The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants

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Recommended Citation
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To appropriate common pastures without compensation may ruin a whole village; it is to seize a piece of free capital without which cows and horses cannot be fed, and thus it is virtually to confiscate the beasts, which are the peasant's tools. When that is done he must either re-assert his rights, or throw up his arable holding, or hire pasture for a money rent; sometimes—a bitter thought—he must hire grassland from the very man who has robbed him.

Tawney, *The Agrarian Problem in the Sixteenth Century* (1912), at 241

INTRODUCTION

An article in the July 1982 issue of the local magazine *La Tierra* reviewed the events of May 11, 1982, involving an injury to Russell Edwards, Jr. Edwards, 19, an employee of the 77,524-acre Taylor Ranch in Costilla County, Colorado, had been treated for a large-caliber bullet wound in his upper arm.

An inquiry into the shooting, including a polygraph test administered to Edwards, had indicated the wound to be self-inflicted, the journal disclosed, relying on an interview with Charles Kalbacker, an investigator with the District Attorney's office in nearby Monte Vista. Furthermore, the investigation had revealed that on the evening he was injured, Edwards, the son of another Taylor employee, former Alamosa County deputy sheriff Russell Edwards, Sr., had discharged more than forty rounds of ammunition from several large-caliber weapons despite the fact that he had not been fired upon.²

That same evening two young residents of San Pablo, Colorado, Alex Mondragon, 22, and his brother Eddie, 15, were driving home after refueling a tractor on private property adjacent to the Taylor ranch. Suddenly, a 30.06 bullet punctured the cab of Mondragon's pick-up. The slug came dangerously close to Alex—"exploding" his down jacket and "ripping the scabbard of his knife."³ The Mondragon brothers, who were without firearms, returned home and reported the incident to authorities

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2. *Id.* at 7.
3. *Id.* at 8.
fifteen minutes before Edwards called the sheriff's office to report a gun battle and request an ambulance.4

This exposé shed new light on an incident which had been reported on the front page of the Valley Courier, the daily Alamosa newspaper, several months earlier under the headlines "Poachers Sought After Shooting."5 The daily had recounted the elder Edwards' tale of the evening's events. He, his two sons and another ranch employee were "arranging to observe" the return of poachers they had espied "at work" the previous day. The junior Edwards surprised the poachers returning "to carry out the elk they had killed, gutted and hidden the day before," and, as a result, "came under fire and was wounded."6

Edwards' controversial injury was merely the most recent episode in the conflict between North Carolina lumber baron Jack T. Taylor and local residents—many of whom are descendants of the original settlers of the southern portion of the one-million-acre Sangre de Cristo land grant. The struggle has entered its third decade and has involved "[t]hreats . . . assaults, shootings, bombings and arson."7 Taylor himself was almost "lynched by an angry mob"8 in 1962 after he was convicted of assault for beating three local young men who maintained they had only wandered on his property in search of a stray cow.9 Then in October 1975 Taylor's ranch house was peppered with bullets from a high-powered rifle fired from a nearby hillside. The North Carolinan was struck in the leg as he slept and his ankle was shattered.10 Taylor renewed his claims of a conspiracy to drive all Anglos from Costilla County11 and inspired headlines such as "Valley on Brink of Vigilante Rule."12

Although the dispute has been marked by both racial overtones and some lawless behavior, such allegations are hyperbolic. Violence is not uncommon in the voluminous history of Spanish and Mexican land grants,13 and the Sangre de Cristo grant is no exception. When Taylor bought the mountain property in 1960 and immediately began to erect barriers and

4. Id.
6. Id. at 1, col. 2, 3.
9. Trillin, supra note 7, at 125.
10. Id. at 128.
11. Id.; see also Earle, Land War Renewed in Costilla County, Denver Post, November 30, 1975, at 1.
12. Earle, supra note 11, at 36C.
fences, few choices remained for local residents. Taylor paid little more than seven dollars an acre for the "Mountain Tract"—land which had traditionally been used for grazing, hunting, fishing and timber cutting by the area's inhabitants.\textsuperscript{14} Without the use of "La Sierra," existence in the isolated, independent villages of southern Costilla County would be much more difficult, even tenuous.

As indicated by the Edwards incident, land grant concerns in northern New Mexico and southern Colorado are current. The history of the Sangre de Cristo Grant is only one of hundreds of similar chronicles, each with distinctive characteristics.\textsuperscript{15} There is, however, a common thread which runs through the majority of land grant profiles.

The great majority of land grants in Mexico's northern provinces included communal lands.\textsuperscript{16} This pattern of granting common lands to settlers conformed to the Hispanic tradition which evolved in Europe during the 12th century.\textsuperscript{17} It also corresponded to the system of communal lands which was embedded in the land tenure pattern of native Mexico.\textsuperscript{18} Not until the United States of America gained sovereignty over the northern territory did the question of who owned the common lands of the Spanish and Mexican land grants become an important one.\textsuperscript{19} This issue, though legally decided in 1897,\textsuperscript{20} has yet to be put to rest. It has continued to trouble historians and legal scholars, as well as the descendants of the original settlers of the grants.

\begin{itemize}
\item \textsuperscript{14} Trillin, \textit{supra} note 7, at 122.
\item \textsuperscript{15} Ebright, \textit{The San Joaquin Grant, Who Owned the Common Lands? A Historical—Legal Puzzle}, 57 \textit{N.M. Historical Rev.} 1 (1982).
\item \textsuperscript{16} Generally, there were two types of land grants—community grants and private grants. Community grants were made to groups of settlers. Typically, community land grants included common lands. Private grants were made to individuals, who, in the interest of settling the grant, often transferred portions of the grant to groups of settlers. Keeping with the Hispanic tradition, the settlers usually received communal lands. The Sangre de Cristo Grant is not an unusual example of this process.

In 1844, Governor Armijo granted the Sangre de Cristo Grant to Narciso Beaubien and Stephen Lee after they had filed a petition for a grant to settle the valleys of the Costilla, Culebra, and Trinchera Rivers. J.J. Bowden, \textit{Private Land Claims in the Southwest} 885 (1969). When both Beaubien and Lee died in the Taos Rebellion of 1847, the grant became the property of Narciso's father, Carlos. Beginning in 1849, Carlos Beaubien established settlements on the grant by giving colonists individual tracts of land along with communal land for the use of all the settlers. Stoller, \textit{Grants of Desperation, Lands of Speculation: Mexican Period Land Grants in Colorado}, in \textit{SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO} 34 (J. Van Ness ed. 1980). In a deed dated May 11, 1863, Beaubien granted the settlers of San Luis, San Pablo, and Los Ballejos the common use of pastures, water, wood and lumber:
\begin{quote}
... todos los habitantes tendran con arreglo conveniente de gozar de los beneficios de los pasteos, agua, lena y madera, siempre cuidando que no prejudicarse uno con otro....
\end{quote}
\textsuperscript{1} Costilla County Records 226 (1863); \textit{see also} Sanchez v. Taylor, 377 F.2d 733, 735, n. 1 (1967).
\item \textsuperscript{17} \textit{See infra} text accompanying notes 31–70.
\item \textsuperscript{18} \textit{See infra} text accompanying notes 71–101.
\item \textsuperscript{19} \textit{See infra} text accompanying notes 198–203.
\item \textsuperscript{20} United States v. Sandoval, 167 U.S. 278 (1897).
\end{itemize}
In *U.S. v. Sandoval*, the Supreme Court ruled that under Spanish and Mexican law, the sovereign retained fee title to all communal lands granted to the villages. This comment will demonstrate the error of that decision. The land tenure structure transported to America during the Conquest was "a juxtaposition of seigneurial property, ordinary private property, municipal property of various kinds, and intermunicipal property." Invariably, American courts confused the king’s seigneurial jurisdiction over communal lands with ownership of those lands.

Divided into three parts, this comment first considers the origins of the system of communal land tenure which developed in Mexico’s northern territory. This system was a synthesis of Castilian and native concepts. At its foundation was the landholding village—the dominant feature in the agricultural communities of both Castile and pre-Conquest Mexico. Historically, this land tenure design had been tried, tested and proven successful—in two different cultural contexts. Also, the system of landholding villages accommodated the objectives of the conquerors and was well adapted to the geography of Mexico.

The second part of this comment examines the laws and policies of Spain and Mexico as they pertain to the land grants in the northern provinces. The political turmoil in Spain and Mexico during the first half of the 19th century makes it extremely difficult to determine what laws were in effect at any given time. However, specific trends can be isolated. The Spanish monarchs drew heavily on their experience during the reconquest of Castile and instituted regulations designed to provide villages with a strong financial base. Communal lands provided this foundation and an inducement to settlers. The Mexican Revolution brought a new government and additional problems. Forced to rely on foreign settlers to populate its northern provinces, Mexico began to lose its political control of the region. Mexican officials reacted to these circumstances by using land grants to establish a buffer zone, thereby protecting Mexico from foreign dominance. It was too late, but their intent was clear—to protect Mexico by settling the northern provinces using traditional Spanish patterns of settlement.

This comment concludes by examining the mechanisms employed by

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21. *Id.* at 296–97 (1897).
23. The lack of discrimination between seigneurial jurisdiction and landownership, whether intentional or not, was not uncommon in Castile either. Thus, the nobility was sometimes able to illegally gain control of communal lands. *Id.* at 19.
25. See infra text accompanying notes 114–37.
26. See infra text accompanying notes 149–91.
27. See infra text accompanying notes 157–59.
28. See infra text accompanying notes 180–92.
29. See infra text accompanying notes 193–94.
the United States to adjudicate land grant claims. The evolution of these mechanisms is revealing. The United States considered the bulk of the land granted to settlers, including the communal lands, to be the new sovereign’s public domain. And, to the extent that adjudication did not reach this result, federal offices and commissions were modified, personnel were altered and laws were amended.

COMMUNAL LAND TENURE

Commons and common rights, so far from being merely a luxury or a convenience, were really an integral and indispensable part of the system of agriculture, a linch pin, the removal of which brought the whole structure of village society tumbling down.

Tawney, at 238

The Spanish System—Castile

Spain’s claim to world domination in the 15th and 16th centuries was due in large part to the agricultural system which evolved in the territory of Castile. The Castilean agricultural scheme, based on the concept of public ownership of land, has been credited with financing Spain’s international enterprises and supporting the grandiose institutions of Church and nobility which developed throughout its empire during the early modern period. The concept of public land ownership was not confined to Castile, or to Spain, for that matter. However, nowhere were the successes of this system more evident.

The foundation of the Castilian system of public ownership was the principle that “no individual had the right to appropriate for himself and monopolize a part of the resources of Nature that were produced without the intervention of man.” An individual could claim ownership of the crops he harvested or the flocks he tended. However, idle land remained “at the disposition of anyone who wished to benefit from it... [P]ossession of the land was dependent on the act of using it.” Theoretically, an individual who wished to use a plot of deserted or idle land, whether it was privately owned or public property, “simply occupied it and used it

30. See infra text accompanying notes 204–84.
32. Id.
33. Similar systems were, at one time, widely distributed throughout Europe. Van Ness, Spanish American vs. Anglo American Land Tenure and the Study of Economic Change in New Mexico, 13 SOC. SCI. J. 45, 47 (1976). For an examination of the English system of common lands in the sixteenth century see R.H. Tawney, THE AGRARIAN PROBLEM IN THE SIXTEENTH CENTURY (1912).
35. Id.
without the intervention of any authority other than his own." 36 He could possess the land until he ceased using it, at which time he would lose his claim and any other labrador (independent peasant farmer) who wished to use it could do so. 37

Municipalities could obtain land in much the same way as individual labradores. Often a town or village would simply appropriate requisite land from the tierras baldias (public lands) 38 for the use of its residents. 39 This tract would then be considered part of the tierras concegiles (lands of the council or community-owned lands).

The tierras concegiles were classified as either municipal lands or common lands. 40 The municipal lands, or propios, 41 were owned by the community and "were treated legally as private property. . . . [t]hey were considered to be at the free disposition of their owners, and not different from private property in relation to the nature and extension of property rights." 42 In this sense, the propios were not truly inalienable. 43 However, the propios were invaluable to the community and were rarely sold. 44 They could be cultivated collectively or rented to individuals or other municipalities. In either case, the proceeds went toward local tax assessments, public works or other forms of municipal support. 45

The common lands 46 of the community were reserved for the "collective and free use of all the vecinos (heads of families) . . . of the municipality." 47 These lands were used communally by the inhabitants of the villages, but were regarded as the private property of the villages. 48 Each

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36. Id.
37. Id.
38. The term tierras baldias or baldio was vague. Generally it referred to unused lands belonging to the Crown. However, the term also applied to lands which had been assumed by individuals or municipalities. "[B]aldios were considered to be public lands, but they could also be private lands that had been usurped from the public domain." Vassberg, supra note 34, at 386.
39. Id.
40. H. PHIPPS, SOME ASPECTS OF THE AGRARIAN QUESTION IN MEXICO 21 (1925); see also Vassberg, supra note 34, at 389.
41. Propios were also referred to as propios de los pueblos, propios de los concejos or bienes de propios. Vassberg, supra note 34, at 389 n. 20.
42. Id. at 389, 390.
43. Id. at 390; Phipps states that the propios were inalienable. Phipps, supra note 40, at 22. Other authorities agree: "neither the public (propios) nor the communal lands (bienes comunales) could be alienated." E. SIMPSON, THE Ejido, MEXICO'S WAY OUT 12 (1937). However, Vassberg's position best fits the overall design of Castilian property rights.
44. Vassberg, supra note 34, at 390.
45. Id. at 389; Phipps, supra note 40, at 21.
46. Spanish terms used to describe common lands were tierras concegiles, tierras comunales and tierras publicas. Vassberg, supra, note 34, at 389 n. 19. Common lands were also known as bienes comunales or bienes de aprovechamiento comun. Phipps, supra, note 40, at 21.
47. Vassberg, supra note 34, at 389.
48. Villages often refused to allow outsiders to use their common lands. However, this hostility "coexisted with a remarkable intercommunalism and intermunicipal cooperation." Some villages belonged to federations and shared intermunicipal common lands called comunidad or comunidad de villa y Tierra. Common lands shared by a federation of towns were clearly distinguished from the commons used by the inhabitants of one village. D. VASSBERG, supra note 22, at 57–58.
village possessed several different categories of communal lands. The *ejido* was located just outside the town. It was utilized as a place to thresh grain, dump garbage, keep stray animals and hold meetings. The *prado* served as pasture land, as did the *dehesa*, the only difference being that the latter was usually enclosed. The *cota* was also enclosed but, unlike the *prado* and *dehesa*, it could be cultivated. Lastly, the *monte* provided "each inhabitant [with a place] to hunt and fish . . . and to supply himself, from any part of it, with firewood, timber, lime . . . or with whatever the tract yielded." The common lands were inalienable and usually remained undivided.

It should be mentioned that, although a clear legal distinction between the *propios* and the common lands existed, villages customarily adapted laws to local conditions and the specific needs of each community. The *exido* was always communal. In contrast, the *prado*, *dehesa*, *cota* and *monte* could function as either common lands or *propios*. In fact some tracts were used communally during one season and as *propios* during another.

Several aspects of the Castilian system are particularly noteworthy. First of all, although private and community property existed side by side, "public land ownership . . . constituted a keystone of the social and economic structure of rural life." This structure included an atmosphere of mutual aid. Despite the legal differences between the *propios* and the common lands, it is clear that neither existed for the benefit of individuals. The *propios* assured the survival of the municipality while the common lands guaranteed its populace the necessities. Customs such as *derrota de miesas* (stubble grazing) were indicative of cooperative efforts. The *derrota* required that each parcel of land, whether publicly or privately owned, be opened to all livestock of the village after the harvest.

Secondly, the crown's generosity with regard to the *tierras baldias*, combined with the maxim, "[t]he sole authority for the possession of the land was its use," had appreciable effects on conditions in Spain. Land was available at no cost to those who would use it. This free land made Spanish colonization efforts in the territory reconquered from the Muslims

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49. *Id.;* PHIPPS, supra note 40, at 21.
50. Vassberg, supra note 34, at 391.
51. *Id.*
52. PHIPPS, supra note 40, at 21, 22.
53. Vassberg, supra note 34, at 390; PHIPPS, supra note 40, at 22.
54. Vassberg, supra note 34, at 390.
55. *Id.* at 390, 391, 393, 401.
56. *Id.* at 400.
57. PHIPPS, supra note 40, at 22.
58. Vassberg, supra note 34, at 386.
59. *Id.* at 393.
comparatively easy.\textsuperscript{60} It also provided both municipalities and individual\textit{laboradores} with the opportunity to prosper. The nation prospered, too, for these principles ensured that each tract of land would be utilized in the manner for which it was best suited. Since a\textit{labrador} could choose from among the\textit{tierras baldias}, he was not compelled to cultivate land not suited for crops. And, if \textquoteright\textquoteright his\textquoteright\textquoteright land proved unproductive, he could abandon it, knowing he had the right to possess and use any plot of idle land.\textsuperscript{61} The abandoned land could then be assumed by a municipality and used as\textit{prado}, \textit{dehesa} or \textit{monte}. Possession of land based on its use was crucial, for it enhanced the Castilian system's ability to adapt to local conditions.\textsuperscript{62} If a village was in a particularly arid or mountainous region and needed additional land, it was customary and well within the law to appropriate the necessary lands from the\textit{tierras baldias}.

Finally, it is particularly significant that public land ownership, common rights and the principle of possession based on use were protected by the Spanish legal system. The\textit{propios} were described in the\textit{Código de las Partidas} as land to be used for the general welfare, and later laws guarded the\textit{propios} against appropriation by influential individuals.\textsuperscript{63} Castilian monarchs, although \textquoteright\textquoteright tempted by their theoretical right of eminent domain over the lands under their control,\textquoteright\textquoteright routinely acted to defend common lands.\textsuperscript{64} The national assembly (Cortes) advocated for community property and repeatedly took issue with any adversary of public land ownership and common rights.\textsuperscript{65} The common use of the\textit{ejido} was \textquoteright\textquoteright recognized, if not established, by the law of the Siete Partidas (1256–1265).\textsuperscript{66} Presura, the authority of\textit{vecinos} to use idle lands, \textquoteright\textquoteright was universally recognized in medieval Spain's\textit{fueros} (law codes).\textsuperscript{67} Usufruct,
the right of use attached to the land, was also ingrained in Spanish land law. Local, municipal councils adopted strict rules and regulations to safeguard common lands. And, perhaps most important, custom and public sentiment supported the concepts of communal property and common rights.

The Indian System—Pre-conquest Mexico

Scholars have been unusually slow to acknowledge the contributions of pre-conquest Mexican civilization. Still, only a brief overview of the native system of land tenure is necessary to demonstrate that in terms of politically elaborate stability and economic success it rivaled, and in many ways surpassed, the Castilian system.

Similar to 16th-century Spain, "the landholding village was the dominant unit in the agrarian economy" of pre-conquest Mexico. This village pattern was characterized by "definite rules of land tenure" and clearly established common rights of possession. At the heart of the village society was the kinship group known as calpulli. Several calpulli might live in a single village, although the households of each would be grouped close together. Town lands, called altepalli, surrounded each village. Each calpulli possessed a definite portion of the altepalli, called the calpulalli (lands of the clan). The calpulalli was held by the clan "in

69. Vassberg, supra note 34, at 393.
70. Vassberg, supra note 31, at 633.
71. N. WHETTEN, RURAL MEXICO 79 (1948).
72. Id.
73. McBride, supra note 66, at 112; see also Whetten, supra note 71, at 76–81; Phipps, supra note 40, at 11–20.
74. McBride, supra note 66, at 117.
75. Authorities disagree about the nature of altepalli. Phipps contends that the "lands of the tribe" contained only agricultural lands and that "villages did not have their own . . . land for hunting, fishing, fuel and water . . . [but rather] . . . roamed at will for game, fish and forest products." Phipps, supra note 40, at 13. Whetten claims that the "town lands" included "tiltable land, timber lands, and hunting grounds." Whetten, supra note 71, at 76, 77. McBride writes: "[i]t may be surmised that a large part of this altepalli was not under cultivation but served as hunting grounds, timber lands, rock quarries and so forth." McBride, supra note 66, at 114. Neither Phipps, Whetten or McBride cite any authority for their contentions concerning the altepalli.

The landholding village system of native Mexico was very adaptive to local conditions. Whetten, supra note 71, at 76. It could be that both views on the nature of the altepalli existed in different parts of the country. In densely populated areas such as the central plateau, the scarcity of land may have made it necessary for each village to be more precise about describing its land. On the other hand, in the sparsely populated, arid regions of the north and mountains of the Sierra Madre there would be no reason to do so.

76. Authorities again disagree about the nature of the calpulalli. Phipps claims the term describes only tillable lands of the clan. Phipps, supra note 40, at 13, 14. Whetten contends that the calpulalli "included lands of all types." Whetten, supra note 71, at 77. Neither cite any authority. McBride does not mention the term calpulalli.
perpetual and inalienable tenure” for the use of its households and was “defended . . . tenaciously from inroads of other groups.”

The arable land of the calpulli was distributed among the several family heads of each calpulli. The size of these family plots (tlatlmilli) varied depending on the land available, quality of the soil and other local conditions. Detailed regulations governed the use of the tlatlmilli. The distribution of the tlatlmilli was the function of the pariente major (or calpulli), usually an elder of the calpulli. He lived in the tecpan (council house) with his family. The pariente major kept and continually revised elaborate picture-maps of the individual tracts of the calpulli, "marking the boundaries, the names of the occupants, the quality of various tracts, indicating which ones were in cultivation and what crops were raised. PHIPPS, supra note 40, at 14-16. Phipps cites several authorities: ZURITA, BREVE Y SUMARIA RELACION DE LOS SENORES, MANERAS Y DIFERENCIAS, QUE AVIA DE ELLOS EN LA NUEVA ESPANA, in 3 ICABALZETA, NUEVA COLECCION DE DOCUMENTOS PARA LA HISTORIA DE MEXICO, 98 (1886-1892); BIART, THE AZTECS, THEIR HISTORY, MANNERS, AND CUSTOMS 189 (1887).

It was required that the plot be cultivated regularly—two successive years left idle and the tract could be forfeited. WHETTEN, supra note 71, at 77. Boundaries were strictly enforced. Death was the penalty for displacing a landmark. PHIPPS, supra note 40, at 15 (citing BIART, supra note 78, at 229).
There was no written title to the *tlatmili*, "but the usufruct of them was transmissible . . . from father to son" provided the conditions of use were met. And, if for any reason the *tlatmili* became idle, it "reverted to the clan and was either reassigned or held in reserve for future needs." Thus, at the same time the Castilian system of public land ownership thrived in Spain, an analogous form of land tenure had developed in native Mexico. And, like the Spanish system, it was rooted deep in the culture of the people. Protected by complex customs and regulations, it formed the basis of rural life in Mexico.

However, the system which the *conquistadores* stumbled upon was unique in several ways. First, native Mexican land tenure was structured around kinship groups. The *calpulli* was the foundation of the design. Under the supervision of the *pariente major*, rules, customs and traditions emanated from the clan. Bolstered by blood relationships, highly organized, independent villages developed throughout Mexico.

Secondly, the concept of public domain was unknown in pre-conquest Mexico. Even a conquered village was not required to relinquish its lands. A conqueror could claim dominion over the persons of a vanquished village, but not over its lands. The village simply set aside a *yaotlalli*, cultivated the land, and delivered the harvest to the sovereign.

Furthermore, "[t]he amount of tribute exacted by the conquering tribe was not in proportion to the area subdued, but to the number of individuals composing the tribe"—additional evidence that dominion over land was inconceivable in native Mexico.

Finally, the geography of Mexico compelled the land tenure system to take on many related but distinct forms. In some regions the mountainous complexion of the land reduced the amount of arable land significantly.

80. PHIPPS, supra note 40, at 15.
81. WHETTEN, supra note 71, at 77; see also PHIPPS, supra note 40, at 15. Villages possessed other classes of public land which, unlike the individual *tlatmili*, were tilled in common by members of the clan. Lands were allotted for the maintenance of the *tecpan* (*tecpantlalli*), the military (*milchimalli* or *cacalomelli*, depending on the type of grain cultivated), and the priesthood (*teocalli*). In larger communities there was a village council with the senor supremo in authority. Each *calpulli* sent a representative (*tlatoca*). The *tlatoca* depended on lands called *tlatocatlalli* (*lands of the speaker*) for his support. PHIPPS, supra note 40, at 16–18 (citing ZURITA, supra note 78, at 109 and BANDELIER, ON THE DISTRIBUTION AND TENURE OF LANDS AND THE CUSTOMS WITH RESPECT TO INHERITANCE AMONG THE ANCIENT MEXICANS 415 n. 418 (1878)); WHETTEN, supra note 71, at 77, 79. McBride calls the *tlatocatlalli* "lands of the chief." The disagreement appears to be over the word *tlatoca*. McBride equates *tlatoca* with the Spanish word for the head of the village council—senor supremo. McBRIE, supra note 66, at 116. Another class of land tilled in common by the members of a town was the *yaotlalli*. If a village was conquered by another tribe, it would set aside a *yaotlalli*. The tribute due the conquerors came from the *yaotlalli*. PHIPPS, supra note 40, at 17, 18.
82. PHIPPS, supra note 40, at 13.
83. Id.
84. Id. at 18 (citing M. CUEVAS, DOCUMENTOS INEDITOS DEL SIGLO XVI PARA LA HISTORIA DE MEXICO, COLEGIDOS Y ANOTADOS 221 (1914)).
The terrain also isolated many small population groups. As a result, the nature of the land tenure pattern of any specific village was tempered by the geography of the region. Of particular interest to this inquiry is the system which evolved in the northernmost territories of pre-conquest Mexico—the area which is now northern New Mexico and southern Colorado.

Pre-colonial Mexican civilization included isolated outposts along the northern frontier. Villages thrived in what is now eastern Arizona and western New Mexico. These remote villages were under the loose control and general influence of the Teotihuacan government in central Mexico. It is not surprising, then, that the same attitude toward public use of land prevailed.

The late 13th century witnessed several power struggles in central Mexico and "the rise of the militaristic sun-worshipping cult." Simultaneously, the northern frontier communities were abruptly abandoned. Many were subsequently re-established in the northern Rio Grande area. The move proved to be a positive one for the Pueblos. The influence of the southern societies was still apparent. Private ownership of land did not exist. Like the rural communities of the rest of Mexico, "[l]and was vested in the Pueblo as a whole and distributed to the members of the community." However, the Pueblos developed autonomous communities structured around an intricate system of hydraulic agriculture.

85. Whetten, supra note 71, at XV.
86. R. Ortiz, Roots of Resistance, Land Tenure in New Mexico, 1680-1980, 15, 16 (1980). The people of these villages grew corn, beans and squash. With the introduction of advanced irrigation methods two thousand years ago, these crops flourished. Id.
87. Merchants from central Mexico in search of turquoise and salt formed an economic web with the northern communities. The presence of these commercial travelers heavily influenced the culture of the region. Ortiz, supra note 86, at 15, 16.
88. Stevens, Changes in Land Tenure and Usage among the Indians and Spanish Americans in Northern New Mexico, in Indian and Spanish American Adjustments to Arid and Semiarid Environments 38, (Symposium held during annual meeting of Southwestern and Rocky Mountain Division of the American Association for the Advancement of Science (1964)).
89. Ortiz, supra note 86, at 17.
90. Some scholars are not as ready to concede that the Pueblo people are descendants of the Anasazi societies which flourished during the first thousand or so years of our current calendar. Much research needs to be done in this area. There is evidence, however, that at least some of these communities re-settled in the Rio Grande area. See Ford, Schroeder and Peckham, Three Perspectives on Puebloan Prehistory, in New Perspectives on the Pueblos 19–39, 289–291 (A. Ortiz ed. 1972).
91. The effects of the turmoil in central Mexico were minimized. Also, the progressive irrigation systems adapted well to the topography of the northern Rio Grande region. Ortiz, supra note 86, at 17.
92. In fact, at the time the Spanish explorers first came to Pecos Pueblo, Nahuatl was spoken by the inhabitants. Ortiz, supra note 86, at 16, 17.
93. Stevens, supra note 88, at 38.
94. Ortiz, supra note 86, at 4.
95. Id. at 18.
and extensive communal hunting grounds—"[a]ll of the land was theirs, as far as they could make use of it."\textsuperscript{96} Like many societies dependent on irrigation systems, "the Pueblos innovated controlling customs, or customary law, rather than codified law."\textsuperscript{97} Laws evolved to provide for extreme conditions, such as the protection and maintenance of the community's water supply in the event of a drought.\textsuperscript{98} But custom ruled the daily lives of Pueblo inhabitants. Mutual cooperation toward the survival of the village was paramount. Ceremonials functioned as an equalization process and "worked to minimize or resolve conflict, curb accumulation, and prevent want."\textsuperscript{99} Hunting parties served the same purpose as game was distributed among all members of the party.\textsuperscript{100}

Viewing the Pueblo structure, it becomes apparent just how flexible the native Mexican system of land tenure was. The foundation of common lands was present. However, far from the reach of any centralized government, the Pueblos developed a unique pattern which was well adapted to the conditions of the northern Rio Grande region—autonomous, self-sufficient villages relying on a complex system of agricultural irrigation and the use of the surrounding mountains for communal hunting, fishing, wood gathering, etc.\textsuperscript{101} Strict laws provided for emergencies, but custom governed day-to-day life and ensured cooperation and the survival of the community.

\textit{The American System—New Spain}

The forms of land tenure which developed in "New Spain" were influenced by three interrelated factors. Naturally, the invaders attempted to impose their concepts concerning land and its use while the conquered struggled to sustain the design they knew and understood. The fact that both systems were similar made the clash of cultures less of an outright war, but the battle was still fought and with interesting results. Secondly, the purposes and aims of the conquerors had their effects and, as these purposes changed, so did the ideas concerning land tenure. Finally, the physical geography of the Americas had a profound effect on the development of the colonial Mexican land tenure system. Both the Spanish

\textsuperscript{96} Stevens, supra note 88, at 38.
\textsuperscript{97} Ortiz, supra note 86, at 20.
\textsuperscript{98} Id. at 20.
\textsuperscript{99} Id. at 22; see also Ford, An Ecological Perspective on the Eastern Pueblos, in New Perspectives on the Pueblos 1–17 (A. Ortiz ed. 1972).
\textsuperscript{100} Ortiz, supra note 86, at 22.
\textsuperscript{101} Pueblos were generally self-sufficient. A small surplus, about fifteen percent, was saved and used for trade or redistributed among the population of the village. Ford, supra note 90, at 6–8; Egan, Summary, in New Perspectives on the Pueblos 288 (A. Ortiz ed. 1972).
and native systems were flexible. And, in the "new world" the diversity of climate and terrain, as well as the territory's seemingly limitless dimensions, compelled the pattern of public land ownership to assume a wide variety of appearances.

The similarity between the Castilian and native Mexican systems of land tenure furnished "a basis for the amalgamation of the two during the colonial period." However, if forced to select, the native Mexican design was certainly more influential. The native system had several advantages. It had the benefit of possession of the field—evolving for thousands of years and adapting itself to the unique geography of the Americas. The Indians also enjoyed a sizeable numerical superiority.

And, even though contact with the Spanish had an immediate and disastrous effect on the native population, a new culture emerged with a predominance of Indian characteristics. Additionally, Spain was quick to recognize and promote a successful system:

\[\text{... the Spanish government recognized the collective system of landholding which had prevailed among the agricultural Indians of Mexico, modified it slightly to make it conform more nearly to Castilian institutions, and gave it a legal status by the enactment of appropriate legislation.}\]

Inevitably, as the two systems blended, the features of native Mexican

102. PHIPPS, supra note 40, at 22.
103. At the beginning of the 16th century there were only fifteen thousand Spaniards in Mexico—"less than one third of one percent of the population of New Spain." F. WATERS, MASKED GODS—NAVAHO AND PUEBLO CEREMONIALISM 55 (1950).
104. In a period of 36 years, from 1532–1568, the Indian population of Mexico was reduced from almost 16.9 million to slightly over 2.6 million. ZORITA, BRIEF AND SUMMARY RELATION OF THE LANDS OF NEW SPAIN (TRANSLATED AND WITH AN INTRODUCTION BY KEEN), PUBLISHED AS LIFE AND LABOR IN ANCIENT MEXICO 9 (1963).
105. Waters writes about the origin of the Mexican race:

\[\text{Everywhere it was the same. A few great haciendas supporting noble families proud of their Castilian lineage. But dozens of small, growing villages ... gradually adopting the life of the Indians. Growing corn, the primal foodstuff of all aboriginal America. Grinding the kernels on a concave stone, the metate, the Aztec metatl. Patting the dough into thin tortillas, the Aztec tlaxcalli “bread,” and cooking them on a griddle, the comal (comalli). Or wrapping the hot cornmeal mush into the husk, flavoring it with meat or chile (chilli) to make the Aztec tamalli (tamale). Or serving it as a gruel, the atole (atolli). ... Spinning and weaving cotton or wool, not with the Spanish horizontal pedal loom, but on the hip with the malacatl (malacate), into the tzalape (zarape, serape). ... Doctoring themselves with osha and yerba de manzo for stomach troubles, topalquin to break a fever, cota for rheumatism, yerba buena to “warm the insides” of pregnant brides ... What was happening? The terrible conflict of the two races was no longer conducted on the surface by force of arms, but continued underground—within the blood stream ... The Whites were disappearing. The Indians ... were winning back the land. Today, of Mexico’s nineteen million population, fifteen million belong to Indian Mexico."}\]

WATERS, supra note 103, at 56, 57.
106. McBRIDE, supra note 66, at 123.
land tenure, now protected by the laws of the conqueror, surfaced and matured.

Both the terms and ideas of the Spanish system were gradually transformed to emphasize Indian concepts. The *ejido*, which in Spain designated "a relatively small unoccupied space at the entrance of the village . . . [came to denote] . . . the wide area that include[d] all of the communal lands of the town . . . the alteptlalli of pre-conquest days." Boundaries were indefinite—"often formed by a barren, uninhabited range of mountains, an infertile lava flow or a profound chasm." Titles, too, were vague and, especially in the northern provinces, "land ownership and usage [was] established by custom" rather than by legal documents.

The northern pastoral villages exhibited additional Indian influence. The Spanish quickly realized that the Pueblos had developed the most efficient methods for coping with the arid conditions of the area. Almost immediately all aspects of land tenure and social structure revolved around irrigation. Land was distributed by the "'vara system'—in narrow strips that fronted on a watercourse and extended back from it more or less at right angles to its frontage." As a result, the mutual cooperation evident within the Pueblo villages became engrained in the Hispanic settlements. Perhaps not as conspicuous, but of equal importance, was the attitude of the villagers toward the land. Like their Pueblo neighbors, the northern communities developed an indelible attachment to *la tierra.*

This sentiment continues to be one of the unique characteristics of the towns and villages in northern New Mexico and southern Colorado.

Initially, the objectives of the Conquest were threefold. The Spanish sought to "extend the realm of the crown" and to Christianize the "pagan

107. Id. at 124; see also Whetten, supra note 71, at 81. The colonial villages continued to possess other pastos communes and montes, but now as components of the ejido.

108. McBride, supra note 66, at 57.

109. White, Koch, Kelley and McCarthy, LAND TITLE STUDY 83 (1971), [hereinafter cited as LAND TITLE STUDY].

110. "They [the Indians] practiced irrigation in a manner so skillful and well regulated . . . the Spanish king ordered by royal decree (November 20, 1536) that their system should be preserved and that the Indian officials who previously had been in charge of dispensing the waters should be retained and . . . empowered to perform that office for Spaniards as well as Indians." Phipps, supra note 40, at 12 (citing 4 Recopilacion de leyes de los reynos de las Indias, Quinta edicion, titulo 7, ley 11 (1841)).


112. O. Leonard, THE ROLE OF THE LAND GRANT IN THE SOCIAL ORGANIZATION AND SOCIAL PROCESSES OF A SPANISH AMERICAN VILLAGE IN NEW MEXICO 133 (1970); Ortiz, supra note 86, at 130. This concept of cooperation is visible today in the form of mutualistas (Hispanic workers' organizations) which thrive throughout the Southwest. See generally Hernandez, Mutual Aid for Survival: The Case of the Mexican American (1983).

FIGURE 2. The "vara system."

WHITE, KOCH, KELLY & MCCARTHY, LAND TITLE STUDY 164 (1971).
nations” of New Spain. Additionally, and surely not the least on the minds of the conquerors, was the acquisition of wealth. These goals “directed the Spaniards in their settlement of the New World and in the establishment of what eventually became the characteristic system of land tenure in Spanish America.”

The Spaniards’ pursuit of the riches of Mexico did not include an acquiescence to physical labor. Consequently, a system of encomiendas and repartimientos was instituted whereby this burden was placed on the backs of the native population. This arrangement, certainly not new to colonialization, distributed the Indians among those who had participated in the Conquest. It was, in effect, a system of conscript labor very much akin to slavery.

The encomienda system did not fare as well in the upper Rio Grande

114. McBRIE, supra note 66, at 42, 43; see also WEstP hull, supra note 111, at 123.
115. McBRIE, supra note 66, at 43.
116. The system was first called repartimiento and was, in fact, an allotment of Indians or entire villages to an individual Spaniard. At the request of Queen Isabella, the more subtle term encomienda came into general use. Indians allotted under an encomienda were reputedly under the care of the grantee. McBRIE, supra note 66, at 43 n.11.

The reader should be mindful of the fact that the nobility of Spain did not always approve of the barbarous behavior of the Spanish colonists. “A veritable struggle went on, throughout the colonial era, between the kings, animated by a noble zeal for the well being of the aborigines, and the colonial government which winked at the excesses of the unscrupulous adventurers.” PHIPPS, supra note 40, at 23.

Needless to say, the realities of the distant frontier and the throne’s unwillingness to confront them proved to be a formidable barrier to humanitarianism. The lofty philosophies of the nobility, as well as the laws enacted reflecting those philosophies, rarely had any noticeable effect on day-to-day life in New Spain.

117. ORTIZ, supra note 86, at 32, 34. Spanish soldiers received the right to exact labor and tribute from villages and, in some instances, entire regions. Cortez himself claimed to have been granted authority over more than 25,000 square miles and 23,000 of the region’s 115,000 inhabitants. McBRIE, supra note 66, at 47. The majority of the encomiendas, including the thirty-five granted in the northern New Mexico region, were not as extensive. They were, however, large enough to attract colonists in search of the ever-more-illusionary treasures of the frontier. WEstP hull, supra note 111, at 123.

The concept of encomienda is an elusive one—not an actual grant of land but a license to dredge benefits in the form of tribute and labor from the land and its inhabitants. The system vaguely resembled the Indian practice of paying tribute to dominant tribes and thus “did not involve a violent change . . . except that payments had to be made by individuals and not the community.” PHIPPS, supra note 40, at 18. Predecessors of the great haciendas, encomiendas included the right to live on the land. It is clear, however, that encomiendas were not granted in fee. The king reserved title to the encomiendas and could revoke them at his pleasure. Despite attempts by the throne to ensure that these great estates would not become entailed, colonists consistently won concessions to extend them. In 1536 the Laws of Succession extended the encomiendas to dos vidas (two generations). Colonists survived a threat to abolish encomiendas altogether when the “New Laws” of 1542 were repealed after much resistance from Mexico and Peru. A royal decree in 1607 sanctioned a third and fourth life for the encomiendas. The New Laws of the Indies in 1629 added a fifth generation. As a result, the encomiendas came to be regarded as possessions of the individual to whom they were granted. Some estates remained intact until Mexican independence. As late as the 19th century Cortes’ estate included 15 villas, 157 pueblos, 89 haciendas, 119 ranchos, 5 estancias (large estate for grazing cattle) with a total population of 150,000 people. McBRIE, supra note 66, at 45–50.
region. Conflicts with the fiercely independent Pueblo Indians consistently hampered the plans of Don Juan de Onate and his companions.\textsuperscript{118} Finally, the Pueblo Revolt of 1680 sent the settlers scurrying southward. When the Spaniards returned in 1692 they did so with altered intentions. No longer were the colonists interested in amassing large estates at the expense of Pueblo land and labor. "The Spanish in New Mexico now instituted a policy of maintaining a frontier outpost to preserve the outer limits of their empire in order to protect the rich interior from competing powers."\textsuperscript{119} The 	extit{encomienda} system was supplanted not by any uniform arrangement, but by a nebulous design which reflected the goals of permanent settlement.\textsuperscript{120}

The resultant land tenure pattern of the villages of the upper Rio Grande region was unique. "[S]ettlements were strategically placed along the periphery of those settled areas which were common entry places for attacking Indians . . . [and] . . . settlers were required by law to defend the frontier."\textsuperscript{121} Villagers lived around plazas for protection and cultivated individual tracts of land distributed by the "vara system." As an inducement, settlers also received the usufruct to grazing land and woodlands.\textsuperscript{122} Corporate communities developed, within which both private and communal forms of land tenure contributed to the subsistence economy of the inhabitants.

Another interesting aspect associated with the settlements in northern New Mexico was the blood relationships within each community. Frequently, villages were settled by extended family groups.\textsuperscript{123} Evident is the re-emergence of the kinship groups so prevalent in the days of the 	extit{calpulli}. Traits of communities bound together by common blood soon became clearly visible—among them autonomy and self-reliance, intra-community cooperation, and the tenacious protection of property, both public and private, against all intruders.

The diverse physical geography of Mexico, coupled with its dimensions, was the final influential factor in the development of the colony's varied forms of land tenure. A land of contrasts—mountains co-exist with lowland coastal regions, rain forests with deserts—physical "barriers tend to separate the population into numerous small isolated and distinct com-

\textsuperscript{118} Onate, son of a wealthy Spanish entrepreneur, won the colonization contract for the New Mexico region in 1602. Shortly afterwards, he assembled approximately 130 soldiers, 7,000 head of stock and an unknown number of Nahuatl-speaking captives and set out to colonize the area. \textit{Ortiz, supra} note 86, at 28.

\textsuperscript{119} \textit{Id.} at 41.

\textsuperscript{120} \textit{Westphall, supra} note 111, at 124.

\textsuperscript{121} \textit{Ortiz, supra} note 86, at 48.

\textsuperscript{122} \textit{Westphall, supra} note 11, at 12.

\textsuperscript{123} \textit{Ortiz, supra} note 86, at 49 (citing \textit{Jenkins, Documentation Concerning San Jose de Garcia del Rio de Las Trampas} (unpublished manuscript 1969)).
munities, each living according to its own peculiar customs and traditions.” 124 Virtually every classification of terrain and climate known can be found within the borders of what was once called “New Spain.” And, like its other social institutions, “[t]he land system of Mexico . . . has . . . grown out of the depths of its physical environment.” 125

The effects of the physical nature of the territory are clearly evident when considering the different types of land holdings and their variable sizes. The self-sustaining character of the haciendas required that each have a variety of land forms. Naturally, the quality and type of land available had a direct effect on the estate’s size. Consequently, the size of a Mexican hacienda ranged from less than 2,500 acres to more than 250,000 acres depending on where it was located. 126 The size of ranchos, small holdings worked by one family, also “varie[d] with the character of the soil and of the climate.” 127

The dimensions of village communal lands, too, were a function of the quality of land and differences in climate. The first order of business for any village was to set aside land “for the common use of the inhabitants, including pasture grounds . . . sufficient for cattle and ejido sufficiently extensive for any probable future growth of the settlement . . . [and] . . . propios, the income from which would be used to defray the expenses of village administration.” 128 That being so, the communal lands in the arid northern territories tended to be more extensive than in the fertile central region. In California, Sonora and other northwest provinces, ejidos consisted of a minimum four square leagues (approximately 23,000 acres). 129 The size of communal allotments in the northern prairie regions of Texas, Coahuila and New Mexico were “gauged by the amount of grassland needed.” 130 Typical of settlements in these regions of the Rio Abajo were Villa de Laredo and Rancho de Dolores. At Laredo thirteen families were assigned “15 square leagues (86,400 acres) of pasture lands.” 131 The allotment for Dolores was even larger—approximately 216,920 acres. 132

The isolated mountain villages of the northernmost provinces present

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126. Id. at 25 (citing Southworth, El directorio oficial de las minas y haciendas de Mexico (1910)).
127. McBride, supra note 66, at 83.
128. Id. at 108.
129. Id.
130. Id. at 109.
131. Id. It is unclear whether these 86,400 acres constituted only the pasto or dehesa of the settlement or whether this area embodied the entire grant. In either event, there is no doubt that in the lower Rio Grande region authorities recognized that in order for a village to survive, extensive acreage was necessary.
132. Id.
perhaps the most unique example of the flexibility of the Mexican land tenure system. Villagers "located their settlements in valleys and along streams wherever valley floors were large enough for village sites and irrigated farm plots."\(^\text{133}\) A subsistence economy ensued. The surrounding mountains were used communally to supply additional elements necessary for survival—game, fish, grazing land and firewood.\(^\text{134}\) And, "isolated from centers of colonial power, the settlers . . . had to adapt their own way of life to the physical and social realities of the New Mexican environment."\(^\text{135}\) The faint-voiced colonial government continued to issue regulations, but these proved to be unenforceable. "[L]aws were made a nullity [and] decisions of governors were jeered at."\(^\text{136}\) Local kinship groups emerged as the foremost legal authority in these villages and "[w]henever the colonial authorities issued regulations which conflicted with the prevailing community ethic, the settlers resisted."\(^\text{137}\)

Characterizing colonial Mexico's land tenure system as Castilian, as most scholars have done, is a substantial oversimplification. Especially on the northern frontier, "[t]he land tenure customs . . . were a synthesis of cultural influences controlled institutionally by Spanish colonial regulations and policies and by the realities of the frontier."\(^\text{138}\) As the preceding treatment indicates, this synthesis, not the Castilian design, provided the foundation for the diverse patterns of land tenure found throughout colonial Mexico and specifically in the northern provinces. Vestiges of the Castilian system survived—narrow private tracts provided individual families with arable lands, forested mountains became part of the village ejido and stabilized the existence of both individuals and the community itself. Traditional Hispanic concepts well suited to the frontier lingered—possession of the land was conditioned on its use;\(^\text{139}\) the custom of derrota persisted in many communities.\(^\text{140}\) However, the callousness and inclemency of life on the frontier, as well as the example set by the Pueblo communities, urged divergence. Hence the development of autonomous subsistence farming and ranching communities "characterized by multiple

\(^{133}\) Knowlton, supra note 13, at 1070.

\(^{134}\) Id.

\(^{135}\) Swadesh, supra note 113, at 154.

\(^{136}\) Id.; see also Westphall, supra 111, at 15.

\(^{137}\) Swadesh, supra note 113, at 171. Swadesh also notes that:

In the colonial, Mexican, territorial and modern periods, there was no formal institutionalization of social control—civil, military, religious, judicial, economic, or educational—which gained dominance over or independence of local kin groups of northern New Mexico. . . . The only authority that had the final say in the plazas was the echelon of command within kin groups. Even today when a stranger appears . . . he is closely questioned about his family origins. . . . The idea of maintaining neighborly relations with people who are not relations, as institutionalized in Anglo-American society, is foreign to the Hispanic tradition. Id. at 154.

\(^{138}\) Ortiz, supra note 86, at 4–5.

\(^{139}\) Westphall, supra note 111, at 124.

\(^{140}\) The custom of stubble-grazing is known as rastrojos in northern New Mexico villages.
forms of land tenure integrated through the corporate community organization and its constituent kinship groups.\textsuperscript{141} Local and regional councils (\textit{ayuntamientos})\textsuperscript{142} managed a mixture of "private agricultural landholding(s), encumbered by various collective constraints, and communal pasturages with individual rights of usufruct."\textsuperscript{143} The resultant pattern was a distinctive network which conformed to the demands of the region. Villages formed "small semi-independent social worlds . . . resistant to acculturation and to . . . political and economic dominance."\textsuperscript{144}

At the core of this structure were the communal lands. Measured in metes and bounds, the \textit{ejido} had little commercial worth. Its value was tied to the social organization of the village and the land's use for the subsistence of the resident population.\textsuperscript{145} Consequently, the dimensions of the communal lands varied depending on "social and use value considerations, including the status of the person(s) being granted the land, the use to which the land was to be put, the character and quality of the land in question and the established needs of the person(s)."\textsuperscript{146}

Just a short trek into the future would bring this intricately balanced system of land tenure and social organization into direct conflict with an encroaching contrary design. The alien Anglo-American system conceptualized land as a "precisely measurable entity . . . [which] . . . permit[ted] both the resources and products . . . of land, as well as the plot itself, to be brought easily into the national and international market."\textsuperscript{147} This rigid pattern, developed on the boundless Midwestern plains to sustain the "individual commercial farm family . . . as an independent productive marketing unit,"\textsuperscript{148} was ill suited to the mountainous terrain of northern New Mexico and southern Colorado. Nevertheless, the intensity of Manifest Destiny would soon thrust it into the region.

\section*{LAND GRANTS—LAWS AND POLICIES}

Mid-nineteenth century Mexico stood on fairly tenuous ground. Having secured her independence by the Treaty of Cordova in 1821, the country began to contend with the many difficulties which had accumulated during the three hundred years of Spanish colonial rule. But, these problems overwhelmed the inexperienced leaders of the new government "who

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\textsuperscript{141} Van Ness, \textit{Introduction}, in \textit{SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO} 8 (J. Van Ness ed. 1980); see also Van Ness, \textit{supra} note 33.
\textsuperscript{142} Swadesh, \textit{supra} note 113, at 157.
\textsuperscript{143} Van Ness, \textit{supra} note 141, at 9.
\textsuperscript{144} Knowlton, \textit{The Town of Las Vegas Community Land Grant: An Anglo American Coup D'Etat} in \textit{SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO} 12 (J. Van Ness ed. 1980).
\textsuperscript{145} Van Ness, \textit{supra} note 141, at 9.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 8.
\textsuperscript{148} Id.
\end{footnotesize}
could neither bring order out of the chaos nor maintain themselves in power." Government, laws and policies changed frequently. Thus, it is extremely difficult to determine the laws which governed the distribution of land in the northern territories. However, the evolution of the laws and policies displays two specific trends. First, settlement of the region, using the system of land grants and public land ownership developed in Castile, was a priority. Second, the native cultures, including the native land tenure structure, became increasingly respected and protected by the governments of both Spain and Mexico.

The numerous decrees and ordinances regulating the distribution of land during the Spanish colonial period were compiled in the Recopilacion de las Leyes de las Indias. The Recopilacion had several notable effects on the land tenure patterns established in the "New World". First, it extended Las Siete Partidas, the compilation of the laws of Castile, to the Spanish colonies. Thus, the Castilian system of land tenure became legally protected in New Spain. Secondly, the Recopilacion "provided for [the] integrity of indigenous villages and land tenure. . . ." Spanish law-makers were quick to recognize "the unique characteristics of the Americas." Considered revolutionary, the laws of the Recopilacion attempted to eliminate the encomienda system and, if only in a "legalistic manner," preserve the native villages and their land tenure pattern. These two seemingly contrary effects contributed to the unique system of land tenure which dominated the northern territories—framed and protected by the laws and customs of Castile, but heavily influenced by the native traditions safeguarded by the nature of the Recopilacion.

The imposition of Spanish civilization on native Mexico was "in its broadest context . . . but a continuation of the struggle between Christian and Moslem that characterized Iberian history in the days of the Recon-

150. See Whitney v. U.S., 181 U.S. 104 (1901). The Supreme Court recognized:
. . . .what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time. . . . because of the frequent political changes which took place. . . . [t]hevolutions and counter-revolutions, empires and republics [which] followed each other with great rapidity and in bewildering confusion.

Id. at 108.
151. LAND TITLE STUDY, supra note 109, at 12.
152. Id. A royal decree in 1530 compiled in the Recopilacion, Book II, Title I, Law 2 provided:
We order and command in all causes, suits and litigations in which the laws of this compilation do not provide for the manner of their decision . . . then, the laws of our kingdom of Castile shall be followed . . .

Id.
153. ORTIZ, supra note 86, at 9.
154. LAND TITLE STUDY, supra note 109, at 11.
155. Id. at 13.
156. ORTIZ, supra note 86, at 9.
quest.” In addition to driving the Moslems from the peninsula, the Reconquest “was also an experience in colonization of the conquered areas . . . a historical preparation for the conquest of America.”\(^{158}\) The system of public land ownership proved to be an effective method of colonizing the reconquered regions of Castile.\(^ {159}\) The Spanish monarchs populated the area by inducing settlers with the promise of free land. Communal lands sustained durable and prosperous settlements and the Spanish civilization was transplanted throughout what is now southern Spain. Several centuries later, Spain needed only to draw on her experience during the Reconquest in order to export her culture across the sea.

The *Recopilacion* also introduced the Spanish legal interpretations of usage and custom into the Americas. “Usage . . . arises from certain things which men say, and do, and practise, uninterruptedly, for a great length of time. . . .”\(^ {160}\) Custom is established when usage is observed by a majority of people in a particular place for a period of ten years.\(^ {161}\) In the Spanish legal system custom was the “unwritten law,” supported by the “force of law.”\(^ {162}\) Custom provided the Spanish legal system with a mechanism for change as well as an authority when confronted with controversy or doubt.\(^ {163}\)

A system of *ecomiendas* dominated the Spanish colonization of central Mexico and Peru.\(^ {164}\) However, liberal European philosophers and resistance from the less sedentary tribes of the frontiers led to the demise of this system.\(^ {165}\) By the early 17th century attention focused on colonizing the fringe provinces of the empire. Regulations concerning the settlement

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158. *Id.* at 181–83.
159. *See supra* text accompanying notes 31–70.
161. *Id.* at Law 5, 13. To become custom, usage must be “reasonable, not contrary to the laws of God, the empire, or natural law; nor have been established through error.” The knowledge of the sovereign, without opposition, and judicial or legislative enforcement (either two uncontradicted judgments upholding the custom or a decision in favor of the custom after it has been disputed) are also required. *Id.*
162. *Id.* at Laws 4 and 6, 13–14.
163. Joaquin Escriche y Martin, the prominent commentator on Spanish law and honorary Magistrate of the Court of Madrid, wrote of custom:

> Custom is the practise long used and received which has acquired the force of the law . . . not only where there is no law to the contrary, but, also, when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful.

165. *Id.* at 52.
of new towns and villages were published in 1573.\textsuperscript{166} These regulations set forth extensive procedures for choosing the site of a new town, planning and building it, distributing land, and planting the initial crop.\textsuperscript{167} Common lands were to be “of adequate size so that even though [the town] should grow greatly there would always be sufficient space for its inhabitants to find recreation and for cattle pasture without encroaching on private property.”\textsuperscript{168} These ordinances remained in force throughout the Spanish colonial period and had an enduring effect on Mexico’s northern frontier.\textsuperscript{169}

The laws of the Indies influenced the northern provinces in an additional way. The Laws of 1573 shifted the emphasis of expeditions into the

\begin{footnotes}
\footnote{166. Royal Ordinances Concerning The Laying Out of New Towns, 5 THE HISPANIC AMERICAN HISTORICAL REVIEW 249 (Z. Nuttall trans. 1922) (hereinafter cited as Royal Ordinances). The original documents were published in Spanish in the same publication in 1921. The Ordinances are also included in the Recopilacion, Book IV, Title 7.}
\footnote{167. Royal Ordinances, supra note 166, at 250–53 (ordinances 111–135). For an illustration of a plan for an ideal pueblo see F. BLACKMAR, SPANISH INSTITUTIONS OF THE SOUTHWEST 167 (1891). Illustrations of plans for specific cities are also found in Blackmar. The plan for San Jose is at page 173, for Los Angeles, page 181, and Santa Barbara, page 212. For an illustration of the plan for San Antonio see Bolton, TEXAS IN THE MIDDLE TH CENTURY 6 (1962).}
\footnote{168. Royal Ordinances, supra note 166, at 252 (ordinance 129).}
\footnote{169. In fact, the Cortes announced in 1811 that among its “principal cares . . . [was] to furnish the inhabitants of the extensive provinces in America all the means necessary to promote and secure their real happiness . . . .” Decree of March 12, 1811, in A COMPILATION OF SPANISH AND MEXICAN LAW 397 (J. Rockwell ed. 1851).}
\end{footnotes}
northern frontiers. No longer were the native people to be conquered and reduced to slavery in Spanish mines.\textsuperscript{170} Instead, priority was given to colonizing the region and converting the Indians to Christianity. Settlements were to be established “peaceably and with the consent of the natives.”\textsuperscript{171} The Indians’ property was to be respected.\textsuperscript{172} Encroachment on native villages was prohibited.\textsuperscript{173} These regulations governed Oñate’s expedition into the New Mexico territory,\textsuperscript{174} as well as all subsequent contact with the natives of the region. The Spanish monarchs attempted to keep the confrontation between the settlers and the natives to a minimum. While there is little doubt that Spanish soldiers and settlers took advantage of every opportunity to exploit the Indians, this “oppression was in defiance of, rather than pursuant to, the laws of Spain.”\textsuperscript{175} It is significant that the natives, their property and, to a certain extent, their culture, were legally protected by the laws of Spain. This protection, along with the previously mentioned efficiency and durability of the native land tenure system, enabled it to survive and provide a model for the Spanish settlements of northern New Mexico.

Neither the decade-long fight for independence nor its resolution in 1821 had any noticeable effect on Mexico’s northern provinces. Generally, “the same laws, principles of government, and forms of administration continued. . . .”\textsuperscript{176} The new government maintained the policies regarding colonization evident during the final years of Spanish rule. The Constitution of Cadiz in 1812 had, perhaps, the greatest effect on these policies.

In 1808 the French invaded Iberia and kidnapped the Spanish monarch and his son. The liberal-minded Cortes seized the opportunity to restructure the Spanish government.\textsuperscript{177} The Cortes abolished feudalism in Spain and, through the Constitution of Cadiz, “provided for greater representative government at all levels . . . transform[ing] ayuntamientos from closed corporations to popularly elected bodies . . . [and] . . .

\textsuperscript{170} Hammond, \textit{The Search for the Fabulous in the Settlement of the Southwest}, in \textit{NEW SPAIN’S FAR NORTHERN FRONTIER, ESSAYS ON SPAIN IN THE AMERICAN WEST 1540–1821} 25 (D. Weber ed. 1982).

\textsuperscript{171} Royal Ordinances, \textit{supra} note 166, at 254 (ordinance 136).

\textsuperscript{172} Id.

\textsuperscript{173} Id. at 254 (ordinance 137).

\textsuperscript{174} Hammond, \textit{supra} note 170, at 25.

\textsuperscript{175} F. Cohen, The Legal Conscience—Selected Papers of Felix Cohen, 230–52 (L. Cohen ed. 1960), \textit{quoted in WESTERN CIVILIZATION AND NATIVE PEOPLES, OCCASIONAL PAPERS, No. 16, THE INDIAN CAUSE IN THE SPANISH LAWS OF THE INDIES Ixx–Ixxi} (S.L. Tyler ed. 1980). As compiled in 1681, the Recopilacion contained an entire book of laws concerning the Indians—Book VI. Although in many ways oppressive—the early laws endorsed the encomienda system and other laws forced the Spanish language and Christianity on the native people—the laws provided for numerous guarantees. For example, Indian children were not to be separated from their parents (Book I, Title I, Law 9), and Indians were allowed to trade freely (Book VI, Title I, Law 25).

\textsuperscript{176} Blackmar, \textit{supra} note 167, at 280.

\textsuperscript{177} Weber, \textit{supra} note 149, at 16.
increas[ing] the number of persons eligible to participate in political life by conferring citizenship upon all Spanish subjects, including Indians. . . ."  

Additionally, the actions of the Cortes facilitated "a determined effort to break up large landholdings in favor of placing more persons in possession of smaller parcels."  

Colonization and greater local autonomy were the major objectives of the final years of Spanish rule. By 1820 policies coinciding with these objectives were well established in the northern provinces.

Augustin de Iturbide, Mexico's first ruler, was not in a position to effect any major policy changes. As one of his first acts as emperor he "declared that those portions of the 1812 Constitution that did not run counter to the interests of independent Mexico would remain in force. . . ."  

However, the new nation was quickly compelled to reconcile the virtuous policies of the Cortes with the international ramifications and activities in the northern frontier. The Yankee Monster was forcing its way into Texas, devouring land in the name of Providence, posing an imminent threat to its southern neighbor.

Only immediate colonization of the northern provinces would provide Mexico with validation of its dominion over the territory. Few prospective colonists had the financial means to undertake such an adventure. As a result, despite its desire to prevent large tracts of land from being monopolized by a wealthy few, the government was forced to rely on those with the ability to organize colonization efforts. The Colonization Law of 1823 authorized large grants of land to empresarios who agreed to lure groups of settlers into the northern provinces.  

The reign of Iturbide ended in March 1823. One year later the newly formed Mexican Congress issued the Decree of August 18, 1824. The Decree of 1824,

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178. Id.
179. WESTPHALL, supra note 111, at 82–83.
180. WEBER, supra note 149, at 18.
181. Although short lived, the Colonization Law of January 4, 1823 set the tone for the laws regulating the settlement of the northern frontier during the Mexican Period. Under the Colonization Law of 1823, vast amounts of land were granted to empresarios who contracted with the government to settle the region. For every 200 families brought in to settle, the empresario would receive over 15 square leagues (approximately 66,800 acres). The maximum amount of land any one empresario would be granted was about 46 square leagues (approximately 200,000 acres). F. HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE 103–06 (1885) (Colonization Law of January 4, 1823, Arts. 3, 5, 7, 19).

Empresarios were required to alienate two-thirds of the land granted within twenty years while retaining the remaining one-third in fee. Id. at 106 (Art. 20). Towns and cities were to be settled following the traditional Spanish land tenure pattern. Id. at 105 (Art. 12). Tracts of arable land were granted to individual settlers and communal lands were allotted to the town. The amount of land granted to each settler varied depending on the quality of the land, climate, and other conditions. Id. at 104 (Art. 9). At a minimum, each settler received one labor and was required to cultivate the tract within two years. Id. at 104, 106 (Arts. 8, 23). One labor amounted to one million square varas or slightly over 177 acres. WEBER, supra note 149, at 340 n. 18.
182. WEBER, supra note 149, at 20.
183. HALL, supra note 181, at 148–49 (Decree of August 18, 1824).
though merely general guidelines for colonization, had a lasting effect on the northern provinces by encouraging settlement by foreigners. In 1828 the Congress issued general procedures for enforcing the Decree of 1824. The Regulations of 1828 also insured that towns and villages would be formed and governed in a manner consistent with existing law and that each settler would receive a minimum amount of land.

It is clear that these regulations were strictly adhered to on only a very few occasions. Rather, "bits and pieces . . . were combined in . . . strange and inconsistent ways, whether out of willful ignorance, deliberate manipulations, or genuine confusion." The laws did, however, provide an excellent framework and were flexible enough to adapt the policies of the central government to conditions in the New Mexico Territory. Perhaps, with more time, the colonization efforts would have been as successful as the Spanish Reconquest of Castile. But, as the United States of America grew, the threat from the north quickly became a reality. Beseiged with internal problems, Mexico was unable to develop any consistent policy to confront the encroaching nation.

Finally, at the insistence of General Mier y Teran, who had travelled extensively throughout Texas, the government issued the Decree of April

184. Weber, supra note 149, at 162–63. Details regarding settlement were left to the states. See Hall, supra note 181, at 131–45 (Colonization Law of the State of Coahuila and Texas, March 24, 1825). The State of Coahuila and Texas guaranteed the rights of foreigners and Indians. Id. at 132–35 (Arts. 1, 2, 4, 5, 19). Land granted was to be settled within six years. Id. at 133 (Art. 8). Each colonist was granted a specific amount of land which could be increased by the government. Id. at 134–35 (Arts. 14, 17).

185. The Decree of 1824 encouraged foreigners to settle any land which was neither private property nor communal land belonging to towns. Hall, supra note 181, at 148 (Decree of August 18, 1924, Art. 2). The Mexican government guaranteed security to the persons and property of foreign settlers and exempted them from taxes for four years. Id. at 148 (Arts. 1, 6). Additionally, the Decree of 1824 guaranteed contracts between the empresarios and settlers and imposed the limit of eleven square leagues (approximately 48,700 acres) as the maximum amount of land any one person could receive. Id. at 149 (Arts. 11, 13). Notably, the Decree also attempted to establish a buffer zone, prohibiting settlements within twenty leagues of any foreign nation or within ten leagues of the sea coast. Id. at 148 (Art. 4).

186. Id. at 149–52 (General Rules and Regulations for the Colonization of the Territories of the Republic of Mexico, November 21, 1828). These regulations authorized the governors of the territories to grant land to empresarios, families, and private persons, both foreign and Mexican. Id. at 150 (Art. 1). Prospective grantees submitted petitions to the governor, who would then determine if the petition conformed with the Decree of 1824. Id. (Art. 2, 3). If the governor approved the petition, it was forwarded to the territorial deputation. At this point grants to families and private individuals could be validated. Id. (Art. 5). However, if the grantee was an empresario, the report of the territorial deputation was delivered to the 'supreme government' for final validation. Id. at 151 (Art. 7). Upon approval, the governor would give the grantee a document confirming title to the land and would specify a time period within which the land would have to be settled and cultivated. Id. (Arts. 8, 11). The grantee secured his right of ownership by proving to the municipal authority that the conditions of the grant had been met. Id. (Art. 12).

187. Id. (Art. 13).

188. Id. (Art. 14). Each colonist received a minimum of approximately 375 acres. This included arable land, land dependent on the seasons (de temporal), and grazing land. Id.

6, 1830. This Decree, designed to halt American influence in the northern provinces, forbade foreigners to enter the territory "under any pretense whatsoever" without a passport. It had little, if any, effect.

Nothing, it appeared, could be done to halt the influx of Americans. Mexican officials were aware of the situation in the northern provinces, "but they also saw that region's problems as only one of a series of urgencies." One key official who did act was Manuel Armijo, Governor of the New Mexico Territory. In the two year period from 1841 to 1843, as part of a calculated attempt to secure Mexico's claim to the entire territory and to establish a buffer zone insulating Mexico from the United States, Armijo awarded grants totaling almost ten million acres, most of which were located in what is now southern Colorado. Among them was the one million acre Sangre de Cristo Grant.

This maneuver proved futile. It came much too late to thwart the hand of Providence. In addition, the independent nature of the northern settlements hampered any scheme of organized resistance that the young and distant government may have had. Manifest Destiny prevailed. Despite the declaration of the Supreme Court that "the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement. . . ." history has made it clear that the ensuing war was just that. Only racial prejudice and the debate over slavery prevented the seizure of all Mexico. Instead, fearing injury to her "digestive system," the United States opted to swallow Mexico "by separate mouthfuls."

Through the Treaty of Guadalupe Hidalgo, the United States acquired sovereignty over the "least infected" portion of Mexico, the region north of the Rio Grande. Article VIII of the Treaty protected the property of Mexican citizens who chose to remain in the territory. However, the

190. WEBER, supra note 149, at 166-71.
191. HALL, supra note 181, at 109 (Decree of April 6, 1830). Article 11 of the Decree prohibited citizens of countries adjacent to Mexico from settling as colonists and suspended all uncompleted contracts involving these foreigners. Id. Three years later the government had a change of mind and repealed Article 11. Id. at 110 (Decree of November 25, 1981, Art. 1). But in 1837, after Texas had declared its independence, the prohibition of foreigners was reinstated. Id. at 115 (Law of the Fourth of April, 1837, Providing for Rendering Effective the Colonization of the Lands Which are or should be the Property of the Republic).
192. WEBER, supra note 149, at xvii.
194. See supra note 16 and text accompanying notes 1-15.
196. See generally Merk, Dissent in the Mexican War in DISSERT IN THREE AMERICAN WARS 35-63 (1970).
198. The Treaty provided that "property of every kind, now belonging to Mexicans now established there shall be inviolably respected." Treaty of Guadalupe Hidalgo, 9 Stat. 922, 943 (1848). The United States refused to ratify Article X of the proposed treaty, which would have provided a "clear-cut . . . standard to be applied in adjudicating land grants in the newly acquired territory." WESTPHALL, supra note 111, at 78.
United States had different priorities. The new sovereign viewed the subsistence land tenure system of the Hispanic settlements as backwards and primitive when compared to the commercialized farms encouraged by the Anglo-American design. Accordingly, rather than protecting the interests of Spanish and Mexican grantees, the United States instituted mechanisms designed to organize the public domain.

After some initial floundering, Uncle Sam's scheme proved successful. By the early twentieth century the federal government had wrested control of over fifty-two million acres from the New Mexico villagers. Much of the acreage had been granted to settlements for use as common lands. The loss of the ejido presaged the decline of the Hispanic design of land tenure. The village inhabitants were placed "in a situation in which their irrigated holdings . . . [were] . . . too small to provide a living, while the lands once used in common . . . [became] . . . the private property of persons outside the village." A way of life, unaltered for more than a century, began to change drastically. This change, and the means employed to accomplish it, have bequeathed to the region a bitterness that has survived several generations. This residue includes "a deeply rooted cynicism toward the American legal and political systems and the values on which they are based" as well as a propensity towards violence as the only effective method of favorably tipping the scales of justice.

ADJUDICATION

". . . common action, which is in effect communal action, is quite possible without those who act either possessing, or feeling the need of possessing, any definite status. It is perhaps not too presumptuous to suggest that the very precision with which the lawyer applies his keen analysis of juristic conceptions to remove the misconceptions of the lay mind, is sometimes an obstacle to the understanding of forms of organisation created by the daily routines of men quite unversed in the law."

Tawney, at 160–61

The deletion of Article X left the Treaty of Guadalupe Hidalgo vague.

Noticeably absent were precise standards by which to judge the claims

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200. Ortiz, supra note 86, at 95.
201. Swadesh, supra note 113, at 70.
204. DuMars and Ebright, Problems of Spanish and Mexican Land Grants in the Southwest: Their Origin and Extent, 1 SOUTHWEST REV. OF MGMT. & ECON. 177, 182. Article X of the Treaty provided: "All grants of land made by the Mexican government or by competent authorities . . . shall be respected as valid, to the same extent that the same grants would be valid if the said territories (New Mexico, etc.) had remained within the limits of Mexico." Id. (emphasis in the original).
of the northern New Mexico villagers. As a result, the United States
government was free to create fresh legal mechanisms designed to frus-
trate the claims of the inhabitants and to usher the Anglo-American land
tenure system into the newly acquired territory. The first of these mech-
anisms was the Office of the Surveyor General of New Mexico.

Surveyor General of New Mexico

In 1854 Congress established the Office of the Surveyor General of
New Mexico.\(^\text{205}\) Among its many duties, the office was to determine "the
origin, nature, character, and extent of all claims to land under the laws,
usages, and customs of Spain and Mexico. . . ."\(^\text{206}\) Land titles were to
be considered as Mexico would have viewed them, with previous deci-
sions of the Supreme Court furnishing the guidelines.\(^\text{207}\) Chief Justice
Marshall had previously commented on the property rights of individual
citizens of a conquered nation. Holding that Indians were "discovered"
rather than conquered, the Court nonetheless accepted the general rule
of humanity "that the rights of the conquered to property should remain
unimpaired. . . ."\(^\text{208}\) Thus, by the time Congress had established the
Commission on Spanish and Mexican Grants to settle private land claims
in California,\(^\text{209}\) the Supreme Court had recognized the international doc-
trine of acquired rights and applied this "law of nations" to land grant
adjudication. Simply stated, this doctrine requires that "property rights
acquired by the citizens of the former state (Mexico) must be respected
by the successor state (the United States) . . . [and that] . . . the law of
the former state . . . must be looked to for the validity of the property
right."\(^\text{210}\)

Unlike the land grants in Louisiana and Florida, which were "without

\(^{205}\) 10 Stat. 308 (1854).

\(^{206}\) Id. § 8.

\(^{207}\) LAND TITLE STUDY, supra note 109, at 29. The Surveyor General would submit his re-
commendations to the Secretary of the Interior, who would forward them to Congress. 10 Stat. 308,
§ 8, at 309. If Congress confirmed the grant, a survey and patent would follow. LAND TITLE STUDY,
supra note 109, at 29.

\(^{208}\) Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589 (1823). Ten years later, in a Florida
land grant decision, Marshall elaborated on this concept:

. . . it is very unusual, even in cases of conquest, for the conqueror to do more
than displace the sovereign and assume domination over the country. The modern
usage of nations, which has become law, would be violated; that sense of justice
and of right which is acknowledged and felt by the whole civilized world would be
outraged, if private property should be generally confiscated, and private rights
anulled. The people change their allegiance; their relation to their ancient sovereign
is dissolved; but their relations to each other, and their rights of property, remain
undisturbed.


\(^{209}\) 9 Stat. 631 (1851).

\(^{210}\) DuMars and Ebright, supra note 204, at 182 (citing 1 O'CONNELL, STATE SUCCESSION IN
MUNICIPAL AND INTERNATIONAL LAW 234–50 (1967)).
substantial economic impact,”211 the fourteen million acres claimed in California “not only included the best of the coastal valleys and much of the best land in the Sacramento and San Joaquin Valleys but also the site of practically every city of significant size today.”212 Further, rapidly rising land values, “hordes of immigrants . . . [and] . . . disillusioned gold seekers” undermined the claimants’ interests.213 Nevertheless, the decisions of the California Commission were “relatively fair . . . [as] . . . many community grants were confirmed in their entirety.”214 The petitioners benefited from “the best legal talent in California, and when necessary, in Washington,” while the government officials were “overburdened and poorly paid.”215 The California Commission itself consisted, for the most part, of “lame duck politicians, who were ignorant of both the Spanish language . . . and Mexican law.”216 California claimants were also afforded judicial review of the Commission’s decisions. And, the Supreme Court applied Marshall’s view of the acquired rights doctrine to the Treaty of Guadalupe Hidalgo, ruling that the treaty “was but a formal recognition of the pre-existing sanction of the law of nations.”217 The Court insisted that the statute creating the Commission “be administered in a large and liberal spirit.”218

The Office of Surveyor General was, in some respects, a facsimile of the California Commission. The Surveyor General was instructed to employ a presumption of a valid community grant if there was proof that a town or village existed on the grant in 1846.219 The California Commission had utilized a comparable presumption.220 There were, however, some very important differences between the California Commission and the Surveyor General of New Mexico.

The most glaring disparity was in the procedures manipulated by the Surveyor General. “He acted ex-parte, the claimant merely presenting evidence . . . without challenge or cross examination.”221 The Surveyor General, who was not authorized to confirm or reject claims, only made recommendations to Congress which “was even less well prepared than

211. DuMars and Ebright, supra note 204, at 181.
212. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 115 (1979).
213. Id.
214. DuMars and Ebright, supra note 204, at 184. The authors note that the California Commission confirmed approximately 75% of the acreage claimed (almost 9 million of the 12 million acres claimed were confirmed). In contrast, the Court of Private Land Claims boasted a rejection rate of 94% (of the 34–36 million acres claimed, the Court rejected 32.7 million acres). Id. at 184, n. 12.
215. GATES, supra note 212, at 116.
216. Id.
218. Id.
220. 9 Stat. 631, § 14 (1851).
221. DuMars and Ebright, supra note 204, at 185.
the Surveyor General to determine the validity of Spanish and Mexican grants.”222 There was no opportunity for judicial review. Thus, “due process safeguards of notice and a hearing” were disregarded and the door was left open to fraud and political collusion.223 Additionally, there seemed to be a general belief among villagers that they were not compelled to bring their claims before the Surveyor General. The basis for this sentiment is unclear.224 Those who viewed the Treaty of Guadalupe Hidalgo as self-executing considered their property adequately protected and declined to file claims.225 Others, despite feeling the need to obtain a confirmation, were prohibited by the cost involved.226 There were also inhabitants of communities who had already experienced “American justice” and feared that if they filed evidence of their titles it might be conveniently lost.227

From its inception, the Office of Surveyor General was plagued with insurmountable problems. Among the drawbacks were insufficient funding, unfamiliarity with Spanish and Mexican laws and customs, and the fact that the determination of land grant titles was only one of the many tasks of the Surveyor General.228 Furthermore, villagers with valid claims failed to assert them. As a result, the system invited fraud. Add the presence of a small group of conniving land speculators who understood the deficiencies of the system and were quick to advance even the most questionable claims and the results were inevitable: “[m]any large grants owned by speculators were erroneously confirmed; other grants which should have been confirmed were not . . . [and] . . . some valid grants were confirmed, but to the wrong people.”229

During the years 1856 and 1857 the Surveyor General recommended to Congress the confirmation of several large grants totaling almost 3.4

222. LAND TITLE STUDY, supra note 109, at 30.
223. DuMars and Ebright, supra note 204, at 185.
224. It appears generally accepted that the Act of 1854 did not require New Mexicans with clear and perfect title under the laws of Mexico to bring their claims before the Surveyor General. The non-compelling nature of the Act of 1854 is viewed as one of the major differences between it and the Act of 1851. MORROW, SPANISH AND MEXICAN PRIVATE LAND GRANTS 21 (1923) (citing Ainsa v. New Mexico and Arizona R. R. Co., 175 U.S. 76 (1899)); WESTPHALL, supra note 111, at 97–102.

The Act of 1851 forced all California claimants to present their claims to the Commission. 9 Stat. 631, § 13, (1851); see also, Botiller v. Dominquez, 130 U.S. 238 (1889). It is not as clear that claimants in New Mexico had a choice whether or not to bring their claims before the Surveyor General. Close scrutiny of the Ainsa decision reveals that the Act of 1854 had been repealed by the Act of 1891, establishing the Court of Private Land Claims. Therefore, the Court found it unnecessary to decide whether, under the Act of 1854, one could claim title to land based on clear and perfect title under Mexican law, without bringing their claim before the Surveyor General.
225. LAND TITLE STUDY, supra note 109, at 29.
226. Id. at 29.
227. Id.
228. Id.
229. DuMars and Ebright, supra note 204, at 185, n. 15.
million acres.\textsuperscript{230} Congress confirmed these grants on June 21, 1860.\textsuperscript{231} The validation of these large grants triggered a frenzy of activity among land speculators in the New Mexican territory. Soon, anticipating enormous profits, the Surveyor General became "aligned [with] . . . the Santa Fe Ring, a group of 'ambitious, unscrupulous Anglo lawyers who regarded the confused legal status of the land grants as an ideal opportunity for adding money and land to their personal assets.'"\textsuperscript{232} Dr. T. Rush Spencer (1869–72), James K. Proudfit (1872–76) and Henry M. Atkinson (1876–84) were especially suspect. Each nurtured the special interests of the speculators and none appeared to have any trouble consolidating private business interests with his duties as Surveyor General.\textsuperscript{233}

The reaction of Congress, though not swift, was extreme. After 1879 it simply refused to confirm any additional grants.\textsuperscript{234} And, at long last, a man who "could not be bought at any price"\textsuperscript{235} assumed the position of Surveyor General. Perhaps he had labored too many years as "a good government man,"\textsuperscript{236} or perhaps this crusty seventy-year-old politician became obsessed with his mission, but George Julian arrived in New Mexico in 1885 with a host of prejudices. Julian viewed himself as a Saviour, appointed by President Cleveland to rescue the sanctified public domain from "wholesale plunder."\textsuperscript{237} The conflict, as he saw it, was between the "organized roguery that [had] so long afflicted New Mexico"\textsuperscript{238} and the United States government. Suddenly the territory was vacuous. Villages and their inhabitants ceased to exist. To aid its development, Julian prophesied, New Mexico would experience the "influx of an intelligent and enterprising population."\textsuperscript{239} Only then would a "temple of civilization . . . be reared upon the ruins of the past."\textsuperscript{240}

While the appointment of George Julian, along with the backlash in Congress, appeared to have halted the "grinding oligarchy of land sharks,"\textsuperscript{241} the assertion of valid claims was also arrested. Moreover, any prospect of communities retaining communal lands ended. Julian arbitrarily abol-

\textsuperscript{230}The grants and the approximate acreage confirmed were: Tierra Amarilla, 600,000 acres; Beaubien and Miranda (Maxwell), 1.7 million acres; Vigil and St. Vrain (Las Animas), 100,000 acres; and Sangre de Cristo, 1 million acres. Stoller, supra note 16, at 26, chart 1.

\textsuperscript{231}12 Stat. 71 (1860).

\textsuperscript{232}LAND TITLE STUDY, supra note 99, at 31 quoting LARSON, NEW MEXICO'S QUEST FOR STATEHOOD, 1846–1912 157 (1968); see also WESTPHALL, supra note 111, at 98–105.

\textsuperscript{233}WESTPHALL, supra note 111, at 98–103.

\textsuperscript{234}LAND TITLE STUDY, supra note 109, at 30.

\textsuperscript{235}Id. at 33 quoting WESTPHALL, THE PUBLIC DOMAIN IN NEW MEXICO, 1854–1891 33 (1965).

\textsuperscript{236}LAND TITLE STUDY, supra note 109, at 33 (quoting WESTPHALL, THE PUBLIC DOMAIN IN NEW MEXICO, 1854–1891 33 (1965)).

\textsuperscript{237}Julian, Land-Stealing in New Mexico, 145 NORTH AMERICAN REVIEW 17, 18 (1887).

\textsuperscript{238}Id. at 31.

\textsuperscript{239}Id.

\textsuperscript{240}Id.

\textsuperscript{241}Id. at 29.
ished the presumption favoring a valid grant if a town or a village existed within the grant in 1846.\textsuperscript{242} Also, the suggestion that the previous sovereign retained title to the communal property of the land grants surfaced during Julian’s tenure as Surveyor General.\textsuperscript{243} This concept was later accepted by the Supreme Court in Sandoval.\textsuperscript{244}

A tally of the land grant claims resolved by the Office of Surveyor General is revealing. From 1854 to 1885, 194 claims were submitted. Of these, 136 were approved, 8 were rejected and 50 were not acted upon. Of the 136 claims recommended by the Surveyor General for confirmation, only 47 were eventually patented by Congress. Perhaps even more significantly, the overwhelming majority of the more than 9 million acres of land patented by Congress were recommended by the Surveyor General before 1861.\textsuperscript{245} The bulk of this land was patented not to communities, but to private individuals—land speculators—those with "money enough to go to Washington, organize a lobby, fight or buy off bloodsuckers and wield sufficient influence to get a bill through congress for such purpose."\textsuperscript{246}

\textbf{Court of Private Land Claims}

Dissatisfaction with the operation of the Office of Surveyor General was widespread. Several bills before Congress in the late 1880s would have vested jurisdiction for land grant disputes in federal district courts.\textsuperscript{247} A preeminent concern of the sponsors was to remove jurisdiction from the Office of Surveyor General and test land grant titles "in an adversary proceeding before a court of law."\textsuperscript{248} Congress also sought to compel land grant claimants to present their claims within a specified period, thus ending the government’s involvement in land grant disputes.\textsuperscript{249}

These bills sparked numerous Congressional debates. The requirements of the due process clause of the 5th Amendment regarding notice to land grant claimants concerned some Senators.\textsuperscript{250} Critics also charged that a lengthy and expensive confirmation procedure would violate the Treaty

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\textsuperscript{242} Ebright, \textit{supra} note 15, at 8–10.
\textsuperscript{243} \textit{Id.} at 9.
\textsuperscript{244} United States v. Sandoval, 167 US. 278 (1897); see \textit{infra} text accompanying notes 283–301.
\textsuperscript{245} Westphall, \textit{supra} note 111, at 133–134. Of the 9,019,024 acres of land confirmed by Congress, 8,806,356 were confirmed upon the recommendation of either William Pelham (1854–1860) or his successor, Alexander Wilbur (1860–1861). \textit{Id.}
\textsuperscript{246} Stone, \textit{Report on the Court of Private Land Claims}, Minutes of the New Mexico Bar Association, 18th Annual Sess. (1904), at 7.
\textsuperscript{247} \textit{Land Title Study, supra} note 109, at 36.
\textsuperscript{248} \textit{Id.}
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} 15 \textit{Cong. Rec.} 952–953 (1884) (Remarks of Senator Lapham); 15 \textit{Cong. Rec.} 990 (1884) (Remarks of Senator Bowen) (both cited in \textit{Land Title Study, supra} note 109, at 37).
of Guadalupe Hidalgo.\textsuperscript{251} Senator Plumb predicted that claimants would find themselves "wiped out [by] the payment of lawyers fees."\textsuperscript{252} Supporters of the proposals argued that the notice was sufficient "considering that land claims had been pending for a long time, and grantees were familiar with the necessity of obtaining confirmation."\textsuperscript{253} Advocates also focused on the need for an adversary procedure to protect the interests of the United States.

Others entered the debate. In his State of the Union address of 1889, President Harrison urged Congress to provide a suitable forum for the adjudication of land grant disputes.\textsuperscript{254} In 1890 a delegation from New Mexico visited the nation's capitol requesting the creation of a land court.\textsuperscript{255} Not surprisingly, the discussion prompted the Mexican government to remind President Harrison of the United States' promise to protect the property rights of former Mexican citizens who chose to remain in the New Mexico territory.\textsuperscript{256}

Congress finally yielded to the pressure and created the Court of Private Land Claims on March 3, 1891—the last day of the final session of the Fifty-First Congress. A court consisting of five judges would provide a forum for an adversary proceeding.\textsuperscript{257} The decisions of the court could be appealed to the Supreme Court.\textsuperscript{258} An attorney would be appointed to represent the interests of the United States.\textsuperscript{259} The Act also set a limitations period of two years within which all claims not already "complete and perfect" had to be filed.\textsuperscript{260}

The Court of Private Land Claims was assembled on July 1, 1891 and, despite the objections of the New Mexico Bar Association,\textsuperscript{261} continued

\textsuperscript{251} 15 CONG. REC. 854 (1884) (Remarks of Senator Hawley)(cited in LAND TITLE STUDY, supra note 109, at 36).
\textsuperscript{252} 15 CONG. REC. 770 (1884) quoted in LAND TITLE STUDY, supra note 109, at 36.
\textsuperscript{253} LAND TITLE STUDY, supra note 109, at 37.
\textsuperscript{254} WESTPHALL, supra note 111, at 239.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Act of March 3, 1891, 26 Stat. 854, § 1.
\textsuperscript{258} Id. §9.
\textsuperscript{259} Id. §2.
\textsuperscript{260} Id. §12.
\textsuperscript{261} By order of the Executive Committee of the New Mexico Bar a special meeting of the Association was convened on November 30, 1891. On the motion of Thomas Catron a committee of five was created, Catron among them, "to prepare and report amendments" to the Act and to "memorialize Congress on the subject."

The Association re-assembled the next day. In addition to seventeen members of the Association, judges and officers of the Court of Private Land Claims attended the meeting. It appears that Mr. Catron led the charge—moving that the Act of 1891 be read section by section and that amendments to each section be suggested by the Association.

The Association completed its work the following day. Catron moved "that Congress be respectfully, but earnestly, urged to consider and pass into law the amendments to the Private Land Court act suggested by the Association as speedily as possible." The Association passed the motion
to adjudicate land grant claims until 1904. The thirteen year history of the court remains controversial. There can be no doubt, however, about who benefitted from the decisions of the court. The Court of Private Land Claims considered over 300 claims embracing almost 36,000,000 acres of land. The court rejected 94% of the claimed acreage—close to 33,000,000 acres. Among the claims totally rejected were the Bartolome Baca grant (500,000 acres) and the Gervacio Nolan grant (275,000 acres). Also, the size of many confirmed grants was diminished significantly. The resultant "reversion to the public domain of the general government of more than 30,000,000 acres" was one of the court's major accomplishments, concluded one of the five justices—"... like [a] new cession of country to the United States—a region illimitable in the undeveloped wealth of its coal, metals, agriculture and health-giving climate." Notably absent from Judge Stone's report is the effect of the court's decisions on the inhabitants of the territory.

The Court of Private Land Claims provided the forum for the United States government to complete the conquest of the New Mexico territory. There are several factors which contributed to the government's success. Primarily, the Act of 1891 contained several subtle, but extremely important, deviations from previous legislation concerning the adjudication of land grant claims. These distinctions, along with the interpretation given them by the Supreme Court, provided the government with an overwhelming advantage. Additionally, the foundation of the adversary system of justice—"a basic equality between the opposing sides attempting to prove their case"—was toppled when Matthew Reynolds was appointed United States' attorney for the Court of Private Land Claims. Reynolds, "a lawyer of splendid ability," was furnished with "an unanimously and a committee of five was appointed to journey to Washington to present the recommendations to the House of Representatives and the Senate. Not surprisingly, Catron's name headed the list. Minutes of the New Mexico Bar Association, Seventh Annual Sess. (1882), at 9–54.

Considering the interests that New Mexican attorneys, especially Catron, had in the adjudication of land grant claims, the recommendations are interesting and they need to be studied in detail. Briefly, the recommendations favored land grant claimants. It should be noted that in land grant litigation the attorney's fee usually included title to a portion of the grant. It is estimated that Catron himself owned two million acres of land including an interest in as many as seventy-five different Spanish and Mexican land grants. LAND TITLE STUDY, supra note 109, at 31.

263. Id. at 15.
264. Id. at 18.
265. Id. Included in this category are the San Miguel del Bado Grant where the Court rejected over 310,000 of the 315,000 acres claimed; the Ignacio Chavez Grant where the Court confirmed only 4,000 of the 148,00 acres claimed. LAND TITLE STUDY, supra note 109, at 228–229 (Appendix E).
266. Stone, supra note 246, at 26.
268. COAN, HISTORY OF NEW MEXICO 475 (1975), quoted in LAND TITLE STUDY, supra note 109, at 34.
arsenal of technicalities . . . several procedural advantages . . . [and] . . . an unbeatable team of experts to assist him in fashioning a defense to each claim.'"269 Land grant claimants, with few assets save their now clouded titles, could not match Reynolds' artillery.

The statute creating the Court of Private Land Claims differed significantly from the 1851 Act and the 1854 legislation establishing the Office of Surveyor General. The 1891 Act left no room for the presumption which favored many California claimants—that of the validity of a grant on the basis of the presence of a town or village. Absent in the 1891 statute was any reference to the "laws, usages and customs" of Spain and Mexico. In addition, the Act of 1891 limited the size of any grant to eleven square leagues.270 Each of these distinctions had its effect on individual claims, "[b]ut perhaps of most significance was the cumulative effect . . . upon judicial attitude toward land grant questions. . . ."271

A series of Supreme Court decisions manifested this attitude and increased the burden of land grant claimants. In 1897 Justice White noted that the general requirements of the 1891 statute, as well as the differences between it and the 1851 Act, "accentuates the intention of Congress to confine the authority conferred by [the 1891 statute] to narrower limits than those fixed by the Act of 1851. terminology.272 The Court interpreted Section 13 of the Act of 1891 as controlling.273 Thus, claims had to be "complete and perfect" in order to be confirmed. And the Court, interpreting this phrase very strictly in subsequent decisions, inquired into whether the official who made the grant had the authority to do so, whether the grant had been submitted to the departmental assembly as required by the Mexican colonization laws, and whether the conditions of the grant had been met.274

The "controlling nature" of Section 13 furnished still another obstacle for land grant claimants. This interpretation enabled both the Court of Private Land Claims and the Supreme Court to avoid express language in the 1891 statute which instructed that the validity of a title be determined "according to the law of nations, the stipulations of the treaty [of Guadalupe Hidalgo] . . . and the laws and ordinances of the Government from which it is alleged to have been derived."275 In the eyes of the courts, "insofar as treaties, international law and prior federal decisions were sources of authority in land grant litigation, they were subordinate in importance to the [1891] statute itself, particularly the restrictive provisions of Section 13."276

269. Ebright, supra note 267, at 78.
271. LAND TITLE STUDY, supra note 109, at 41.
273. Id. at 714.
274. LAND TITLE STUDY, supra note 109, at 40–41.
276. LAND TITLE STUDY, supra, note 109, at 41.
If the judicial interpretation of the 1891 statute did not make a just and fair proceeding next to impossible, the "arsenal" of the United States' Attorney certainly did. Reynolds had at his disposal two very valuable associates, Will M. Tipton and Henry O. Flipper. Tipton's sixteen years of experience as custodian of the Spanish and Mexican archives in the Office of Surveyor General made him an expert in the field.\(^{277}\) This expertise gave him a distinct advantage over attorneys representing land grant claimants. Flipper researched and wrote *Spanish and Mexican Land Laws*, a compilation of laws published in 1895 under Reynolds' name.\(^ {278}\) The book contains "a substantial bias, both in the selection of the laws included and in the summary of those laws in the prefatory 'historical sketch.'\(^ {279}\) Nevertheless, "the courts accepted Reynolds' book as the definitive statement of Spanish and Mexican law [and] adopted these biases, giving the government another substantial edge over land-grant claimants."\(^ {280}\) Reynolds and his book were instrumental in convincing the Supreme Court to accept the theory that the title to the common lands was held by the previous sovereign.\(^ {281}\) The theory has enjoyed general acceptance among historians and legal scholars.\(^ {282}\)

**CONCLUSION**

Communal lands were an integral and indispensible component of the land tenure structure and subsistence economy which developed in the Hispanic villages of northern New Mexico and southern Colorado. The obstacle that these communities placed in the path of Manifest Destiny was removed in 1897 when the Supreme Court ruled that, under Spanish and Mexican law, the sovereign, not the villages, retained title to the common lands.\(^ {283}\) That case, *United States v. Sandoval*, involved the San Miguel del Vado Grant in northern New Mexico.\(^ {284}\)

\(^{277}\) Ebright, *supra* note 267, at 79.
\(^{278}\) *Id.*
\(^{279}\) *Id.*
\(^{280}\) *Id.*
\(^{281}\) See *United States v. Santa Fe*, 165 U.S. 675 (1897); *United States v. Sandoval*, 167 U.S. 278 (1897).
\(^{283}\) *United States v. Sandoval*, 167 U.S. 278 (1897).
\(^{284}\) On November 25, 1794 Fernando Chacon, the civil and military governor of the kingdom of New Mexico, granted what became known as the San Miguel del Vado Grant to Lorenzo Marquez and fifty-one other heads of families. The following day, in accordance with Chacon's orders, Antonio Jose Ortiz, the principal alcalde of Santa Fe, placed Marquez and his companions in possession of the land to be held "in common, not only in regard to themselves, but also to all settlers who may join them in the future." Transcript of Private Land Claim Reported No. 119 in the Name of Lorenzo Marquez, Known as the San Miguel del Vado Tract, in San Miguel County, New Mexico, Ex. Doc. No. 63, 46th Congress, 3rd Session, at 72–87 published in PRIVATE LAND CLAIMS, Vol. 11, 1874–
The Court of Private Land Claims had previously confirmed the 315,300 acre San Miguel del Vado Grant to the heirs and legal representatives of Lorenzo Marquez and fifty-one co-grantees. 

The Court, through Justice Fuller, stated that the "object of making this grant . . . was that this land . . . be possessed and enjoyed in common by all who might choose to settle thereon." However, Matthew Reynolds, Attorney for the United States, pressing the theory that the sovereign held the title to any communal lands, appealed the case to the Supreme Court. The Court ac-
cepted Reynolds argument citing as its primary authority the recently decided *Santa Fe v. United States*. 288

*Santa Fe* involved an issue quite different from the question raised in Sandoval. The *Santa Fe* claimants had convinced the Court of Private Land Claims that, by operation of law, every Spanish town received vested title to four square leagues of land. 289 The Supreme Court, finding no basis for this proposition in either the Spanish law or the history of the community of Santa Fe, reversed. 290 The Court recognized the Spanish Crown’s authority to grant lands both to individuals and, for the purposes of settlement, to colonies and contractors. 291 The quantity of land granted “varied with the conditions of the respective settlements.” 292 Therefore, the court reasoned, to imply that every town was automatically granted four square leagues “would be to suppose that every settlement was alike, whilst the law itself contemplated that they would be different and subject to different allowances.” 293 The Court examined the history of Santa Fe and concluded that the town’s creation was “the outcome and development of the success of the Spanish arms, rather than the exercise of the power to induce settlements. . . .” 294 Logically, the Crown had no reason to grant the town communal lands, *proprio vigore* or otherwise. 295 Three additional facts influenced the *Santa Fe* Court. First, the claim to the four square leagues included “no proof of a single act of ownership.” 296 Second, “practically every foot” of the area claimed by the town had been granted to other individuals. 297 Finally, the city itself had petitioned the Crown, in 1715, for land within the area it now claimed was included in the original grant—which was made prior to 1680. 298

The *Sandoval* Court, although recognizing that *Santa Fe* resolved an issue not raised in *Sandoval*, declared that the disposition of the two cases “involved the same considerations” and deemed the “reasoning and conclusions” of *Santa Fe* “decisive.” 299 Clearly, Chief Justice Fuller did not

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288. 165 U.S. 675. *Santa Fe* was decided March 1, 1897. The Supreme Court heard arguments in *Sandoval* on March 9 and 10 of the same year and published the opinion in May 1897. Matthew Reynolds was the attorney for the government in both cases. Also, the *Santa Fe* Court cited Reynolds’ book *SPANISH AND MEXICAN LAND LAWS*. *Id.* at 684–85; see *supra* text accompanying notes 278–281.

289. 165 U.S. 675, 675–89. The four square league area was measured from the center of the town’s plaza. *Id.*

290. *Id.*

291. *Id.* at 689.

292. *Id.* at 690.

293. *Id.*

294. *Id.* at 691. The original settlers of Santa Fe were deserters from the Spanish army who, in 1543, refused to accompany Coronado on his return to Mexico. *Id.* at 676.

295. *Id.* at 691–92.

296. *Id.* at 714.

297. *Id.*

298. *Id.* at 691–92.

follow his own mandate. The reasoning of *Santa Fe* demanded that the grant be confirmed to Lorenzo Marquez and his companions: Settlement was the express purpose of the San Miguel del Vado Grant and the claimants had been in possession of the land for almost one hundred years. Instead, the Court relied on dicta in *Santa Fe* asserting that even if the Crown had granted four square leagues to a village, the interest the town acquired was “far from being an indefeasible estate such as is known to our laws.” Several excerpts from comments on Spanish law, two of which were also cited in *Santa Fe*, support Justice Fuller’s view. However, the Court analyzed the passages singularly and ahistorically without considering the nuances of translation and the backdrop of history.

Subsequent land grant litigation has followed *Sandoval*, ignoring, as did Chief Justice Fuller, conflicting historical authority. Clearly, the

300. See supra note 284.
301. United States v. Sandoval, at 297 (citing United States v. Santa Fe, at 713); see also Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 373–74 (1868); Townsend v. Greeley, 72 U.S. (5 Wall.) 326, 336 (1867). The origin of this passage appears to be Justice Field’s opinion in *Townsend*. In *Townsend* the Supreme Court ruled that the four square leagues granted to San Francisco was held in trust, by the city, for its inhabitants. Searching for the nature of the right in the land under Spanish law Justice Field stated:

> It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted . . . to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. This right of disposition and use was, in all particulars, subject to the control of the government of the country.

*Townsend v. Greeley*, at 336. Justice Field’s sentiment concerning the nature of the villages’ right in communal lands is certainly arguable. He recognized that common lands did not fit neatly into one of the categories created by the American legal system. However, he apparently confused the government’s jurisdiction over communal lands with ownership of them. Notwithstanding his error, if the holding of *Townsend* had governed the disposition of the San Miguel del Vado Grant, the common lands would have been confirmed to the several villages on the grant, to be held in trust for their inhabitants.

The case of *Hart v. Barnett*, relied on in *Townsend*, discussed the nature of the pueblos’ right in municipal lands after an extensive consideration of the subject. 20 Cal. Rep. 530 (1860). The California Supreme Court stated “that pueblos held the direct dominion of these lands, subject to certain trusts and uses.” *Id.* at 557. The villages had “such a right and interest in their lands within their limits that they could distribute, concede, or grant them in lots to individual settlers, subject in this as in all other matters to the instructions and orders which might be given them by the superior authorities.” *Id.* at 558. The *Hart* court continued:

> . . . we are of the opinion that Spanish and Mexican towns had, under the general laws, such a right and title to land within their limits as will enable and require the courts to protect them, and those holding under them, in the enjoyment of those lands.

*Id.* at 562.
Spanish and Mexican governments granted land in northern New Mexico and southern Colorado primarily to induce settlement and thereby validate their claim to sovereignty over the region. Both governments made the grants following the Spanish tradition developed during the Reconquest of Castile. Thus, the Spanish land tenure structure was transplanted in the Americas. Publicly-owned lands were a vital element of this structure, providing the villages with a durable economic foundation. The Spanish laws concerning colonization were versatile, allowing the villages to adapt to the physical geography of the region and the conditions of the frontier. The native Mexican land tenure system, also sustained by public ownership of land, provided a model. Gradually, sanctioned by Spanish laws and policies, the villages adopted many of the features of the system that had developed in native Mexico. The Spanish ejido took on the appearance of the native alteptalli. Isolated outposts appeared on the frontier, autonomous, independent villages controlled by kinship groups. The mountain villages required more extensive ejidos. And the Spanish tradition, which had always provided settlements with all the requisite ecosystems, responded. The Mexican authorities tendered more substantial grants, and protected their border at the same time. A subsistence economy developed along with a culture peculiar to the region.

Land grant litigation has ignored this history as well as the internationally accepted doctrine of acquired rights and American principles of due process and fairness. Both Congress and the Supreme Court have played major roles—"two branches of a powerful government flouting the law—as well as human dignity." Perhaps it was inevitable. Manifest Destiny and the vision of a unified, homogeneous nation infatuated the United States. The even more powerful dream of dollars and power propelled politicians, attorneys and land speculators. But, land is more than mere property. Our use of the earth beneath us is but an extension of the way we live, how we relate to each other and to the world around us. And, culture dies slowly. Thus, the finality so long sought in land grant disputes is yet to be realized. Clouded titles, controversy, and litigation continue to plague the region that was, not too many years ago, the New Mexico territory.

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305. WESTPHALL, supra note 111, at 61.