty.⁹⁵ In many cases, the Spanish and Mexican granting documents themselves contained language that made it manifestly clear that the common lands were not private lands, and these documents were always closely reviewed by the relevant U.S. officials. Federal personnel delved into much more arcane nuances of Spanish and Mexican land grant law, albeit not always correctly, such as exactly who could authorize a land grant, the legal maximum size a land grant could be, or how long the grantees had to reside on the grant before it vested. The fact that land grants were originally granted either as private grants or as community grants—but virtually never as tenancies-in-common—was basic by comparison.⁹⁶ Given this and the fact that the Surveyor General was

95. Tyler, *Ejido Lands*, *supra* note 91, at 2; Tyler, *Spanish Colonial Legacy*, *supra* note 92.

96. Spanish and Mexican granting documents did not use the distinguishing terms “community” or “private” grants to differentiate grants that had true common lands from purely privately-held grants. However, there were often clear indications in the granting documents as to the community nature of a particular land grant, which would have indicated that these grants were not tenancies-in-common under Spanish and Mexican law. For example, the GAO considered a land grant to be a community grant if any one of the following three criteria were met in the original grant documents: (1) the grant documents declared part of the grant to be for communal use, using such terms as “common lands” or “pasturage and water in common”; (2) the grant was made for the purpose of establishing a new town or settlement; or (3) the grant was issued to 10 or more settlers. U.S. GEN. ACCOUNTING OFFICE, DEFINITION AND LIST OF COMMUNITY LAND GRANTS IN NEW MEXICO 13 (2001), available at <http://www.gao.gov/new.items/d01951.pdf>. Had federal officials used even these simple criteria to designate “original document” community grants, and been consistent in ruling out a tenancy-in-common land tenure for those grants, many land grants would have been spared the problems and losses that accompanied confirmation as a

specifically mandated to settle land claims “precisely as Mexico would have done had the sovereignty not changed,” it is hard to understand this wholesale misconstruction of the basic land-tenure pattern under Spain and Mexico.⁹⁷

Yet of the 131 non-Pueblo community lands grants identified by the GAO, U.S. decision makers awarded fewer of them as true community land grants (20) than as tenancies-in-common (27) – an astounding statistic when one considers that tenancies-in-common were a land-tenure pattern not used by Spain or Mexico for community grants. Each of these tenancies-in-common recast the common lands as a set of fractional, highly-marketable private shares – a far conceptual cry from the Spanish and Mexican idea of common lands as an intact and inalienable pool of publicly-owned resources.

Why this happened is certainly an issue that would benefit from further research. In some cases, it is clear that land speculators with connections to decision makers in Washington influenced the outcome so that certain community land grants were confirmed as tenancies-in-common despite the residents’ wishes to the contrary. An example of this is discussed in Part II.C.3, below, in the case of the Mora Grant. The obvious motivation for a land speculator would have been that the speculator understood that a tenancy-in-common would have afforded several types of opportunities to detach the former common lands from the community and release them into the market. All the speculator had to do was acquire a share of the tenancy-in-common from any heir and force a partition suit, and he could make a profit on his acquired share or put in a speculative bid on the entire common lands.⁹⁸ Or, if the speculator were a lawyer, which

tenancy-in-common.

97. See *supra* note 67.

98. David Correia, *Land Grant Speculation in New Mexico During the Territorial Period – Appendix to Righting the Record: A Response to the GAO’s 2004 Report Treaty of Guadalupe Hidalgo*, 48 NAT. RESOURCES J. 927 (2008) [hereinafter Correia, *Land Grant Speculation*]. In the case of the Mora Land Grant, a partition suit was filed by Stephen B. Elkins, a non-resident land speculator, and Vicente Romero, a resident, both of whom had bought a number of fractional interests in the Grant. See, case study on Mora Grant *infra* Part II.C.3. Elkins, an attorney, had also acquired an interest in the Grant as payment for representing a Grant resident in a criminal case. The partition suit for the Domingo Fernandez (a/k/a San Cristobal, a/k/a Eaton) Grant was filed by non-resident Thomas B. Catron after he acquired an interest by purchase. The Santa Barbara Grant was represented by attorney Napoleon Bonaparte Laughlin before the CPLC, for which he received a fee of an undivided one-third of the Grant. The Grant was confirmed as a tenancy-in-common, which made Laughlin a one-third co-owner of the common lands, and therefore a potential initiator of a partition suit. Three years after confirmation and receiving his fee, he sued for partition, and the entire common lands of his former clients were sold. Laughlin himself was the high bidder at the auction, so he bought the Grant and reportedly sold it five years later at more than 400 percent profit. Obviously it was a serious ethical violation for an attorney to take land as

was not uncommon, he could facilitate the process without having to make an initial purchase by encouraging a grantee to file a partition suit and by representing him or her in that suit.⁹⁹ In contrast, a community land grant confirmed with intact, community-owned common lands would not have been subject to partitioning and would not have provided these types of speculative opportunities.¹⁰⁰

That still begs the question, however, as to why federal officials would have entertained the proposition that common lands could be held as tenancies-in-common, especially given the absence of either Spanish or Mexican law or customary practice recognizing this type of land tenure

payment and then file a suit that resulted in the sale of his clients' land out from under them. Yet this occurred in a number of cases. See David Benavides, *Lawyer-Induced Partitioning of New Mexico Land Grants: An Ethical Tragedy* (1994) (unpublished manuscript, on file with the University of New Mexico School of Law Library). All three of these grants were considered "original documentation" community grants by the GAO, but were confirmed as tenancies-in-common.

99. Attorney Alonzo B. McMillen represented the Petitioner in the suit to partition the Town of Las Trampas Land Grant. McMillen's law partner was the sole bidder at the auction. The court, however, determined that this setup was fraudulent and ordered a new sale. At the time the Alameda Grant was partitioned and ordered sold, McMillen, who again represented the party petitioning for partition, was found to be the owner of just under one-half of the common lands of the Grant, which he had received "for legal services rendered and by purchase." *Montoya v. Heirs*, 16 N.M. 349, 358, 120 P. 676, 678 (1911). Thus, through the partition suit McMillen hoped to receive just under half of the proceeds of the sale. (In that case, however, the court decided there were no common lands to partition, so there was no sale.) McMillen also represented the Petitioners in the suit to partition the Cañon de San Diego Grant. This time McMillen, as the only bidder at the auction, did purchase the Grant and the purchase was not set aside. G. TAYLOR, *NOTES ON COMMUNITY-OWNED LAND GRANTS IN NEW MEXICO* 8 (1937). These three grants were considered community grants by the GAO, with the Las Trampas Grant and the Cañon de San Diego Grant being "original document" community grants.

100. The partitioning of the Town of Tome Grant was halted when the Grantees attempting to sue for partition were held to have no interest in the common lands because all legal title in the common lands was vested in the incorporated town. See *Bond v. Unknown Heirs of Barela*, 16 N.M. 660, 120 P. 707 (1911) *aff'd*, 229 U.S. 488 (1913). This same description of community-ownership of the common lands – and the absence of private ownership in the common lands – was determined for the Town of Atrisco Grant in *Arnijo v. Town of Atrisco*, 56 N.M. 2, 239 P.2d 535 (1951), the Town of Chilili Grant, in *Shearton Dev. Co. v. Town of Chilili Land Grant*, 2003-NMCA-120, 134 N.M. 444, 78 P.3d 525, the Town of Belen and Town of Casa Colorado grants in *Yeast v. Pru*, 292 F. 598 (D.N.M. 1923) and the Anton Chico Grant in *Reilly v. Shipman*, 266 F. 862 (8th Cir. 1920). See also *Cubero v. DeSoto*, 76 N.M. 490, 491, 416 P.2d 155 (1966). These were all cases of grants confirmed as community land grants and not as tenancies-in-common. None of these grants was successfully partitioned. Proper confirmation of a community land grant, therefore, tended to be a shield against partitioning. The only instance of a partitioning of a community land grant confirmed as such is the partial partitioning of the Cebolleta Land Grant, in which the common lands were not sold as a block by the court, but large tracts were awarded to private non-resident individuals and attorneys, leaving the Grant itself with only about 16 percent of its former common lands.

among land grants. The GAO suggests that because of the quitclaim language in the confirmatory acts and in patents, it was of little consequence if federal officials got the ownership wrong. According to the GAO, the true owners could have their day in state court after the federal confirmation process and ultimately have the grant awarded to the proper owners or in the proper land-tenure pattern.¹⁰¹ If this explanation were true, it would mean, in effect, that the federal government felt it was discharging its treaty obligation even if it was negligent in awarding land grants and even if the rightful owners were thereby forced to initiate a completely different court process to get back the grant from the individual to whom the federal government had improperly awarded the grant.

It does not appear, however, that the federal government actually relied on the existence of state court corrective action to make up for any lack of federal rigor in applying Spanish and Mexican law. If it had, the federal government would have made dramatic changes in the wake of the *Tameling* decision to conform its subsequent confirmations more closely to Mexican law. As discussed in Part III of this report, the U.S. Supreme Court's 1876 decision in *Tameling* made it clear that the courts had no jurisdiction to review an allegedly incorrect land grant confirmation by Congress. Contrary to the GAO's theory, however, there is no record of this ruling resulting in a systematic review of federal recommendations to look for possible mistakes (to avoid those mistakes being set in stone once Congress acted), nor was there a halt to the confirmation of community lands as tenancies-in-common.

In fact, the federal government often took less interest in correctly determining the nature of a grant's land tenure than in correctly determining other aspects of the grant. The case of the San Joaquin de Nacimiento Grant illustrates this pattern.¹⁰² The Grant was submitted to Surveyor General T. Rush Spencer in 1871. Spencer found the Grant to be valid and drafted a decision approving the Grant. He died before the decision was formally issued. His successor as Surveyor General, James K. Proudfit, issued the formal decision approving the grant in 1872, and submitted it to Congress. The decision confirmed the Grant, incorrectly, as a tenancy-in-common, to "the thirty-six original grantees and their heirs and legal representatives."¹⁰³ The Grant was surveyed in 1879 for 131,725 acres.¹⁰⁴

101. GAO REPORT, *supra* note 1, at 66, 107, 132.

102. This Grant is centered around present-day Cuba, N.M.

103. The Spanish granting documents made clear that the Grant was for the purpose of establishing a settlement, and that the Grant was being made to 36 heads of family. The GAO considered this Grant as an "original document" community grant. *See supra* note 96.

104. J.J. Bowden, *Private Land Claims in the Southwest 1384* (1969) (Master's thesis, Southern Methodist Univ.) (on file with the University of New Mexico School of Law Library).

Tension arose on the Grant because of the presence there of settlers who had no connection with the original 1769 settlement, some of whom had recently been given small holding claim permits by the General Land Office.¹⁰⁵ At the same time, the Grant had seen a steady influx of descendants of the original settlers re-occupying the grant as conditions became safer for permanent occupation in the outlying areas of the territory.¹⁰⁶ Had the Grant been understood to be a community grant, it is possible that the community could have accommodated new settlers, provided them with unallotted lands or unoccupied lands that were not resettled, and integrated them into the Grant. This happened on a number of grants.¹⁰⁷ But the combination of the tenancy-in-common designation, in which only descendants of the original grantees had rights to the land, and the unlawful yet federally issued small-holding claim permits for some of the same land, created what seemed to be irreconcilable claims. Here was a perfect opportunity for the federal government to properly recognize the Grant as a community grant, undo the tenancy-in-common designation, affirm the common lands as a public resource and perhaps resolve a locally-contentious issue that it helped create in the first place.

Surveyor General Julian and his staff conducted significant field research in an 1886 re-examination of the claim, but his decision compounded the errors of his predecessors by reversing their approval of the Grant and holding that it was invalid “by reasons of non-compliance with the conditions prescribed.”¹⁰⁸ Not only were the three reasons given fairly technical ones (non-compliance with the four-year residency requirement; that the town itself did not conform to the design or size as set forth in the Spanish granting papers; and that “[t]he names of the present claimants of the land are not given and there is no proof that they are the heirs and legal representatives of the grantees”), but the second reason was not a valid reason for denying a land grant, and the first one was not

105. The 1854 Surveyor General Act sought to prevent the unnecessary creation of competing claimants for the same lands by making claimed land grant lands off limits to distribution by the General Land Office (GLO) under homestead and similar laws. The GLO reported in 1885, however, that its employees had routinely disregarded that prohibition during this time period, which created unnecessary internal problems for many land grants. *Letter from the Secretary of the Interior Transmitting Copies of Reports upon the Subject of Fraudulent Acquisition of Titles to Lands in New Mexico*, S. EXEC. DOC. NO. 106, 48th Congress, 2nd Sess. (1885) (statement of Henry M. Teller, Sec’y of the Dep’t of the Interior of the United States).

106. See HILARIO LUNA, *SAN JOAQUIN DE NACIMIENTO* (1975) at 43-68, 151 (on file with authors).

107. See *infra* Part II.C.3: Case Study: The Town of Mora Grant.

108. LUNA, *supra* note 106, at 137 (citing Surveyor General Julian’s 1886 supplemental report).

supported by the evidence.¹⁰⁹ But it is Julian's third point that was collateral to the issue of the Grant's validity. If the Grant had been correctly confirmed to the Town of San Joaquin del Nacimiento, or the inhabitants of San Joaquin de Nacimiento, as other correctly-identified community grants had been, rather than as a tenancy-in-common to "the thirty-six original grantees and their heirs and legal representatives," the question of who was descended from the original grantees would have been moot.¹¹⁰ But since Julian's investigation focused more effort on finding technicalities for invalidating the Grant than on determining the proper ownership pattern under Spanish law, this solution was never reached. Instead, Julian's decision, had it been adopted by Congress, would have meant that the entire land grant would have been U.S. public domain.¹¹¹

In this and other cases, U.S. officials showed themselves quite capable of delving into the minutiae of Spanish and Mexican land law, but it appears they did so selectively. In the Nacimiento case, one sees a very rigorous analysis, albeit incorrect, regarding the validity of the Grant. The same attention was not consistently given to the land-tenure question, which could have ensured greater conformity with the community-ownership patterns established under Spanish and Mexican law. Having earlier determined a tenancy-in-common where one had never existed, federal officials found "problems" regarding the validity of the Grant, some of which in fact were problems arising only as a consequence of the tenancy-in-common designation. These "problems," as well as conflicts on the ground, all could have been resolved by simply abandoning the tenancy-in-common notion. But the land-tenure question did not seem to carry the same importance to federal decision makers, although it was critically important in terms of the ultimate fate of the Grant itself.

109. Julian based his finding of non-compliance with the four-year residency rule "most probably on account of the hostility of the Indians." *Id.* at 136 (citing Surveyor General Julian's 1886 supplemental report). None of the affidavits upon which Julian relied related to the four-year period after the Grant was made (1769-72). The affiants only could attest to the condition of settlement of the Grant in the 1800s, when it appears there were alternating periods of abandonment and resettlement of the Grant. On the other hand, multiple births and marriages were recorded in archdiocese records for the period 1769-86 among residents identified as being from San Joaquin del Nacimiento; many of the original Grantees named in the Spanish granting documents are named in these records. Thus records existed that supported the settlers' compliance with the four-year residency requirement. Julian, without any evidence to the contrary, simply chose to believe otherwise.

110. *Id.* at 118-19 (citing Surveyor General Proudfit's 1872 report recommending approval of the Grant.).

111. That was the ultimate fate of the Grant, even though Congress did not act on any of the Surveyor General recommendations. The CPLC rejected the Grant on the basis of lack of the authority of the re-granting Spanish official. *See infra* Part V: Rejected Claims and Acreage.

2. Consequences

Because tenancies-in-common and partition sales were completely foreign to the Spanish and Mexican way of regarding community land grants, it was rare that the Mexican claimants understood the legal ramifications of the precise wording of the confirmation enough to timely challenge the determination of the Surveyor General.¹¹² Certainly it is difficult to imagine land grant residents, operating in a land-based, subsistence economy, and dependent on free access to the common lands for their livelihoods, knowingly consenting to a land-tenure pattern that allowed the possibility of 90-some percent of their land base being sold out from under them in a partition suit. It is probable that in most cases land grant residents only understood that their grant had been "confirmed" or "patented," and would have assumed that such confirmation had maintained the common lands in the same land tenure as had existed prior to U.S. sovereignty, which indeed was what the federal government was obligated to do.

If the land grant was converted to a tenancy-in-common, a person's rights as a land grant resident suddenly depended on which names were found in the original Spanish and Mexican granting documents and whether that person was descended from one of those original grantee names. Under Spain and Mexico, it was *residency on the grant* that gave people their rights of access to the common lands, and all residents were roughly equal to one another in terms of that access, whether they were new residents or long-time residents.¹¹³ For this reason Spanish and Mexican officials did not always find it necessary to set down a precise or complete list of the original grantees. U.S. decision makers, however, once they decided to give the grant to identifiable people rather than to a community, took some or all of the named grantees found in the grant documents and

112. The Mora Grant and the Anton Chico Grant are two exceptional instances in which land grant residents clearly were aware of and opposed a tenancy-in-common designation and focused the General Land Office's attention on that issue. Notwithstanding this, however, the patents to both grants were issued as tenancies-in-common by federal officials. See *infra* Part II.C.3: Case Study: The Town of Mora Grant; Michael J. Rock, *Anton Chico and its Patent*, in *SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO* 86 (John R. & Christine M. Van Ness eds., 1980). In the case of the Anton Chico Grant, there was a blatant conflict of interest in that the Surveyor General chose to deliver the patent to the New Mexico Land and Livestock Company, of which he was the president, rather than to the community. The community-ownership of the Anton Chico Grant was ultimately salvaged by a settlement that cost the Grant 135,000 acres of land, and by a 1920 federal court ruling that the confirmation language, which ran to the community, prevailed over the language of the patent, which ran to the assigns of the original settlers. *Id.*; see also *Reilly v. Shipman*, 266 F. 862 (8th Cir. 1920).

113. Tyler, *Ejido Lands*, *supra* note 91, at 26.

conferred on them the status as the *only* legal owners of the grant.¹¹⁴ Some granting documents listed only one or two names, and for that reason an entire community grant would sometimes be awarded only to those individuals, even if it was clear from the documents that they were being accompanied by other unnamed people.¹¹⁵ Unnamed grantees and residents who had taken up residency after the grant was made were deemed to have no ownership interest, while named grantees were deemed to have a full ownership interest even if they no longer resided on the grant.¹¹⁶

This bizarre two-class division of people into grant owners and non-owners — artificially created by chance and the vagaries of the granting documents to satisfy an erroneous tenancy-in-common designation — was in marked contrast to those grants that were correctly confirmed as true community grants with common lands. As was noted in the San Joaquin de Nacimiento case, this division created unnecessary tensions among residents who were not descended from the original grantees and who correctly surmised that their status on the grant was threatened.

This division was magnified by the United States making the original grantees and their heirs actual *owners* of the common lands, thus elevating the named *co-tenants* from co-equal *users* of the common lands to persons with the power to do what no resident of a true community grant could do, i.e., unilaterally sell or otherwise dispose of a share of the common lands. In contrast, the unnamed grantees and the later-established residents were rendered completely without input as to the fate of the common lands as legal control passed from the community to the designated tenants-in-common. If the grant was sold or partitioned, it was done against their wishes and with little or no remuneration.¹¹⁷

Furthermore, tenancy-in-common and private-grant designation served as a legal prerequisite that attracted significant outside economic pressures directed at establishing ownership of the former common lands entirely in non-resident owners. To the outside world, particularly those in the land business, a tenancy-in-common was an infinitely more marketable commodity than a community grant, both because the common lands were private and freely marketable, and because it distilled the larger population of the grant to a more limited list of co-owners who possessed the marketable shares of the grant. Share-purchasing from newly-created

114. See Correia, *Land Grant Speculation*, *supra* note 98. (regarding the Surveyor General decision as to whether to award the Petaca Grant to three, rather than to nine, named Grantees).

115. *Id.*

116. *See id.* at 19.

117. It should be noted that, with partitioning in particular, most of the designated tenants-in-common usually also opposed partitioning in spite of being entitled to proceeds from the sale. *See* EBRIGHT, *supra* note 34, at 155–56.

tenants-in-common in New Mexico became literally an international activity in which some of the world's wealthiest people participated.¹¹⁸ A number of share-purchasing strategies could lead to ownership of the entire grant, including a strategy of forcing a partition sale.¹¹⁹ Most of these strategies depended on a tenancy-in-common designation because they required the existence of a pool of land grant residents possessing marketable shares of the grant.¹²⁰ Since no resident of a community land grant had any share of common lands to sell, this type of speculation focused on grants confirmed as tenancies-in-common and as private grants.

Occasionally things would happen in reverse order, but for the same reason, i.e., a buyer would make a speculative quitclaim purchase from a grant resident who was a named grantee *prior* to confirmation (i.e., prior to the seller even having any legally recognized share of the grant) and then lobby strenuously for confirmation as a tenancy-in-common or as a private grant, as opposed to a community grant, so that the purchase would not be worthless.¹²¹ In this way, the fact that a tenancy-in-common was even an acceptable *option* in the adjudication of community land grants brought not only outside economic forces into play, but also outside pressure to bear on federal officials to erroneously validate it as a land-tenure pattern.¹²²

118. See Correia, *Land Grant Speculation*, *supra* note 98; MARÍA E. MONTOYA, *TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900* (2002).

119. Correia, *Land Grant Speculation*, *supra* note 98, shows two strategies that were used. The first, which was more labor intensive, involved attempting to acquire every interest from every designated tenant-in-common and then claiming the entire grant. The second involved acquiring at least one share from one tenant-in-common, partnering with a potential buyer, and suing for partition and having the buyer bid to acquire the entire grant at the partition sale. An example of a premeditated partition strategy was set forth in a provision of a business contract between two individuals, L. Bradford Prince and Alonzo McMillen, who were for many years actively involved in the acquisition and sale of New Mexico land grants. The provision read, “[they] have associated themselves, and do hereby associate themselves together for the purpose of acquiring title to the Sebastian Martin Land Grant...and to take the steps necessary to bring to a public sale of said real estate.” MARGARET COYNE, *ESTACA IN HISTORY 18–19* (1997) (alteration in the original).

120. *E.g.*, Thomas B. Catron stated that initially his land grant acquisition strategy focused on confirmed grants where his attention could be focused on identifiable individuals in whom confirmation was vested. VICTOR WESTPHALL, *MERCEDES REALES: HISPANIC LAND GRANTS OF THE UPPER RIO GRANDE REGION 221* (1983).

121. Correia, *Land Grant Speculation*, *supra* note 98.

122. People who bought what they believed to be a tenancy-in-common share would sometimes not even wait for confirmation before extracting resources from the grant. Correia, *Land Grant Speculation*, *supra* note 98, (extensive extraction of timber and minerals and extensive grazing use on Petaca Grant by buyer of supposed shares of tenancy-in-common in years leading up to decisions by CPLC and the New Mexico Supreme Court that grant was *not* a tenancy-in-common).

In some cases these transactions took years to develop and manifest into any kind of tangible denial of access to the common lands, and in the meantime, the residents continued to occupy and use the land collectively as before, under the assumption that the common lands remained in community ownership. For example, the Cañon de San Diego Grant was a community land grant erroneously confirmed in 1860 as a tenancy-in-common. It was partitioned and auctioned off in 1907 or 1908. After 1908, the residents were suddenly assessed fees by the new owner for grazing and firewood gathering on the former common lands, which had previously been free to all residents.¹²³

By that point in time, it was too late to undo the tenancy-in-common designation. After 1876, the U.S. Supreme Court had made it clear through the *Tameling* decision that the courts would not revisit a congressional confirmation of a grant, no matter how erroneous it may have been.¹²⁴ Partition suits were also notorious for passing under the community radar, and many partition suits were announced only by publication in English-language newspapers.¹²⁵ In any event, in a non-cash economy, land grant residents were in no position to buy out the interest of the person seeking partition, much less put in a high bid at the partition auction. The common lands that were sold usually comprised the vast majority – often 95 percent or more – of the land base of the grant.¹²⁶ Without them, the subsistence farming and ranching economy of the land grant became unviable. The conversion of the common lands to a tenancy-in-common set events on a course that most communities were virtually powerless to reverse, even if they had been aware of the legal landscape.

3. Case Study: *The Town of Mora Grant*

In 1875 and 1876, the Secretary of the Department of the Interior and the Commissioner of the General Land Office in Washington, D.C., had a decision to make in which, it seemed, many people in New Mexico were very interested: Should the patent to the Town of Mora Land Grant be issued to the “Town of Mora” or to the “76 original settlers of the grant, their heirs and assigns”?¹²⁷

The former designation would have tended to establish the Grant as a community land grant in the historical land-tenure pattern (i.e., areas of settlement surrounded by common lands), whereas the latter designation

123. TAYLOR, *supra* note 99.

124. *See infra* Part III.

125. *See* EBRIGHT, *supra* note 34, at 152.

126. *See, e.g., id.* at 151–53; TAYLOR, *supra* note 99, at 6–8.

127. Robert D. Shadow & Maria Rodriguez-Shadow, From Repartición to Partition: The Life and History of the Mora Land Grant, 1835–1916, at 32 (Apr. 1993) (unpublished manuscript, on file with authors).

would have created a tenancy-in-common that had not heretofore existed on the Grant. In their formal petition to the Surveyor General, the Petitioners for the Grant had not asked for it to be awarded to only the 76 original settlers but rather to “themselves and the other inhabitants, settlers of the valley of Mora.”¹²⁸ By this time, the inhabitants of the Mora Land Grant included many families in addition to the 76 original families and they were spread among a number of newer communities in addition to the original communities of Mora (Santa Gertrudis) and San Antonio (now Cleveland). In their exhaustive study of the Mora Land Grant, Robert D. Shadow and Maria Rodriguez-Shadow concluded that “[t]he fact that [the patent] was finally issued in the latter format is due largely to the work and influence of Congressman Stephen B. Elkins.”¹²⁹

What possessed Elkins, New Mexico’s first elected delegate to Congress, to influence the Department of the Interior to, in effect, mischaracterize the land ownership of the Mora Land Grant?¹³⁰ The short answer, according to Shadow and Shadow, is personal gain.¹³¹ Elkins, along with the notorious land speculator Thomas B. Catron, had previously sought out willing sellers from among the original 76 settlers (or their descendants), some of whom no longer lived on the grant. These individuals then purchased a number of fractional interests in the Mora Land Grant.¹³² These “interests,” however, legally hinged on the form of issuance of the patent, a decision that had not yet been made. Elkins and Catron were banking on the patent creating a tenancy-in-common. A tenancy-in-common would mean that each of the 76 settlers owned a fractional share of the common lands and actually had something valuable to sell. The share of just one of the original 76 settlers would have been 1/76 of the 827,621-acre grant, or 10,890 acres. On the other hand, designation as a community grant would have meant community ownership of the common lands. In that case, no descendant would have had any ownership interest in the common lands to sell. The interests the descendants had quitclaimed to Elkins and Catron would have been virtually worthless. Elkins, therefore, had no small vested interest in altering the historic land-tenure pattern to that of a tenancy-in-common. By the time he permanently moved to Washington, D.C., in 1873 as New Mexico’s Congressional Delegate, he was in a unique position to influence the upcoming decision.¹³³

128. *Id.* at 31.

129. *Id.* at 32.

130. The Mora Grant qualified as an “original document” community grant under any of the criteria used by the GAO. *See supra* text accompanying note 98.

131. Shadow & Rodriguez-Shadow, *supra* note 127, at 31–37.

132. *Id.* at 33.

133. *See* Clark S. Knowlton, *The Mora Land Grant: A New Mexican Tragedy*, in *SPANISH AND MEXICAN LAND GRANTS AND THE LAW* 59, 64–65 (Malcolm Ebright ed., 1989).

Land Grant residents caught wind of Elkins' efforts and protested, realizing that privatization of the Grant would mean the potential loss of free access to the common lands upon which all residents relied to some extent for their livelihood.¹³⁴ Since the Grant's inception in 1835, the number of residents had swelled to about 10,000 by 1875, a great many of whom had migrated there after 1835 and could not claim ancestry from the original 76 settlers.¹³⁵ In 1875, 1,073 Hispano residents of the Grant signed a petition which was forwarded to the General Land Office.¹³⁶ The petition pointed out, among other things, the absurdity of giving exclusive property rights to persons named on a granting document, some of whom abandoned the grant without ever residing on it, at the expense of those actually living on and using the grant. The petition also made clear the terms under which it was understood by everyone on the Grant that new families could settle it after 1835, i.e., with full rights to use the common lands equal to the original grantees.¹³⁷ Many of these new families were in fact invited under these terms to settle the Grant by the original families, who saw greater numbers as affording greater protection against raids by nomadic tribes. A group of Anglo-American residents of the Grant sent a similar letter to the Department of the Interior, making the same points and objections as the Hispano residents' petition.¹³⁸

In this case, unlike most others, the Grant residents themselves were alert to what was going on and properly focused the attention of federal officials on the question of community grant versus tenancy-in-common. There was certainly sufficient on-the-ground information upon which to base a sound decision. Those officials, however, chose to disregard the fact that even the claimants who petitioned the Surveyor General and were descended from the original 76 settlers sought confirmation of the Grant as a true community grant and not as a tenancy-in-common. The patent was issued by the General Land Office on August 15, 1876, to "the 76 original settlers of the grant, their heirs and assigns," i.e., as a tenancy-in-common. Elkins and Catron had prevailed.¹³⁹

134. *Id.*

135. *See id.* at 66-67.

136. *Id.*

137. *Id.*

138. *Id.*

139. Shadow and Rodriguez-Shadow's research shows that the subsequent partition suit filed by Elkins and Vicente Romero took an unusual turn which diminished the financial returns that were gained by the various land speculators, although nothing could be done to re-establish the common lands as community-held property. The state district court handling the partition suit allowed Grant residents and other long-time squatters on the Grant to make exaggerated claims of private inholdings within the grant. Since private inholdings were not part of the tenancy-in-common they were shielded from the partition sale. The size of the common lands was dramatically decreased by permitting these large private inholdings,

This case shows that the conversion of community land grants to tenancies-in-common was sometimes the result of deliberate lobbying by people with vested interests. Federal officials, charged with adjudicating land grant claims “precisely as Mexico would have done had the sovereignty not changed,” neglected that duty in some instances and were instead influenced to designate a land tenure that had not previously existed on the Grant.¹⁴⁰

D. The GAO Counted as Confirmed Even Those Grants Whose Confirmation, Under *United States v. Sandoval*, Was Fundamentally Erroneous and Whose Acreage Was Vastly Reduced

In *United States v. Sandoval*, the U.S. Supreme Court held that common lands were owned by the sovereign, not the community, and passed to the United States at the change in sovereignty.¹⁴¹ In a landmark decision that eviscerated the character of all community land grants adjudicated from that point on, the Court limited the San Miguel del Bado Grant to the land encompassed by individual allotments rather than any of the common lands, holding that it was up to Congress whether to convey the otherwise “equitable” title to the common lands.¹⁴² This ruling reduced the San Miguel del Bado Grant award by 98.4 percent: from 315,300 acres, as decided by the CPLC (combined total of individual allotments and common lands), to 5,024 acres (individual allotments only).

While the GAO acknowledges the significant loss of common lands in the six land grant decisions following *Sandoval*, and the fact that the decision has been criticized for its legal and historical accuracy, the GAO fails to analyze or even discuss such criticism.¹⁴³ Rather, the GAO describes the lands lost under *Sandoval* as simply an “equitable” issue and the nature of the common lands as outside the jurisdiction of the courts under the Act of 1891:

As our analysis explains, however, the [Supreme] Court *had no authority under the 1891 Act* to confirm grants based on the type of *equitable rights* involved in the *Sandoval* land grant claim and related cases; it could confirm only those grants

meaning there was much less acreage to sell in the partition sale, and presumably a lower sale price and less profit for those having shares of the common lands. Although this strategy gained extra private land for some grant residents, the entire Grant was privatized in one way or another by this process, as with any tenancy-in-common, and the common lands effectively destroyed as such. Shadow & Rodriguez-Shadow, *supra* note 127, at 33-40.

140. GAO REPORT, *supra* note 1, app. IX, at 198. See *supra* text accompanying note 67.

141. *United States v. Sandoval*, 167 U.S. 278, 295-98 (1897).

142. See *id.* at 298.

143. GAO REPORT, *supra* note 1, at 115-17 & nn.96-97.

“lawfully and regularly derived” under Spanish or Mexican law.¹⁴⁴

The GAO’s analysis appears to miss the mark in two ways, the first having to do with the GAO’s characterization that only equitable rights were involved in the case. Certainly there is a widespread sense of inequity in so dramatically altering the nature and size of community grants that came up for confirmation on the heels of *Sandoval*, compared to those that came before and kept their common lands intact. Additionally, severing the common lands from the community – thereby undermining fundamentally the local economy and the livelihoods of community members – seems obviously contrary to the Treaty’s basic property guarantees.

However, from a strictly legal perspective, a significant body of post-*Sandoval* scholarship has concluded that those communities possessed legal rights to ownership of the common lands – as opposed to merely equitable rights – under the very Spanish and Mexican law upon which the Court professed to rely.¹⁴⁵ These studies explore the Court’s strained interpretation of a very limited supply of English-language texts on Spanish and Mexican land law and suggest that, had the Court been able to form a more accurate understanding of how Spain and Mexico would have regarded the legal rights to the common lands, it would not have characterized the community rights to the common lands as merely equitable.¹⁴⁶

Nowhere does the GAO describe the role of the U.S. Attorney as a formidable force in advancing this legal theory to both the CPLC and the Supreme Court, nor whether this role was legitimate insofar as protecting the United States from fraudulent land claims. Rather than suggest that the *Sandoval* decision may have misinterpreted Spanish and Mexican law or provide an historical analysis of what might have caused the Court to do so, the GAO simply restates and accepts for purposes of its analysis the notion that the *Sandoval* case concerned purely equitable rather than legal rights.¹⁴⁷

The other major flaw in the GAO’s analysis is its premise that the Supreme Court had “no authority under the 1891 Act” to rule in favor of community ownership of the common lands.¹⁴⁸ Even if the Court, *arguendo*, correctly applied Spanish and Mexican law, the GAO failed to analyze whether the Court nonetheless misinterpreted the Act of 1891 by construing the Act to omit any consideration of equity, as discussed in Part I above. In other words, even given its flawed interpretation of the lack of legal

144. *Id.* at 163 (emphasis added).

145. See EBRIGHT, *supra* note 34, at 105-23; Tyler, *Ejido Lands*, *supra* note 91, at 26.

146. See EBRIGHT, *supra* note 34, at 105-23.

147. GAO REPORT, *supra* note 1, at 163.

148. *Id.*

entitlement to the common lands, the Court could have awarded the common lands on equitable grounds. Here, the GAO simply repeats the *Sandoval* Court's own constricted, and likely flawed, characterization of its authority at the time without any analysis whatsoever.

Certainly both issues are relevant to Congress's consideration of any redress for these seven grants and the 1.1 million acres of common lands lost as a direct result of the *Sandoval* decision. While the GAO cites *Sandoval* as an example of a court ruling that Congress may want to "legislatively overrule," the fact that the GAO offers no substantive critique of the case and its much-contested interpretation of Spanish and Mexican law as well as the 1891 legislation, is itself a significant omission in its report.¹⁴⁹

E. Arguably the Vast Majority of Community Land Grants Were Not Confirmed as They Would Have Been Under Mexico

Despite the significant numbers of cases in which improper confirmation led directly to the loss of land grants, the GAO failed to incorporate the issues surrounding these erroneous confirmations into its conclusions or statistical analysis. When discussing confirmed community grants, the GAO simply gave a figure for the number of community grants that were "confirmed" without analyzing those grants to determine which of them were confirmed correctly or incorrectly.¹⁵⁰ This was a surprising omission in a study that was supposed to address these types of concerns. Contrary to the GAO's assessment, the vast majority of community land grants were *not* confirmed as Mexico would have done and, in light of the disastrous implications of these misconfirmations, by no measure should be considered successfully confirmed by the federal government.

These oversights skewed the numbers the GAO used to support its ultimate conclusions. The community land grants that were erroneously confirmed as tenancies-in-common and private grants were all counted by the GAO as land grants that were "awarded," and the acreage contained in those land grants was similarly regarded as "approved acreage."¹⁵¹ In other words, the GAO appeared to credit the United States for community land grants improperly designated as tenancies-in-common or private grants just as if the grant had been properly approved as a community grant. The entire category of 84 "confirmed" non-Pueblo community grants was treated by the GAO as encompassing lands for which the obligations under the Treaty of Guadalupe Hidalgo were fulfilled.¹⁵² However, while the

149. *Id.* at 163-64.

150. *Id.* at 8, 95.

151. *Id.* at 92-95, 149.

152. *See id.* at 146-60.

accuracy of the confirmation is highly relevant to the question of whether Treaty obligations were met, the GAO did not provide a breakdown of the 84 “confirmed” grants to distinguish those grants that were subject to significant land loss as a direct result of erroneous confirmations. The numbers and chart below are an attempt to address this shortcoming by the GAO by providing figures as to the land tenure in which the 84 confirmed community grants were actually confirmed.

The GAO concluded that over 68 percent of the 154 community land grants were confirmed, and that 63.5 percent of the community land grant acreage was awarded.¹⁵³ When looking only at the 131 non-Pueblo community land grants, the GAO found that 84 of those (64 percent) were confirmed. However, these 84 community grants included: (1) grants that were confirmed as private grants, (2) grants that were confirmed as tenancies-in-common, and (3) grants that were stripped of their common lands before approval.

Looking strictly at the 131 non-Pueblo community land grants, only 20 of those were actually confirmed to the community itself with their common lands intact.¹⁵⁴ That is, only 20 of those land grants were confirmed by the United States in the land-tenure pattern that Spain or Mexico recognized for a community land grant. For the vast majority of community land grants, the common lands did not survive the U.S. confirmation process as true common lands. Instead those common lands were confirmed in some other land ownership pattern that afforded less protection for maintaining the common lands intact.

For seven of the 131 non-Pueblo community grants, common lands were stripped from the grant and passed into federal government ownership. In 30 cases, the grant was confirmed as a private grant, and the entirety of the unallotted lands passed to the heirs and assigns of a single individual. In 27 cases, the grant was confirmed as a tenancy-in-common and the common lands became an assortment of privately-owned fractional shares. In other words, more community lands grants were confirmed in a land-tenure pattern unrecognized by Spain or Mexico for community land grants (27) than were awarded in the form of a true community grant with true common lands (20). Forty-seven of the 131 non-Pueblo community grants were not confirmed at all.

153. *Id.* at 95–96.

154. Original research on file with authors.

Table 1:¹⁵⁵ Results for the 131 Non-Pueblo Community Grants Identified by the GAO

20 land grants	Correctly confirmed in a community grant ownership pattern <ul style="list-style-type: none"> • 15% of total • 24% of those confirmed
64 land grants	Confirmed in a non-community grant ownership pattern <ul style="list-style-type: none"> • 30 confirmed as individual grants • 27 confirmed as tenancies-in-common • 7 stripped of common lands (<i>Sandoval</i>)
47 land grants	Not confirmed: rejected or no proceedings on the merits of the claim

The relatively low number of proper community grant confirmations¹⁵⁶ provides both a sobering appraisal of the outcome of the U.S. confirmation process and some insight into why so few land grants survived into modern times as self-governing entities administering intact common lands. In order to survive in this way, a land grant had to not only be recognized as a valid grant—47 were not—but to have its common lands recognized as belonging to the community itself, rather than to the federal government, a private individual, or a group of individuals as their own private property. The fact that this was not done in the vast majority of

155. Original research on file with authors. Research was based on the original Surveyor General and/or CPLC files at the New Mexico State Records Center and Archives in Santa Fe, N.M.

156. Although it is clear that the number of community lands grants confirmed as they would have been recognized under Mexico should have been much higher than 20, it is a more difficult task to determine exactly how many. The GAO in its 2001 Report made the first published attempt to characterize each of the 295 New Mexico land grants as either a community grant or an individual grant. Although here we use the GAO's determination of 154 community grants (and 131 non-Pueblo community grants) as the baseline number of community land grants in New Mexico, we do so with some reluctance. As indicated elsewhere in this report, Spanish and Mexican granting documents did not use the distinguishing terms "community" or "private" grants as labels, so it is a judgment call in some cases whether a grant was in fact a community or private grant, and people may not agree with the GAO's characterization in every case. Almost certainly, some of the 131 non-Pueblo community lands grants that were designated in the 2001 GAO Report would have been regarded under Mexican law as private or individual grants, and the reverse is also true with respect to the GAO's designation of individual grants. This leaves the actual number of non-Pueblo community grants existing in New Mexico at the time of U.S. sovereignty—of which only 20 were truly confirmed as community grants—open to question.

cases resulted in the loss of vast amounts of common lands beyond the amount the GAO attributed to the federal confirmation process. Over time, these losses undermined the economies of many communities that depended on those common lands. In its evaluation of the federal confirmation process, the GAO simply failed to account for these erroneous confirmations or the significant land losses that resulted.

III. TAMELING V. UNITED STATES FREEHOLD CO. AND THE MYTHICAL MONTOYA REMEDY

One of the GAO's most egregious errors is its repeated reliance on a since-overturned state district court case, *Montoya v. Tecolote*, for the notion that federal confirmations were not "final" as to parties with adverse claims, and that people who believed they were the rightful owners, but were not awarded the grant ("third parties"), remain free to challenge confirmations in state court.¹⁵⁷ Throughout the report, the GAO states that errors in the confirmation process could be remedied by collateral attacks in the state courts, despite the fact that courts have routinely rejected such claims by land grant heirs.¹⁵⁸ Insisting such state court claims are viable, the GAO also concludes that confirmations were not "final" as to all parties, so less rigorous due process was required under *Mathews v. Eldridge*. The GAO reasons that "post-deprivation hearings" of third-party claims in state court would, in addition, remedy any lack of due process in the confirmation process.¹⁵⁹ Each of these claims is simply inaccurate, beginning with the GAO's premise that third parties may challenge a congressional confirmation in state court—a notion that could not be further from the legal experience of New Mexico land grant claimants over the past 150 years.

A. Contrary to the GAO's Claims, *Tameling* Precluded State Court Challenges to Federal Land Grant Confirmations

In 1876, the U.S. Supreme Court held that, regardless of the validity of a particular land grant under Spanish or Mexican law, Congress's confirmation of a grant under the 1854 Act—whether as a particular type or size, or to a particular entity or individual—constituted a *final decision* on the matter which had to be appealed through the political rather than

157. The district court's decision in *Montoya v. Tecolote Land Grant*, No. D-412-CV-1999322 (4th Jud. Dist.), was reversed in *Montoya v. Tecolote Land Grant*, 2008-NMCA-014, ¶ 33, 143 N.M. 413, 422, 176 P.3d 1145, 1154, *cert. quashed as improvidently granted*, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

158. See GAO REPORT, *supra* note 1, at 64, 66, 71 n.59, 80 n.67, 136 n.126.

159. See *id.* at 137–38.

judicial channels.¹⁶⁰ The Court reasoned that, unlike the “essentially judicial” process established to adjudicate California land grants, the Act of 1854 establishing the New Mexico Surveyor General/congressional confirmation process differed markedly in that “[n]o jurisdiction over such claims in New Mexico was conferred upon the courts.”¹⁶¹ Instead, the Office of the Surveyor General of New Mexico was established to determine the original nature, origin, character, extent and validity of each land grant under Mexican law.¹⁶² Once Congress acted on the Surveyor General’s recommendation and confirmed a particular grant, any claim of error in Congress’s determination was not subject to judicial review. Rather, according to the Court, “[t]his was [sic] matter for the consideration of Congress; and we deem ourselves concluded by the action of that body...[S]uch an act [of Congress] passes the title of the United States as effectually as if it contained in terms a grant *de novo*.”¹⁶³

Contrary to the GAO’s contention that third party claimants could challenge a congressional confirmation in state court, *Tameling* and its progeny foreclosed any judicial review of such confirmations, notwithstanding that those persons aggrieved by that confirmation might possess evidence as to the error of the congressional determination. In such cases, a claimant’s only remedy is to seek relief from the political branch.¹⁶⁴ A court is without jurisdiction to even hear such evidence and must dismiss the claim.

In the past 130 years, *Tameling* has been repeatedly affirmed for the proposition that third-party claimants may *not* collaterally attack a congressional land grant confirmation in the courts.¹⁶⁵ Consequently, when community grants were wrongly patented to an individual, as in the case of the Tierra Amarilla Grant, or wrongly patented to a group of families rather than the community, as in the Mora Grant, these decisions were nonetheless set in stone. In the decisions involving the Sangre de Cristo Grant, both the Colorado state courts and the federal appeals court held *Tameling* barred the third-party claimants’ arguments that their predecessors had valid adverse claims to the grant based on Mexican law and custom.¹⁶⁶ Likewise, in the case of the Tierra Amarilla Grant, based on

160. *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 662 (1876).

161. *Id.* at 662.

162. *Id.*; Act of July 22, 1854, ch. 103, § 8, 10 Stat. 309, 309. *See also* *Jones v. St. Louis Cattle Co.*, 232 U.S. 355, 360 (1914).

163. *Tameling*, 93 U.S. at 663.

164. *See Sanchez v. Taylor*, 377 F.2d 733, 737 (10th Cir. 1967) (“If the confirmation of the title was [in error], the question was political, not judicial”).

165. *See, e.g., id.*; *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 365–66 (1887).

166. *See Sanchez*, 377 F.2d at 737; *Lobato v. Taylor*, 13 P.3d 821, 829 (Colo. App. 2000), *rev’d on other grounds*, 71 P.3d 938, 946 (Colo. 2002). In a stunning victory for land grant claimants, the state supreme court reversed the lower court on other grounds, upholding the communal

Tameling, state and federal courts repeatedly rejected the attempts of settlers of the Grant to make similar claims to rights under Mexican law, thus barring them from even putting on a case that the grant had been wrongly confirmed as an individual rather than community grant.¹⁶⁷ Contrary to the GAO's theory, there was simply no remedy for correcting the original misconfirmation in such cases, regardless of the weight of evidence against the original confirmation.

B. The Quitclaim Language Did Not Alter the Effect of *Tameling*

Again, contrary to the statements of the GAO, aside from limited instances described below, courts have consistently applied *Tameling* to bar third-party claims in spite of the language found in the confirmatory acts and land grant patents that provided the confirmation or patent should be "construed as a quitclaim or relinquishment upon the part of the United States and shall not affect the adverse rights of any person or persons whosoever."¹⁶⁸ In all of the decisions cited above in which the courts applied *Tameling*, they did so despite similar language found in the congressional act or patent.

The GAO itself acknowledges that courts have upheld *Tameling* in spite of the quitclaim language in the confirmatory act.¹⁶⁹ In the decisions involving the Sangre de Cristo Grant, for instance, both the Colorado state courts and the federal court held *Tameling* foreclosed adverse claims to the Grant based on Mexican law and custom despite quitclaim language in both the congressional Act and patent.¹⁷⁰

use rights of the settlers' heirs to the private grant lands under American law. See *Lobato v. Taylor*, 71 P.3d 938, 956 (Colo. 2002). The supreme court did not directly take issue with the court of appeals' *Tameling* analysis; it agreed generally with the lower court that Mexican law could not be a source for the claimants' rights. *Id.* at 946. The high court was able to avoid the *Tameling* bar after finding the Grant was not settled until after the Treaty of Guadalupe Hidalgo and therefore it was unnecessary to consider what rights had been established under Mexico prior to the congressional confirmation. *Id.*

167. See, e.g., *Martinez v. Rivera*, 196 F.2d 192 (10th Cir. 1952); *H.N.D. Land Co. v. Suazo*, 44 N.M. 547, 105 P.2d 744 (N.M. 1940).

168. *H.N.D. Land Co.*, 44 N.M. at 547-52, 105 P.2d at 745-49; see also GAO REPORT, *supra* note 1, at 64, 66, 132, 134; see, e.g., Act of Dec. 22, 1858, ch. 5, 11 Stat. 374, 374.

169. GAO REPORT, *supra* note 1, at 64 n.51, 136 n.126.

170. See *Sanchez*, 377 F.2d at 737 ("even if under Mexican law or the terms of the grant certain settlement rights which conflicted with the congressional confirmation had been given to third persons prior to the treaty, the quit-claim clause would nevertheless be of no avail to appellants, because title had passed to the United States"); *Lobato v. Taylor*, 13 P.3d at 829 (Colo. App. 2000) (contrary to plaintiffs' arguments that the quitclaim language preserved their claims, "*Tameling* established the finality of the 1860 Act confirming title in [the private grantee] and foreclosed judicial review of claims based on rights that assertedly arose before the date of the Act."). As discussed in *supra* note 166, the state supreme court reversed the

Likewise, contrary to the GAO's claims,¹⁷¹ courts also lack jurisdiction to consider adverse claims that may have derived from a *separate* land grant, except in those rare instances where a conflicting claim was also recognized by Congress as valid. Thus, in cases in which Congress confirmed two independent but conflicting grants, courts have held that this quitclaim language reserved the rights of each *as against the other*.¹⁷² For a court to have jurisdiction to adjudicate such "adverse rights" under a quitclaim proviso in the patent or relevant statute, these adverse claims must first be addressed to Congress, not to the courts.

This analysis is supported by the facts and language of *Brown and Beard v. Federy*,¹⁷³ cases cited by the GAO in support of its contrary claim that a congressional confirmation affected only the claimant rather than any third parties.¹⁷⁴ In *Brown*, the New Mexico Supreme Court explained that in order for a congressional confirmation to be deemed not conclusive, so as to confer jurisdiction on the courts to adjudicate an adverse claim to the same lands, the adverse party must have "title under the former sovereign which is, *equally with that of the confirmer*, entitled to protection by the United States."¹⁷⁵ According to the court, Congress recognized that adverse land grant claims often progressed simultaneously through the confirmation processes, in rare instances resulting in congressional confirmations to overlapping land grant lands.¹⁷⁶ The quitclaim proviso became necessary to confer judicial jurisdiction over these overlapping but separately confirmed land grant claims.¹⁷⁷ As illustrated by *Brown*, for an

lower court on other grounds in its landmark decision upholding the communal use rights of the settlers' heirs to the private grant lands. *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002). Another example is *H.N.D. Land Co. v. Suazo*, which the GAO attempts to distinguish as a type of case to which *Tameling* did apply. GAO REPORT, *supra* note 1, at 106 & n.89. There the New Mexico Supreme Court held it lacked jurisdiction under *Tameling* to question the confirmation of the Land Grant to an individual rather than a community, despite similar quitclaim language in the confirmatory act and patent. *See H.N.D. Land Co.*, 44 N.M. at 548, 105 P.2d at 745, 746-47 (referring to the quitclaim proviso as the "ordinary and familiar clause found in all other like patents of the time").

171. *See* GAO REPORT, *supra* note 1, at 71 n.59, 107.

172. *See* *Bd. of Trustees of Anton Chico Land Grant v. Brown*, 33 N.M. 398, 399-400, 269 P. 51, 52-53 (N.M. 1928) (holding that, where the overlapping Anton Chico and Preston Beck grants were each confirmed by Congress, Congress reserved the rights of each of the two confirmeres as against each other); *Jones v. St. Louis Land & Cattle Co.*, 232 U.S. 355, 361 (1914) ("if there be claims *under two patents*[.] each of which reserves the right of the other parties, the inquiry must extend to the character of the original concession") (emphasis added).

173. *See* *Beard v. Federy*, 70 U.S. 478, 491 (1865); *Bd. of Trustees of Anton Chico Land Grant*, 269 P. at 53-55.

174. *See* GAO REPORT, *supra* note 1, at 136 n.126.

175. *Bd. of Trustees of Anton Chico Land Grant*, 33 N.M. at 399-400, 269 P. at 53 (emphasis added).

176. *See id.* at 52.

177. *See id.*

adverse claimant to be equally “entitled to protection,” so as to confer jurisdiction upon the courts, required a congressional confirmation.¹⁷⁸

Similarly, in *Beard v. Federy*,¹⁷⁹ the defendants claimed lands that had already been patented through the federal process established for California land grants. The Supreme Court held that quitclaim language in the federal statute allowed judicial review of adverse claims only where such claimants held “superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.”¹⁸⁰ Although the defendants claimed title deriving from Spain or Mexico, they had failed to seek and obtain a separate federal confirmation.¹⁸¹ The court held that such a claim, *unsupported by a federal patent*, lacked standing under the quitclaim proviso to raise such a claim.¹⁸² Courts have been consistent in this respect; apart from the limited *Brown*-type exception to *Tameling*, courts have not applied the quitclaim clause to permit judicial review of a congressional land grant determination. Rather, the only feasible remedy for land grant claimants who dispute a federal confirmation is to appeal to Congress.

C. The Mythical *Montoya* Remedy

The GAO’s reliance on a single state district court decision, *Montoya v. Tecolote*, for the notion that claimants still have a remedy in cases of wrongful confirmations – a claim otherwise at odds with over a century of federal and state case law – suggests a remarkable lack of candor. At the very least the GAO’s claim was misplaced, particularly in light of the court of appeals’ recent reversal of the district court’s decision.¹⁸³

There appears to be no question that, after Congress confirmed a land grant, courts simply lacked jurisdiction to second-guess what third-party rights may have existed to the same land under the original Spanish or Mexican grant. If Congress confirmed a grant improperly, or if due process was circumvented in the congressional confirmation process, the damage was permanently done. The GAO’s claims to the contrary – in

178. *Id.* at 53.

179. *Beard*, 70 U.S. 478.

180. *Id.* at 493.

181. *See id.* at 489.

182. *See id.* at 492–93; *cf. State ex rel. State Game Comm’n v. Red River Valley Co.*, 51 N.M. 207, 268, 182 P.2d 421, 459 (1945) (recognizing “a confirmation by Congress under the congressional act involved, determined that a Mexican grant was valid” and suggesting that, under the quitclaim language, courts only have jurisdiction to go behind such a confirmation where Congress has first confirmed an adverse land grant claim).

183. *Montoya v. Tecolote Land Grant*, 2008-NMCA-014, ¶ 33, 143 N.M. 413, 422, 176 P.3d 1145, 1154 (finding the district court decision was contrary to the *Tameling* bar), *cert. quashed as improvidently granted*, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

support of its assertion that improper confirmations were not final and could be remedied and due process protections relaxed (and ultimately remedied if violated in the confirmation process)—are unfounded and unsupported by case law.

The GAO's discussion of *Tameling* also seriously understates the lasting harmful effect of that decision in terms of foreclosing opportunities for corrective court action. By wrongly concluding that those opportunities existed and continue to exist, and thereby suggesting that land grant heirs have neglected those opportunities, the GAO places unwarranted and misplaced responsibility on heirs for not "recovering" more lands through court action. Clearly heirs have made considerable efforts to overcome or limit *Tameling*, finding the barrier posed by that case to be all too real.

IV. POST-CONFIRMATION LAND LOSSES

Alongside its reliance on the notion that mistaken confirmations could be remedied in the courts, the GAO neglects to acknowledge the significant legal implications of misconfirmations on the ultimate fate of land grants and common lands, instead ascribing many of the losses of improperly confirmed common lands to the actions of land grantees and heirs themselves.

A. Boundary Conflicts

The confirmation process deprived some land grants of their lands in ways other than through miscalculating the nature of the grant itself. In some cases, particularly in the CPLC era, the United States argued for more constricted grant boundaries than the grantees understood had been designated by Spain or Mexico.¹⁸⁴ In other cases, the confirmation of one grant resulted in other valid land grant lands encompassing some of the same lands being rejected or otherwise unable to be heard due to reasons unrelated to the merits of the grant.¹⁸⁵ The GAO notes the factual and legal problems encountered by these grantees, but neglects to relate the manner in which these confirmations were handled in light of federal obligations under the Treaty.

The establishment of land grant boundaries, which in turn determined the size of the grant, was a process of matching landmarks described in the Spanish and Mexican granting documents to the actual landmarks on the ground.¹⁸⁶ Since the grants were almost never formally surveyed in the Spanish and Mexican periods, the total area granted was

184. See GAO REPORT, *supra* note 1, at 102-04.

185. See *id.* at 108-10.

186. See *id.* at 65-66, 102-04.

not known and therefore there was no way to corroborate a particular landmark in the field if there was uncertainty as to whether it was correct.¹⁸⁷ The GAO gives a fairly detailed account of how such factual uncertainty was potentially open to abuse in favor of claimants during the Surveyor General era, citing such things as contract surveyors who were paid by the mile and Surveyors General who relied heavily on claimants to point out the correct landmarks.¹⁸⁸ The GAO also relates how controversial boundary designations, such as the one that resulted in the Maxwell Grant being awarded to a private individual in the amount of 1.7 million acres, caused Congress to cease further confirmations until the enactment of the Act of 1891, which, among other things, limited private grant awards to a ceiling of 11 square leagues (48,800 acres) per person.¹⁸⁹

The GAO does not recount, however, the manner in which federal officials in the later Surveyor General era and under the CPLC consistently argued for grant boundaries that seemed unreasonably constricted in relation to the boundary calls in the grant documents. Historical research suggests that certain federal actors may have consciously done this out of a sense that they were engaged in “reform” or that it was what they were hired to do.¹⁹⁰

For instance, the Juan Bautista Valdez Grant was recommended to be reduced from 250,000 acres to less than 1,500 acres by Surveyors General Atkinson and Julian based on the unlikely argument that, where the boundaries asked for in the *petition* to the Spanish government were less extensive than the boundaries designated in the actual *act of possession*, the

187. *Id.*

188. *Id.*

189. GAO REPORT, *supra* note 1, at 70–74, 79–80.

190. U.S. Attorney Matthew Reynolds reported to the U.S. Attorney General in 1894:

In New Mexico and Arizona the total area claimed in the suits disposed of... was 4,784,651 acres; amount confirmed, 779,611 acres; amount rejected and not confirmed 4,005,040 acres. The result is very gratifying to me... you will notice that in most of the grants where judgments were obtained, the areas have been much reduced. This result was secured by result of your sustaining me in my request for sufficient means to employ assistance to investigate these claims and obtain the evidence for the defense... the amount of land saved in this way alone during the term of court just past will more than compensate the Government for the cost of this court and the salaries of its officials during the entire time for which it was created.

REPORT OF THE U.S. ATTORNEY FOR THE COURT OF PRIVATE LAND CLAIMS, 1894 ATT'Y GEN. ANN. REP., ex. 4, at 4. Further, Surveyor General Julian, in commenting on the evidence for various boundary calls for the Cañon de Chama Grant, stated: “If any descriptive words [in the boundary calls] were susceptible of two meanings, the one implying extension and the other restriction, he [the Surveyor General] was bound to govern himself by the latter. This was his clear duty under the law.” Opinion of George W. Julian regarding the Cañon de Chama Grant, Dec. 11, 1885, SG 71, roll 20, frame 676 (on file with NMSRCA).

petition should prevail over the act of possession. There, the Spanish act of possession augmented the valley lands asked for in the petition with higher-elevation common lands, a typical thing for the Spanish government to do when establishing a community grant.

In addition, the CPLC process was structured so that the U.S. Attorney could assume an adversarial posture with respect to land grant claimants, and he was under no directive to be balanced or reasonable in his positions.¹⁹¹ United States Attorney Matthew Reynolds took a similar approach to the Juan Bautista Valdez claim as Surveyor General Julian, arguing for boundary designations that virtually eliminated all of the common lands. Likewise, the Santo Domingo de Cundiyo Grant was reduced from 20,000 acres¹⁹² to about 2,137 acres after the U.S. Attorney challenged three of the four boundaries claimed.¹⁹³ Land grant claimants who had received an initial favorable recommendation from the Surveyor General but ended up receiving their final disposition from the CPLC were very likely to see a reduction in acreage as part of that final disposition.¹⁹⁴ Claimants did not tend to have the same level of resources as the United States to litigate boundary issues, and when they found themselves in a boundary dispute, the courts placed the burden of proof on the claimants and not on the government.¹⁹⁵

While the GAO noted the occurrence of these boundary disputes, it left unexplored a number of fundamental issues raised by this apparent shift in the role of federal actors in establishing land grant boundaries. Most important was the question of whether Congress established the role for the U.S. Attorney in the CPLC process, and funded that office, with the intention that the U.S. Attorney would do something other than seek the most reasonable and likely interpretation of the grant boundary calls. Certainly there is no suggestion in the CPLC Act that the U.S. Attorney's duty was to secure as much land for the federal public domain as possible, regardless of the language of the grant document. Thus the positions taken by the U.S. Attorney and Surveyor General Julian raise the possibility that the intentions of Congress to honor the Treaty and the actions of federal agencies and employees may have been inconsistent with one another.¹⁹⁶

191. *Id.*

192. WESTPHALL, *supra* note 120, at 257.

193. Jennifer Davis, Perceptions of Power: The Court of Private Land Claims and the Shrinking of the Santo Domingo de Cundiyo Grant (1983-84) (unpublished paper written for the Univ. of N.M. School of Law, on file with authors); *see also* GAO REPORT, *supra* note 1, at 104, tbl. 19 (showing that 14 additional grants were significantly reduced in acreage in the CPLC era after boundary disputes with the United States).

194. *See infra* Part V.B, at Table 2.

195. *Whitney v. United States*, 167 U.S. 529, 548 (1897).

196. *See discussion infra* Part V.B.

A different issue was raised for land grant claimants when one grant was wholly located within another grant, or where two or more grants had overlapping boundaries and one land grant was awarded the entire overlap before the second grant was able to assert its own claim to those lands.¹⁹⁷ As the GAO acknowledges, there was a jurisdictional bar in the Act of 1891 that prevented the CPLC from even considering a claim for lands that had already been part of a congressional confirmation.¹⁹⁸

While this “first-come-first-serve” policy avoided a scenario where the CPLC might create conflicting awards to the same land, the implication for the grant that came later was that it was effectively rejected by rule, as opposed to being considered and the conflict resolved on the merits. In the case of a valid community land grant and wholly subsumed within an earlier-confirmed grant and *not* confirmed as a community grant, the blow was twofold. The later grant’s common lands that were incorporated into the earlier grant’s award lost their character as common lands and were privatized, with the result that the residents ultimately lost the ability to use them as common lands. Moreover, the later grant also lost any local control or governing authority as a community over those lands as they passed into ownership of an entity outside the community.

Most of the 27 community grants that the GAO characterizes as those that grantees “failed to pursue” faced this problem of being contained within or substantially overlapped by an earlier-confirmed grant.¹⁹⁹ The phrase “failed to pursue” conveys an unfair impression as it applies to these grants. Their lands were essentially rejected by application of the jurisdictional bar and not from any lack of effort or interest in gaining confirmation. The GAO does otherwise accurately categorize these grants under the broader category of “rejected” grants.²⁰⁰ From the perspective of the later grant claimants, the rule created a *fait accompli* that they had no way of anticipating and that left them with no recourse within the CPLC process.

197. For example, the Guadalupita Grant was made in 1837 only after Alcalde Juan Nepomoceno Trujillo sought and received the permission of the principal citizens of the Town of Mora Grant to allow the formation of a new settlement within the exterior boundaries of the Mora Grant. However, because the Mora Grant was confirmed in its entirety by Congress in 1860, it precluded confirmation of the Guadalupita Grant and it is probably for that reason that the claimants withdrew their claim, which was pending before the CPLC. Guadalupita Grant, SG 152, roll 27, frame 1573 (on file with NMSRCA).

198. GAO REPORT, *supra* note 1, at 108–09; see Act of Mar. 3, 1891, 26 Stat. 854, § 13, cl. 4. The CPLC apparently applied this same bar to lands that the CPLC had already awarded as well. In this way, for example, the CPLC’s confirmation of the Juan Jose Lovato Grant barred consideration of a number of grants that were contained within that Grant that later came before the court. See *id.* at 109–10, tbl. 21.

199. See *id.* at 109–10, tbl. 21.

200. See *id.* at 108, 212.

The GAO's analysis omits any discussion of the harshness with which the jurisdictional bar applied to later claimants, and whether a mechanism that more closely resembles how Spain or Mexico might have resolved the conflicting claims could have been adopted by the United States to address these later grant claims.²⁰¹ That question is still relevant for Congress today.²⁰²

B. Myth of "Voluntary" Post-Confirmation Action by Heirs

In its discussion of post-confirmation losses, the GAO focuses only on whether the federal government had a post-confirmation fiduciary duty to land grantees, comparable to that owed to Indian Tribes and Pueblos, rather than recognizing the legal effects of the misconfirmations themselves on the fate of land grants and common lands.²⁰³ Concluding there was no such duty, the GAO ascribes the loss of improperly confirmed common lands to the actions of land grantees and heirs themselves and to state law.²⁰⁴ This analysis overlooks how the federal government's breach of its *original* duty to land grantees, by confirming land grants improperly, set in motion the ultimate loss of common lands. Rather than breaching a post-confirmation duty, the breach had already occurred – resulting inevitably in significant losses to community grants.

As discussed above, the GAO's treatment of the problem of wrongful confirmations is wholly inadequate. The problem of tenancies-in-

201. In cases where overlapping claims had both been approved by the Surveyor General, the CPLC "jurisdictional bar" did not apply. These types of conflicts tended not to be decided by federal officials and at times ended up in state court, as an exception to the *Tameling* rule, where inconsistent versions of a first-come-first-serve analysis were applied. For example, in 1860 Congress confirmed the Town of Anton Chico and the Preston Beck Grants, which included an approximately 120,000-acre overlap between the two grants. When the Preston Beck owners sought to quiet title in order to partition the Grant, the Board of Trustees of the Town of Anton Chico Grant was forced to intervene in order to protect its interest in the overlap. Although the Anton Chico Grant preceded the Preston Beck historically, the New Mexico Supreme Court asserted, based on the *Sandoval* precedent, that because the disputed area was an unallotted part of the Anton Chico common lands it was part of grant *de novo* made by Congress and the Preston Beck Grant had superior title. *Board of Trustees of Anton Chico Land Grant v. Brown*, 33 N.M. 398, 269 P. 51 (1928).

202. For instance, two conflicting claims that were recommended to Congress by the Surveyor General were resolved by Congress contemporaneously to the satisfaction of the two groups. There, the Baca family and the Town of Las Vegas were both determined by the Surveyor General to have valid grants to the exact same lands. The Baca family agreed to waive its claim to the lands and Congress approved an equivalent quantity of land chosen by the Baca family from among unclaimed lands in the federal public domain. See EBRIGHT, *supra* note 34, 203-04.

203. See GAO REPORT, *supra* note 1, ch. 4.

204. *Id.*

common, for example, lacks any analysis by the GAO of how tenancies-in-common came about, who was responsible for their creation, whether they were consistent with Spanish and Mexican law, or their direct consequences in terms of land loss. The GAO's version of this history is that the problem of tenancies-in-common was simply a post-confirmation problem.²⁰⁵ The GAO implies that the federal government did everything it was obligated to in confirming these grants, regardless of how they were confirmed, and that the loss of common lands was the result of later causes unrelated to the confirmation process:

Some land grant heirs and advocates of land grant reform have expressed concern that the United States failed to ensure continued community ownership of common lands after the lands were awarded during the confirmation process...Land grant acreage has been lost, for example...by partitioning suits that have divided up community land grants into individual parcels...[C]laimants have lost substantially more acreage *after* the confirmation process...than they believe they lost *during* the confirmation process."²⁰⁶

This passage and its context is puzzling for a number of reasons. First, it fails to acknowledge that the critical point at which the loss of community ownership occurred was *during* the confirmation process when the common lands were converted to private tenancies-in-common or other private landholdings. It is not that the United States "failed to ensure continued community ownership of common lands" after confirmation in these cases, but that the confirmation itself failed to give legal recognition to the community ownership of the common lands.²⁰⁷ The GAO seems to regard partitioning as the event in which community ownership was compromised, without acknowledging any link between partitioning and the conversion of land tenure that occurred earlier during the confirmation process. In the same way, the entire history of land speculation and share-purchasing that was made possible only because of the creation of tenancies-in-common is absent from the GAO Report, so no context is given for understanding an entire major category of land loss that would not have been possible under Spanish and Mexican law. Also, curiously, partitioning is incorrectly described in the passage quoted above as "divid[ing] up community land grants into individual parcels," when in fact partitioning typically was the sale of the entirety of the former common lands in one block after they had been wrongly designated as a tenancy-in-common.²⁰⁸

205. See *id.* at 146-60.

206. GAO REPORT, *supra* note 1, at 146.

207. *Id.*

208. See EBRIGHT, *supra* note 34, at 42-43.

While, according to the GAO, the problem was rooted in the existence and application of the state partition law,²⁰⁹ this is a completely erroneous way to frame the issue, both legally and historically. The state partition law, enacted in 1876, applied only to tenancies-in-common, such as land owned jointly by family members, and was a useful tool in that context and still is today.²¹⁰ In itself, the partition law was not necessarily a law or policy that was inimical to community ownership of land grants. As discussed above, the partition law never should have applied to community lands grants. It was not the partition suit that privatized the common lands; the prior federal confirmation process had already done so. Once these lands were privatized, any number of laws, such as trespass laws, could have been used or invoked to enforce these newly created private rights and deny formerly lawful access to the former common lands. The root of the problem was not the state laws relating to private property, but the privatization of the common lands that made those laws suddenly applicable.

The effect of the GAO framing the issue in this way is that it never reached a discussion of how critically important it was for the federal confirmation process to designate land grants in the proper land-tenure pattern, and the considerable consequences in terms of land loss where it failed to do so. On page 152 of the GAO Report, the authors relate, without comment, the contentions of land grant heirs and legal scholars to this effect. But there is no analysis or evaluation of these points, nor do the GAO's conclusions incorporate such considerations:

[N]either Article VIII nor Article IX [of the Treaty of Guadalupe Hidalgo] created any fiduciary duty of the United States to protect owners of confirmed community land grant acreage in a special manner superior to the protections afforded to other U.S. citizens. Rather, community land grant owners were to have the same property protections, guarantees, and responsibilities that all U.S. citizens had, which would include...being subject to partition suits...and any other legal mechanism potentially resulting in loss of real property ownership.²¹¹

This conclusion simply repeats the earlier analytical errors by stating that "community land grant owners" were "subject to...partition suits," despite the fact that the partition law clearly only applied to tenancies-in-common.

209. See GAO REPORT, *supra* note 1, at 147-56.

210. 1875-76 N.M. Laws ch. 3, codified at N.M. STAT. §§ 42-5-1 to -9 (1978).

211. GAO REPORT, *supra* note 1, at 154.

Community land grants were not subject to partition suits when they were correctly confirmed as such.²¹²

These key analytical concepts for understanding land losses were either absent or badly misstated in the GAO Report. These oversights also skewed the numbers the GAO used to support its conclusions. The community land grants that were erroneously confirmed as tenancies-in-common and private grants were all counted by the GAO as land grants that were “awarded,” and the acreage contained in those land grants was similarly regarded as “approved acreage.”²¹³

The effect is that the GAO credits the United States for community land grants improperly designated as tenancies-in-common or as private grants in the exact same manner as if the grant had been properly approved as a community grant. The entire category of 84 confirmed non-Pueblo community grants is seemingly regarded by the GAO as land for which the obligations under the Treaty of Guadalupe Hidalgo were fulfilled.²¹⁴ However, clearly the question of the correctness of the confirmation is highly relevant to the question of whether Treaty obligations were met. Yet the GAO does not provide a breakdown of the 84 “confirmed” grants to distinguish those grants that were subject to significant types of land loss as a direct result of erroneous confirmations. Table I in Part II.E, above, is an attempt to address this shortcoming by the GAO by providing figures as to the land tenure in which the 84 confirmed community grants were actually confirmed.

Determining the number of acres lost during the “post-confirmation” era as a result of misconfirmations is a greater challenge. For example, partitioned grants include 10 “original documentation” community grants (Mora, Santa Bárbara, Cañon de San Diego, Las Trampas, Domingo Fernández, Nicolas Durán de Chávez, Caja del Rio, Bernabe Manuel Montano, Rancho del Rio Grande, and Ojo de San Jose); and five “self-identified” community grants (Alameda, La Majada, Sebastián Martín, Polvadera, Black Mesa, and Francisco Montes Vigil). None of these grants was confirmed by the United States as a community grant, yet all of these are grants and acreage for which, by virtue of confirmation, the GAO seems to have considered the Treaty to have been satisfied.²¹⁵ The total acreage sold or otherwise privatized through partition suits brought under these grants was probably about 1.6 million acres, though this number could be much higher, as systematic research on partitioned land grants has never been done.

212. See *supra* note 100 and accompanying text.

213. See GAO REPORT, *supra* note 1.

214. *Id.* at 146–60.

215. *Id.*

Similarly, community grants lost by buyouts of designated tenants-in-common and of private grantees (such as in the case of the 594,000-acre Tierra Amarilla Grant) have not been systematically analyzed and would require further research. Since the GAO did not account for these in the 3.4 million-acre figure it characterizes as lost during the confirmation process, that figure would be modified upwards significantly to reflect additional acreage lost due to misconfirmations of community grants.

One of the most troubling of the GAO's conclusions – and one that is frequently quoted – stems from these flawed figures and the flawed assumptions underlying them. Table 27 of the GAO Report purports to enumerate post-confirmation land losses not attributable to flaws in the federal confirmation process. The table lists the 84 “confirmed” land grants, and compares the vast “original acreage confirmed” with the virtually non-existent “current community acreage owned.” In the accompanying text, the GAO concludes:

[I]t appears that virtually all of the 5.3 million acres in New Mexico that were confirmed to the 84 non-Pueblo Indian community grants have since been lost by transfer from the original community grantees to other entities.

...

This means that claimants have lost substantially more acreage *after* completion of the confirmation process – almost all of the 5.3 million acres that they were awarded – than they believe they lost *during* the confirmation process – the 3.4 million acres they believe they should have been awarded but were not...²¹⁶

Upon examination, however, the grants listed in Table 27 include grants confirmed as tenancies-in-common and then partitioned (e.g., Town of Mora, Santa Barbara, Town of Las Trampas); it includes the grants affected by the *Sandoval* precedent, which the confirmation process left with virtually no community-owned acreage; it also includes the privatized Tierra Amarilla Grant and the Anton Chico Grant, whose significant reduction in acreage, due to the botched confirmation, is described below. In this manner the GAO characterizes what happened to the common lands of these grants as a “transfer from the original community grantees to other entities” in a time and manner unrelated to the confirmation process.²¹⁷

For many of these grants, this is a serious misstatement, historically and legally. In 1875 more than 1,000 Mora Grant residents petitioned the federal government and pleaded with federal officials to properly confirm

216. GAO REPORT, *supra* note 1, at 146-47.

217. *Id.* at 11.

their grant as community-owned, to no avail.²¹⁸ This misconfirmation of the Mora Grant by federal officials is the most important factor in why there is so little current community-owned acreage within the Grant today, rather than because of some post-confirmation "transfer" to other entities by the Mora residents. Likewise, the Tierra Amarilla Grant residents have been to state and federal court five times to try to undo the erroneous confirmation of their community grant as a private grant.²¹⁹ That is what happened *after* the confirmation process, though it was *during* the confirmation process that the community land loss occurred, when Francisco Martinez was improperly awarded the entire Grant.²²⁰

Even in some cases where the land grantees knew they were parting with their common lands, the federal government bears a significant amount of responsibility for the circumstances under which they did so. For example, the Anton Chico Grant would not have had to "spend" 135,000 acres of common lands on attorneys fees and as a legal settlement, were it not faced with having to undo the legal confusion that resulted from one branch of the federal government (Congress) *confirming* the Grant as a community grant, while another branch of the federal government (Secretary of the Interior) *patented* the Grant as a tenancy-in-common, while still a third branch of the federal government (Surveyor General) delivered *possession* of the patent as a private grant to the successors of the *poblador principal*.²²¹ The GAO cited the Anton Chico Grant as an example of land loss through payment in land for legal services and described the nature of the legal services as "outside the confirmation process."²²² This is yet another example of the GAO failing to acknowledge federal actions in the confirmation process that were the proximate cause of later land loss.

The entire treatment by the GAO of "confirmed" community grants, and Table 27 in particular: (1) completely obscures the link between land tenure as confirmed and losses by combining all "confirmed" grants in one statistic without regard to correctness; (2) suggests that as long as the United States confirmed a grant to *someone*, it adequately performed its obligation under the Treaty; (3) conveys an element of self-determination on the part of the community which did not exist for many grants, and in fact had been taken away by the erroneous confirmation; and (4) conveys the impression that, because of the passage of time between the erroneous confirmation and the assertion of private property rights (e.g., fencing, partition), the federal government bears no responsibility for the consequences of creating the private rights in the first place. Table 27, and

218. See discussion *supra* Part II.C.3.

219. See *supra* note 86.

220. See *id.*; EBRIGHT, THE TIERRA AMARILLA GRANT, *supra* note 77, at 14–20.

221. Rock, *supra* note 112, at 88–91.

222. GAO REPORT, *supra* note 1, at 151.

the GAO's figures and conclusions discussed in this part, give a seriously misleading impression of what actually occurred in the history of New Mexico land grants.²²³

V. REJECTED CLAIMS AND ACREAGE

As discussed above, land grant lands were frequently rejected during the CPLC era because a grant was wholly subsumed within another grant or because the overlapping claim had already been confirmed to another grant. In addition, land grants were entirely rejected based on technicalities that would not have applied under Spain or Mexico. While it acknowledges the narrow decisions that resulted in the rejection of these claims, the GAO Report omits any critical analysis of the decisions themselves. The GAO Report underemphasizes the inequity of such decision making and the consequences thereof, particularly when a number of these grants were recommended for confirmation by prior federal actors, but then were ultimately rejected after Congress failed to act on these confirmations and the grants became subject to the stricter standards of subsequent decision makers.²²⁴

A. Grants Rejected, Withdrawn, or Dismissed Due to Erroneous Holdings

Part I above discusses how the CPLC and U.S. Supreme Court in certain cases applied an overly narrow view of their authority under the Act of 1891, and how the GAO failed to consider evidence that Congress intended in that Act for the CPLC to not be confined to such a strict application of Spanish and Mexican law in considering the validity of land grants. In a number of cases, land grants were rejected as invalid on technical grounds that Spain or Mexico would not have applied to such grants.²²⁵ These decisions appeared increasingly arbitrary, as cases with similar facts resulted in vastly different outcomes.²²⁶ Numerous examples

223. Without question there were post-confirmation losses of common lands for properly confirmed community grants as well, as described by the GAO in Chapter 4 (e.g., sales of common lands by land grant boards of trustees). However, there were only 20 non-Pueblo grants confirmed as community grants, out of 84 confirmed, with the other 64 confirmed as private grants or tenancies-in-common. See *supra* Part II.E. So the land losses associated with these latter types of misconfirmations were a much more significant problem, numerically speaking, than land losses associated with properly confirmed community grants.

224. See GAO REPORT, *supra* note 1, at 210-11.

225. *Id.* at 118-23.

226. See *supra* Part I. Prior to the supreme court's *Hayes* decision, the CPLC made a persuasive statement in approving the Town of Bernalillo Grant as to why it made no practical sense – and why it made no sense under the U.S. Treaty obligations – to deny grants

in New Mexico land grant literature describe at length the various problems of land grants being rejected on such technicalities.²²⁷

The GAO does make brief mention of the effect that these adverse court decisions undoubtedly had on claims that were pending before the CPLC under similar fact situations or similar evidentiary situations.²²⁸ Between the grants that were rejected in this manner by adverse precedent when their claim was still pending, those that were directly rejected by the court on technicalities that would not have applied under Spanish and Mexican law, and those barred for jurisdictional reasons involving prior confirmation of another grant, the CPLC era generated a sobering legacy of unnecessarily rejected grants. These rejections arguably deviated from Congress's understanding of the United States' Treaty obligations as they were understood prior to 1891. Overruling such rulings may be one appropriate remedy for Congress to consider.

based on the technicalities of who made copies of granting documents:

We know from our examination of many claims under Spanish grants... that the practice of perpetuating in this manner the evidence of title... was common. Indeed, that was the only way that evidence of title in the hands of the people could be perpetuated... The papers were passed from hand to hand as the ownership of the property changed and necessarily in the lapse of time, they became mutilated. It is true that public records of the proceedings relating to the grants of land were required to be made. But the sovereignty over the country has been twice changed, once by revolution and once by military conquest and in addition to that it is a matter of history that there have been times of turmoil in which all civil government in the country has been endangered. In view of these facts, it is not remarkable that the ancient records should now be in an unsatisfactory and imperfect condition. It has also many times been proven before us that spoiliations of the records have occurred since our own government acquired jurisdiction over the country. It is manifest that if claimants should now be held to the strictness of proof which would be required in the establishment of a title of American origin, great injustice would be done, and the measures established by the government for the purpose of carrying out its treaty stipulations, would be made the instrument of defeating that purpose.

Decision by the Court of Private Land Claims in the case of the Town of Bernalillo Grant, PLC 258, roll 53, frame 20 (on file with NMSRCA). Subsequent to the *Hayes* decision, a nearly identical fact situation was presented by the Embudo Grant in 1898. A divided CPLC rejected the Grant, with the majority apologetically doing an about-face and asserting the restrictions of its mandate set forth in *Hayes*. Chief CPLC Justice Joseph R. Reed and Justice Wilbur F. Stone spoke to the plain injustice of the decision in a dissenting opinion reminding the other justices that the court had confirmed the Town of Bernalillo Grant on "substantially the same character of evidence which the court now rejects." See Bowden, *supra* note 104, at 1201.

227. See EBRIGHT, *supra* note 34, at 127-42.

228. GAO REPORT, *supra* note 1, at 109 ("In some instances, it appears that claimants withdrew their claims after learning that... the CPLC had previously rejected similar claims.").

B. Federal Delay Resulted in Grants Faring Worse

A significant percentage of community lands grants came one step shy of final approval after receiving a recommendation for approval by the Surveyor General.²²⁹ Grants submitted to Congress for action on the Surveyor General's favorable recommendation were virtually assured final confirmation, since Congress, when it did act on a favorable Surveyor General recommendation, always affirmed that recommendation.²³⁰ However, after a number of circumstances brought congressional confirmations of land grants to a standstill,²³¹ many of these recommendations simply languished before Congress. In the case of 56 of the 88 (64 percent) non-Pueblo community land grants that received favorable recommendations, Congress simply failed to act on the recommendations.²³² Thus, nearly two-thirds of these grants never benefitted from the favorable recommendation and were forced to wait and begin the process again after 1891, when the CPLC process was enacted; a process in which the United States played the role of adversary and one that turned out to be significantly more problematic for land grant claimants.

The vast majority of these 56 grants fared significantly worse under the CPLC process, after coming so close to full recognition under the Surveyor General process.²³³ As demonstrated by Table 2, below, 26 of the 56 grants were reduced in acreage under the CPLC process, compared to the Surveyor General's preliminary survey or the amount of acreage stated in the petition.

Sixteen other grants were totally or almost totally rejected under the CPLC process, including 11 that were rejected as invalid, and five that had their common lands entirely rejected; a result that would not have occurred in the Surveyor General era.²³⁴ Three other grants never reached a decision on the merits under the CPLC process, most likely because prior approval of another grant that conflicted with the grant deprived the CPLC of jurisdiction to consider the claim. Only 11 of the 56 grants fared the same or better, in terms of acreage, under the CPLC process. Table 2, below, details the final disposition of the 56 Surveyor General-approved grants on which Congress failed to act. This table also shows which grants that were slated for approval under one Surveyor General received a new

229. See, e.g., *id.* at 76, 112.

230. See *id.* at 62, 64, 76.

231. *Id.* at 52.

232. All of the grants brought before Congress in the first six years of the 1854 Surveyor General Act were acted on by Congress in its confirmatory Act of June 21, 1860. GAO REPORT, *supra* note 1, at 64. There were approximately 60 such grants, including Pueblo and non-Pueblo community grants and private grants.

233. See, e.g., GAO REPORT, *supra* note 1, at 112-23.

234. See *id.* at 97, 112-23.

recommendation for a reduction in acreage or for rejection under a subsequent Surveyor General.²³⁵

The GAO Report acknowledges this problem, but not the magnitude of it. The GAO discusses the causes of the congressional delay and acknowledges that grants that would have been confirmed in the Surveyor General era were often rejected in the CPLC era.²³⁶ The GAO also concludes that "pursuing a land grant claim was inefficient and burdensome for many claimants...some claims had to be presented multiple times to different entities under different legal standards."²³⁷ But a number of difficult questions that arise in light of this problem remained undiscussed by the GAO.

For instance, when Congress passed the Act of 1891, did it really intend this type of result, i.e., that so many land grants similarly situated to ones that it had approved in the Surveyor General era would fare so much worse? Unquestionably Congress was trying to prevent unwarranted and expansive private claims on federal public lands, but did Congress intend to create obstacles to full confirmation for smaller grants containing viable communities as well? It appears unlikely that Congress believed it was setting such a significantly harsher standard or that it intended grants to fare worse on this scale. Further, did Congress intend that the role of the U.S. Attorney in the CPLC process would be to advance novel legal theories for the rejection of community grants that were not applied in the Surveyor General era, such as the theory that common lands did not belong to the community grant? This also seems unlikely, at least to the degree that it occurred under the CPLC.

It does not appear, as the GAO seems to suggest, that Congress sought the type of harsh result that occurred after it enacted the CPLC.²³⁸ What the figures below at least suggest is an overly severe systemic response by key federal actors (e.g., the U.S. Attorney, the Supreme Court, or Surveyor General Julian) to the Act of 1891 or the circumstances prior to its passage. Many otherwise perfectly valid community land grants were negatively affected by this response and by those circumstances. This included not only those grants that had been regarded favorably in the Surveyor General era, but also those valid community grants that came up

235. Surveyor General Julian's subsequent review of a formerly favorably-recommended grant usually presaged unfavorable treatment under the CPLC process, resulting in either a reduction in acreage or a recommendation of rejection. Of the 21 grants that Surveyor General Julian reviewed after they were recommended for confirmation by his predecessors, Surveyor General Julian recommended that 10 grants be ultimately rejected, nine be confirmed by Congress (but with a reduction in the acreage to be confirmed), and two of them be confirmed as previously suggested. See *infra* Part V.B, at Table 2. See also EBRIGHT, *supra* note 34, at 43-45.

236. GAO REPORT, *supra* note 1, at 70-87.

237. *Id.* at 164.

238. See, e.g., GAO REPORT *supra* note 1, at 78, 97, 112.

for consideration for the first time in the CPLC era.²³⁹ This is an important history for the present-day Congress to be aware of as it assesses possible remedies for land grants.

Table 2: Final Disposition of Grants

Grants Recommended for Approval by Surveyor General and Not Acted Upon by Congress²⁴⁰

Name of Grant	Year initially recommended for confirmation	Final disposition: rejection of grant as invalid by CPLC or on appeal to the U.S. Supreme Court	Final disposition: found to be valid but common lands totally denied by CPLC or U.S. Supreme Court	Final disposition: acreage reduced by CPLC or U.S. Supreme Court	Subject to review by subsequent Surveyor General & recommended for rejection (rej.) or reduction in acreage (red. acr.)
1. Town of Alameda*	1874			x	(rej.)
2. Alamitos	1872			x	
3. Antonio Baca*	1877			x	(rej.)
4. Arroyo Hondo	1888			x	
5. Bernabe Manuel Montañó*	1870			x	(red. acr.)
6. Town of Bernalillo	1874			x	
7. Bosque Grande*	1874			x	(rej.)
8. Cañada de los Alamos	1874			x	
9. Cañada de San Francisco	1871	x			
10. Cañon de Carnue	1886		x		
11. Cañon de Chama*	1872		x		(red. acr.)
12. Cebolla	1872	x			
13. Chaca Mesa*	1874			x	(red. acr. and rej.)
14. Town of Cieneguilla*	1872	x			
15. Cuyamungue	1871			x	
16. Don Fernando de Taos	1878		x		
17. Francisco de Anaya Almazán*	1878			x	(red. acr.)

(Continues)

239. For example, the Santa Cruz and Santo Domingo de Cundiyo grants were considered for the first time in the CPLC era. See GAO REPORT, *supra* note 1, app. X, at 200-08. The Santa Cruz Grant was denied its common lands under the 1897 *Sandoval* precedent. *Id.* at tbls. 23-24 and accompanying text at 113-18. The Cundiyo Grant was vastly reduced in acreage by the U.S. Attorney challenges to the Grant boundaries. See Davis, *supra* note 193 and accompanying text.

240. Original research on file with authors. Research based on the original Surveyor General and/or CPLC files at the New Mexico State Records Center and Archives in Santa Fe, N.M.

(Continued)

Name of Grant	Year initially recommended for confirmation	Final disposition: rejection of grant as invalid by CPLC or on appeal to the U.S. Supreme Court	Final disposition: found to be valid but common lands totally denied by CPLC or U.S. Supreme Court	Final disposition: acreage reduced by CPLC or U.S. Supreme Court	Subject to review by subsequent Surveyor General & recommended for rejection (rej.) or reduction in acreage (red. acr.)
16. Don Fernando de Taos	1878		x		
17. Francisco de Anaya Almazán*	1878			x	(red. acr.)
18. Francisco Montes Vigil*	1881			x	
19. Gervacio Nolan	1858	x			
20. Gijosa	1876			x	
21. Gotera	1877	x			
22. Juan Bautista Valdez*	1871			x	(rej. and red. acr.)
23. Juan de Gabaldon	1872			x	
24. Los Serrillos	1872			x	
25. Maragua	1880	x			
26. Mesilla Civil Colony	1874			x	
27. Ojo Caliente	1874			x	
28. Pajarito	1887			x	
29. Petaca*	1875		x		(red. acr.)
30. Plaza Colorado	1886			x	
31. Polvadera*	1882			x	(rej.)
32. Rancho del Rio Grande	1860/ 1879			x	
33. Refugio Civil Colony	1874			x	
34. San Antonio de las Huertas	1862			x	(rej.)
35. San Antonio del Rio Colorado*	1874	x			
36. San Clemente*	1855			x	(rej.)
37. San Joaquin del Nacimiento*	1872	x			(rej. and red. acr.)
38. San Miguel del Vado*	1879		x		(red. acr.)
39. Santa Fe	1874	x			
40. Albuquerque	1881	x			
41. Socorro*	1875			x	(red. acr.)
42. Vallecito de Lovato*	1875	x			(rej.)
TOTALS		11	5	26	16

* Indicates re-examined by Surveyor General G.W. Julian and either recommended for rejection or recommended for confirmation with a reduction of acreage

Grants Confirmed for Total Petitioned Acreage

Name of Grant	Year recommended for confirmation	Year acted upon by the CPLC
43. Nicolas Duran de Chavez	1887	1896
44. Cristobal de la Serna	1888	1892
45. Cañon de San Diego	1880	1893
46. Santos Tomas de Yturbide*	1885	1900

Grants Confirmed for More than Their Petitioned Acreage

Name of Grant	Year recommended for confirmation	Year acted upon by the CPLC
47. Abiquiu	1885	1894
48. Santa Barbara	1879	1894
49. Atrisco	1885	1894
50. Sevilleta	1874	1893
51. San Marco Pueblo*	1873	1892
52. Dona Ana Bend Colony	1874	1896
53. Caja del Rio	1872	1893

Grants With No Proceeding in CPLC on Merits of Claim

Name of Grant	Year recommended for confirmation	Likely reason for lack of proceeding on merits
54. Jose Trujillo	1878	All land within this claim had already been confirmed as parts of Pueblo grants by Congress so CPLC probably lacked jurisdiction.
55. El Rito	1870	Most land within this claim had already been confirmed by the CPLC as part of the Juan José Lovato Grant so CPLC probably lacked jurisdiction.
56. Antonio de Salazar*	1882	Most land within this claim had already been confirmed by the CPLC as a part of the Bartolome Sanchez and so the CPLC probably lacked jurisdiction.

VI. DUE PROCESS CONCERNS

For years, lawyers, scholars, and activists have argued there were violations of constitutional due process guarantees in the land grant confirmation process in New Mexico. Such concerns are based on the guarantees of the U.S. Constitution, made applicable to the states, that no property rights shall be denied “without due process of law.”²⁴¹ The principal concerns regarding the federal confirmation process are: (1) the inadequacy of publication notice of pending claims under the Surveyor General to potential grantees and possible third-party claimants; (2) the lack of any procedure to address such third-party claims before the Surveyor General; (3) third-party claimants not being systematically brought into CPLC adjudications, resulting in arguably incorrect confirmations and third-party claims being forever barred; and (4) the adversarial process under the CPLC in which claimants were forced to defend their claims against government attorneys but with vastly fewer resources.²⁴²

The GAO Report concludes that the process was constitutionally sufficient, focusing in large part on the erroneous premise, discussed at length in Part III above, that the confirmations were not “final” determinations because third parties could still assert their claims collaterally in the state courts.²⁴³ The GAO’s analysis ignores relevant case law, the realities of the time, and the fact that such confirmations were in fact final as to all potential claimants.

A. Surveyor General Era

As discussed by the GAO, during the Surveyor General era the Surveyor General published notices in the Santa Fe newspaper requiring claimants to present land grant claims to the Surveyor General in Santa Fe for confirmation.²⁴⁴ Although the Surveyor General was specifically directed to attempt to ascertain names of grantees of the various land grants through an examination of the Spanish and Mexican records in Santa Fe,²⁴⁵ there is no evidence that he did so, or if he did, that he ever attempted to give notice to such grantees. Thus, claimants were not generally notified of pending claims whose validity, boundaries, or ownership they might contest. Once a claimant came before the Surveyor General, occasionally witnesses were

241. U.S. CONST. amends. V, XIV.

242. See GAO REPORT, *supra* note 1, at 125 n.107 (citing several examples of these criticisms).

243. See discussion *supra* Part III.

244. See GAO REPORT, *supra* note 1, at 57, 59.

245. See *id.* at 193-97 (Instructions of Interior Issued to the Surveyor General of New Mexico).

cross-examined or additional witnesses called, but notice was rarely if ever given to potential adverse claimants of such claims, resulting in largely *ex parte* decisions.²⁴⁶

Contrary to the GAO's conclusion, this lack of notice appears to have been constitutionally unsound under both the traditional and modern notice standards. In the modern case of *Mullane v. Central Hanover Bank & Trust Co.*,²⁴⁷ the U.S. Supreme Court held that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."²⁴⁸ In so holding, *Mullane* restated the traditional principle that the requisite degree of due process – in particular, the type of notice and the opportunity to be heard – always depends on all of the circumstances of the particular deprivation, rather than there being any precise formula for what process is due.²⁴⁹

Mullane itself was not a meaningful departure from the due process standard that had existed up to that point, at least insofar as it affected New Mexico land grant claimants, contrary to the claims of the GAO.²⁵⁰ Rather, the modern test of constitutional notice, i.e., "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," appears to be the modern equivalent of the notice standards for adjudications involving land grants even in nineteenth-century New Mexico.²⁵¹ The GAO contends that, up until *Mullane*, notice by publication was sufficient for proceedings involving land adjudications.²⁵² In the case of New Mexico land grants, however, the legal foundation for the *in rem* vs. *in personam* distinction (i.e., the fact that property holders may be beyond the jurisdictional reach of the state), was simply not present, so *Mullane* did not change the inapplicable standard. As *Mullane* emphasized, the precise circumstances of any situation have always determined the amount of process that is due. The cases upon which the GAO relies are inapplicable

246. See *id.* at 60, 69 (quoting Surveyor General Clark's statements questioning the legality of this process). Although theoretically such notice was permitted under the Act of 1854, *id.* at 56 (quoting section 8 of Act), the lack of resources provided to the Surveyor General in New Mexico meant that potential adverse claimants were rarely made aware of pending claims. *Id.* at 69.

247. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

248. *Id.* at 314.

249. See *id.* (citing more than 50 years of case law for its proposition).

250. See GAO REPORT, *supra* note 1, at 128–29.

251. See, e.g., *Rodriguez v. La Cueva Ranch Co.*, 17 N.M. 246, 257–58, 134 P. 228, 231–32 (1912); *Priest v. Town of Las Vegas*, 16 N.M. 692, 696, 120 P. 894, 895 (1911), *aff'd*, 232 U.S. 604 (1914).

252. GAO REPORT, *supra* note 1, at 127–34 (distinguishing constitutional notice in "*in rem*" or "*quasi in rem*" from that required in "*in personam*" proceedings).

to New Mexico land grants and fail to support its blanket proposition that, pre-*Mullane*, newspaper notice was constitutionally sufficient.

For instance, *Arndt v. Griggs*,²⁵³ cited by the GAO for the proposition that publication notice was acceptable for *in rem* proceedings, held that due process was satisfied by publishing notice to *non-resident owners* of property located within the state; but its reasoning is inapplicable where property owners are located in-state. Likewise, in *Walker v. City of Hutchinson*,²⁵⁴ the Court rejected the state's argument that notice by newspaper publication in a condemnation action was permissible under *Huling v. Kaw Valley Railway & Improvement Co.*,²⁵⁵ a case also relied on by the GAO.²⁵⁶ *Walker* held that the state's reliance on *Huling* was "misplaced" since the appellant in *Walker*, unlike the railroad in *Huling*, was a *resident* of the state in which the property was located.²⁵⁷ The Court held *Huling* was inapplicable where the person in question *was a resident* of the state where the property was located.²⁵⁸ Clearly, even in the late 1800s, notice by publication was disfavored and only acceptable where the state's powers to hail a person into court by other means were constrained.²⁵⁹

Even if the cases cited by the GAO were applicable to the publication notice given by the Surveyor General—despite the fact that newspapers in those states were commonly used and property holders were out of state, unlike in New Mexico—they suggest that notice of the action should be given by posting such notice on the property in question, in addition to newspaper publication. For instance, in *The Mary*,²⁶⁰ used by the GAO for its argument that constructive notice suffices for property proceedings, personal notice was not required were the property in question, a vessel, was physically seized. The equivalent notice in the case

253. *Arndt v. Griggs*, 134 U.S. 316, 320–21 (1890).

254. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

255. *Huling v. Kaw Valley Ry. & Improvement Co.*, 130 U.S. 559 (1889).

256. GAO REPORT, *supra* note 1, at 128 n.114.

257. *Walker*, 352 U.S. at 116 (distinguishing *Huling*, which sanctioned publication notice where the railroad was out-of-state).

258. *Id.*

259. See Emily Riley, *Practicalities & Peculiarities: The Heightened Due Process Standard for Notice Under Jones v. Flower*, 27 J. NAT'L ASS'N L. JUD. 209 (2007). Further, cases allowing notice by publication in *quasi in rem* proceedings did so based on a presumption that publication of proceedings affecting property rights was a commonly used technique, and that therefore a prudent property holder would be expected to take notice by reading the newspaper. See GAO REPORT, *supra* note 1, at 132. In addition to the low literacy rate in New Mexico, as discussed below, notice by publication was not authorized in New Mexico until 1874, and therefore property holders in the territory would have no such expectation. Applying such a presumption arguably violates the principles of fairness on which due process is premised.

260. *Mary*, 13 U.S. 126, 144 (1815).

of land grants would be at least a posting on the property, not publication in a regional newspaper.

Similarly, *Huling*, relied upon by the GAO to support its argument that publication provided sufficient notice to all potential claimants, was a situation involving property holders who were not residents in the state/territory, and therefore could not expect to be personally served.²⁶¹ Such absentee property-holders were expected to take notice of information in publications where their property was located. The rationale for allowing for notice by publication in cases involving property was based in part on the Court's judgment that property owners should monitor and guard activities that could affect their property.²⁶² In the case of absentee property owners, because they are outside the state courts' jurisdiction and should not expect personal service of actions involving their property, the Court in *Huling* explained it is their responsibility to monitor the newspapers, or have a representative do so, since this is the most reasonable way for them to learn of any such action.²⁶³ This principle is inapplicable to residents of a land grant where landowners lived on the land, so even under these cases something more than published notice would be required.

Even under the standard as articulated by *Mullane*, the GAO claims that notice to claimants by newspaper alone was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."²⁶⁴ However, *Mullane* itself considered notice by publication *alone* to be constitutionally suspect, particularly when any other type of feasible notice was more reasonably calculated to alert individuals of the potential deprivation.²⁶⁵ This holding was consistent with earlier Supreme Court

261. *Huling*, 130 U.S. at 563-64.

262. *See Mary*, 13 U.S. at 144.

263. *See Huling*, 130 U.S. at 563-64. Clearly, however, the appointment of such a representative would be ineffective if neither the property is described nor the land owner identified in the published notice. In such a case, there is no way for either the representative or the owner to know when the owner's property is being affected.

264. GAO REPORT, *supra* note 1, at 131. Further, the GAO claims notice *must* have been reasonable, since claimants filed claims in 130 of 154 community grants, and 208 of the 295 total grants. *Id.* at 131. The GAO disregards the fact that some of the individuals who advanced claims were not the true owners, e.g., Tierra Amarilla, or that individuals advancing the claim may not have been representative of the entire community in the case of community grants, resulting in numbers of improper confirmations.

265. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 316 (1950) ("[P]ublication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning.").

cases from the mid-to-late 1800s, during the same time period as the land grant adjudication process in New Mexico.²⁶⁶

Further, the GAO overlooks the realities of nineteenth-century New Mexico, and the fact that such notice was unlikely in fact to inform potential claimants of their rights, much less any adverse claims. At the time, New Mexico had an extremely low literacy rate and few individuals could have even read the notices. In 1851, the first census of New Mexico taken by the U.S. Department of State reported a total population of 56,984; of those, seven-eighths were illiterate.²⁶⁷ It is questionable whether notice by publication could ever be reasonably calculated to inform individuals in such circumstances.²⁶⁸ Further, newspaper notification was not authorized under New Mexico law until 1874, so there would have been no expectation that any information concerning the legal taking of property would be found in the newspaper. At that point a landowner would arguably have looked to local newspapers for information concerning his property, rather than to the regional newspaper in Santa Fe.

In addition, there were several methods of notice which were certainly "feasible" and would have been "substantially more likely to give notice of the action" than simple publication by newspaper.²⁶⁹ As discussed above, the Surveyor General was required to ascertain names of grantees, as well as probable locations of both the land and grantees; certainly the notices could have been sent to the named grantees at the post office servicing the location of the land. The notice could have been posted on the land under consideration and at the post office in the district in which the land was situated. Additionally, the notice could have been published in local newspapers or in the churches, stores, and meeting places in the areas under consideration. In any of these cases, the method of notification arguably would have made an illiterate land grant claimant aware of proceedings potentially affecting the claimant's property interests.

In claiming publication notice satisfied the reasonableness standard of *Mullane*, the GAO does not even mention the two New Mexico cases that addressed the "reasonableness" of publication notice in the context of land

266. See, e.g., *Davidson v. New Orleans*, 96 U.S. 97, 105-06 (1878) (in tax assessment action, in accordance with constitutional due process, statute properly required the government to give personal service to those who were known, to search for those who were unknown, and to publish notice in the newspaper in which the property was located to all those who could not be found or were unknown).

267. Territorial Papers: New Mexico, I, Records Group 59, National Archives, Washington D.C.; ROBERT LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912* 65 (1968).

268. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) ("[P]articularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence.").

269. See *Mullane*, 339 U.S. at 318; *Dusenbery v. United States*, 534 U.S. 161 (2002).

grant cases and reached the opposite result. In *Rodriguez v. La Cueva Ranch Co.*, the state supreme court held the inclusion of “unknown claimants” in a partition decree was insufficient under the state’s notice statute to satisfy due process because the claimants were reasonably ascertainable.²⁷⁰ Although *La Cueva* was a state law rather than federal constitutional decision, it was based on what was considered reasonable notice at the time, and in considering reasonableness, the presence of people on the land was a factor that should be taken into account in determining whether potential claimants were reasonably ascertainable.²⁷¹

Likewise, in *Priest v. Town of Las Vegas*,²⁷² the New Mexico Supreme Court held that parties seeking to enforce a quiet title decree within the Las Vegas Land Grant did not satisfy statutory or constitutional due process by publishing notice to “unknown heirs” when such claimants, including the town itself, were reasonably ascertainable and could be named and served personally.²⁷³ The parties argued that although the grant had been confirmed to the town by Congress in 1860, the town was not incorporated until much later and therefore the parties did not know who to serve (as the town “was a mere aggregation of people without corporate organization”). The court rejected this argument, as there was no obstacle to naming the town in the notice, and the Supreme Court had previously held, in *Maese v. Herman*, that the town was a sufficiently “substantial entity” to receive a patent to the grant.²⁷⁴ *Priest* underscores that notice by publication in land matters was not automatically constitutionally sound pre-*Mullane*, and that the determination rested on the precise circumstances, the feasibility of alternative methods, and the difficulty of ascertaining the interested parties.

In addition to concerns about the insufficiency of notice given to potential claimants, and on a related note, scholars have pointed to the largely *ex parte* nature of Surveyor General proceedings and the lack of opportunity for adverse parties to be heard in proceedings that affected them – another touchstone of constitutional due process. Not surprisingly, the GAO concludes that provisions such as the opportunity for adverse parties to appear and for cross-examination were not constitutionally required in the Surveyor General process.²⁷⁵ Here the GAO reiterated the flexible nature of the type of procedures constitutionality required, both traditionally and under the U.S. Supreme Court’s present-day analysis in

270. *Rodriguez v. La Cueva Ranch Co.*, 17 N.M. 246, 257–58, 134 P. 228, 231–32 (1912).

271. *See id.*

272. *Priest v. Town of Las Vegas*, 16 N.M. 692, 120 P. 894 (1911), *aff’d*, 232 U.S. 604, 614 (1914).

273. *Id.* at 697–98, 120 P. at 896.

274. *Id.* at 699, 120 P. at 896 (citing *Maese v. Herman*, 183 U.S. 572 (1902)).

275. GAO REPORT, *supra* note 1, at 134–39.

Mathews v. Eldridge, depending on: (1) the private interests affected; (2) the risk of erroneous deprivation; and (3) the government's interest in not providing the particular safeguard. The GAO concluded that the relatively uncomplicated, "investigative" process by the Surveyor General did not require the right to a formal hearing, with the full participation of adverse parties and the constitutional right to cross-examine witnesses.²⁷⁶

As discussed above, the GAO relies heavily on the notion that confirmations under the 1854 Act were not final as to potential third-party rights, nor did the proceedings even seem to *involve* the rights of third parties, so that fewer due process safeguards were required under the *Mathews* balancing test.²⁷⁷ This error had a significant impact on the GAO's determination of what protections were constitutionally required, in particular causing it to vastly underestimate the third-party interests involved in each confirmation, in addition to the significant risk of erroneous deprivation to third-party claimants. While the GAO insisted that, under cases such as *United States v. O'Donnell*,²⁷⁸ there was simply no obligation to require an adversarial process in Surveyor General proceedings, such arguments ignore the fact that, in many ways unlike the California Commission process, Surveyors' General recommendations—being unappealable to the courts and consistently adhered to by Congress—were in fact final and binding.

Perhaps most surprising of all, the GAO contends land grant claimants under the Surveyor General process may not have even been *entitled to any* due process protections, since the Surveyor General was "not empowered to determine legal rights...[or] actually deprive [any] person of life, liberty, or property," again relying on distinguishable cases.²⁷⁹ The GAO likened the Surveyor General process to *Hannah v. Larche*,²⁸⁰ in which a commission merely investigated, rather than acted on, civil rights claims and therefore truncated due process was permissible. This was in contrast to *Jenkins v. McKeithen*,²⁸¹ which involved a commission that conducted adjudicative proceedings where full due process was required. The GAO concluded the Surveyor General process was arguably more of an investigative fact-finder, as in *Hannah*, and hence did not have to provide the due process required for actual determinations or deprivations of legal rights. The GAO's claims are tenuous in light of the realities of the federal confirmation process and the fact that Congress consistently followed the

276. *Id.* at 135–37.

277. *Id.* at 135–40.

278. *United States v. O'Donnell*, 303 U.S. 501 (1938) (addressing concerns regarding the California confirmation process).

279. GAO REPORT, *supra* note 1, at 129–30.

280. *Hannah v. Larche*, 363 U.S. 420 (1960).

281. *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

favorable recommendations by New Mexico's Surveyors General, thereby permanently deciding legal rights and extinguishing others. Even the GAO concedes, after proffering its initial claim, that the land grant situation was more akin to the facts in *Jenkins*, where individual property rights were irrevocably affected by commission action, than to those in *Hannah*.²⁸²

B. Court of Private Land Claims Era

Although the GAO does not address any due process concerns from the CPLC process, several have been noted by land grant scholars and lawyers that bear mention. In particular, critics note that, under the adversarial CPLC process, the stakes were much higher for claimants and the risks of erroneous determinations greater, yet the procedure still lacked fundamental protections such as the systematic joinder and participation of third-party claimants.²⁸³ In cases such as the Juan Jose Lobato, Cundiyo, and Truchas land grants, for instance, claims proceeded through the CPLC process without evidence of adverse claimants being made aware of such pending claims. In other cases, such as the Pueblo Quemado Grant, claimants were made aware of possible adverse claimants but there is no evidence that notice was ever provided to most of those potential third parties of the pending claim.²⁸⁴

Further, while the GAO notes the increasingly adversarial nature of the proceedings and exclusion of a number of presumptions that aided claimants under the Act of 1854,²⁸⁵ concluding that such decisions were up to Congress (subject to due process, which it claims was satisfied), the GAO ignores some of the deeper systemic problems that arguably violated the procedural due process rights of claimants in the CPLC era. The fact that the action was adversarial in nature, was initiated under direction from the government²⁸⁶ and prosecuted by U.S. attorneys against poor and often illiterate individuals, and often involved a complete deprivation of Treaty-protected property rights, arguably warranted additional due process safeguards under *Mathews v. Eldridge*. In particular, the vastly differing resources between land grant claimants and government attorneys substantially increased the risk of erroneous deprivation to claimants. These and other due process concerns under the CPLC process, omitted entirely from the GAO Report, certainly deserve additional analysis and scrutiny.

282. GAO REPORT, *supra* note 1, at 130-31.

283. See, e.g., EBRIGHT, *supra* note 34, at 46-48.

284. See Davis, *supra* note 193, at 25, 28-29.

285. GAO REPORT, *supra* note 1, at 78-81.

286. *Id.* at 80-81. Although the Act of 1891 did not require perfect claims to be brought before the CPLC, the GAO recognizes that this was the practical effect of the Act, given that land was not set aside from the public domain pending resolution of claims. *Id.* at 80-81.

C. The Finality of Confirmations Under Both Processes

These apparent due process violations were particularly egregious in light of the finality of land grant confirmations under the Surveyor General and adverse claimants' inability to collaterally challenge such confirmations.²⁸⁷ Throughout its due process discussion, the GAO relies heavily on the notion that the Surveyor General confirmation process did not require such rigorous due process since it did not constitute a final decision, the confirmation being ultimately up to Congress.²⁸⁸

As discussed above, the GAO's contentions regarding the lack of finality could not be further from the truth. Rather, recommendations by the Surveyor General and decisions under the CPLC process sealed the fate of land grants and in only very limited, rare circumstances were subject to collateral attack by third parties in the courts. The GAO's analysis throughout this section should be reviewed in light of its misplaced reliance on this notion, supported only by the anomalous New Mexico district court decision in *Montoya v. Tecolote*, since reversed by the court of appeals.

In particular, the following points made by the GAO should be reviewed in light of the GAO's erroneous reliance on the "*Montoya*" principle: (1) the notion that the Surveyor General process was not final, in light of *Montoya*-type opportunities to establish title, and so required less rigorous notice to possible claimants;²⁸⁹ (2) the notion that this lack of finality required fewer due process touchstones such as opportunities for cross-examination and prohibitions on *ex parte* proceedings;²⁹⁰ (3) the notion that the Surveyor General only "determine[d] who owned a tract as between a claimant and the United States..., not who owned the land as between all parties," and that this meant no potential adverse claimants, other than the United States, were constitutionally entitled to cross-examine potential claimants, *much less even appear* in the proceedings;²⁹¹ (4) the notion that third-party claimants were in an even "better position" than the parties in *Hannah*, who were constitutionally denied the right to cross-examination, in light of the opportunity for "second-bite at the apple" under the *Montoya* principle;²⁹² and (5) the notion that the existence of a *Montoya*-type "post-deprivation" hearing would justify any due process violation that may have occurred in the confirmation process.²⁹³ Particularly in light of the GAO's

287. See discussion *supra* Part III.

288. See GAO REPORT, *supra* note 1, at 132-40.

289. *Id.* at 132.

290. *Id.*

291. *Id.* at 136-37.

292. *Id.* at 137.

293. See GAO REPORT, *supra* note 1, at 138.

erroneous reliance on the since-overturned *Montoya* case, Congress should reconsider whether the federal government complied with constitutional due process when it deprived land grant claimants of their land grant rights in the confirmation process.

CONCLUSION

Clearly there are a number of reasons to dispute the GAO Report's conclusion that there was no legal violation in the confirmation process warranting relief by the federal government. Of these, the most significant are surely the GAO's superficial analysis of Treaty rights and problematic case law following the Treaty; its flawed analysis regarding the misconfirmation of the majority of New Mexico's community land grants; its erroneous conclusion that third parties could collaterally attack federal confirmations and the implications of this irreversibility; and its problematic analysis regarding constitutional due process.

Even the GAO concedes that, as a matter of policy "or even law,"²⁹⁴ Congress may want to consider some sort of remedy to New Mexico land grant heirs in light of the many serious problems in the federal confirmation process.²⁹⁵ For instance, the GAO suggests Congress may want to legislatively overrule *United States v. Sandoval*; such a remedy may also be appropriate for Supreme Court cases such as *Botiller v. Dominguez*, which arguably misapplied the Treaty and federal statutes enacted under the Treaty, as well as *Hayes v. United States* and *United States v. Vigil*, which were decided on technical grounds in arguable contravention of the Treaty and federal statute.

Likewise, the GAO suggests Congress may want to establish a remedy for land grant losses under the federal confirmation in light of the following concerns with the confirmation process: the excessive burdens placed on claimants; the insufficient resources resulting in scant notice and other due process safeguards; the fact that the system required claimants to hire English-speaking lawyers and pay them in land grant land; the fact that similarly situated grants often fared much worse during the CPLC era than they would have under the Surveyor General and certainly under Spain or Mexico; the excessive and crippling costs of surveying required after a confirmation; and the fact that inalienable common lands under Spain and Mexico were converted by the government into alienable private lands and lost forever from many New Mexico communities.²⁹⁶

294. *Id.* at 163.

295. *Id.* at 143-44, 163-64.

296. *See id.* at 143-44, 164.

If Congress chooses to address the many legal and equitable problems in the confirmation process, the question remains, what type of federal remedy is appropriate? The GAO lists several possibilities, including: (1) taking no additional action at this time because the majority of the community land grants were “confirmed,” the majority of the acreage claimed was “awarded,” and the confirmation processes were conducted “in accordance with U.S. law”; (2) acknowledging difficulties in evaluating the original claims and that the process could have been more efficient and less burdensome and imposed fewer hardships on claimants; (3) creating a commission or some other entity to evaluate and resolve remaining concerns about individual claims or categories of claims or to reexamine community land claims that were rejected or not confirmed for the full acreage claimed; (4) transferring federal land to communities that did not receive all of the acreage originally claimed for their community land grants; and (5) making financial payments to heirs or other entities for the non-use of land originally claimed but not awarded.²⁹⁷

Of these, New Mexico community land grant heirs have historically advocated most strenuously for the restoration of lands to communities where common lands were stripped or lost after being recast as private lands during the confirmation process. Certainly a claims commission could be established to evaluate such instances and possible land transactions. Financial payment is less attractive to most community land grant heirs, as money is never a substitute for land—particularly the land of one’s ancestors—but could be appropriate in certain limited circumstances in which heirs could purchase comparable neighboring land.

In the past, Congress has shown an ability to provide such a remedy when it has had the political will to do so. For instance, in the case of the Santa Fe and Albuquerque land grants, Congress passed individual acts recognizing these grants after the CPLC rejected both grants as being based on equitable claims that lay beyond its jurisdiction.²⁹⁸ New Mexico’s land grant heirs are hopeful that Congress will consider both the legal and equitable concerns regarding the loss of so much of New Mexico’s common lands and community land grants, and will find an appropriate remedy to address such concerns. These concerns are just as palpable and painful today as they were a century ago for land grant heirs and for New Mexico as a whole.

297. *Id.* at 161-70.

298. *See* *United States v. City of Santa Fe*, 165 U.S. 675 (1897).