Persistence and Disintegration: New Mexico's Community Land Grants in Historical Perspective

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The experience of land grants across New Mexico is extremely heterogeneous and extremely difficult to generalize. And so a synthesis, which is my task today, necessarily requires simplification. And whenever you simplify, you always get someone upset. So I plan to get a few people upset.

My presentation takes a long view. I want to talk about trends in the survival and mortality of community land grants and make an attempt to identify some of the most proximate causes for that survival or mortality. I am going to be using the Government Accounting Office’s 2004 (GAO Report) definition of a community land grant, even though we have heard some discussion about the controversial nature of that definition. The GAO Report defines community land grants fairly broadly and loosely, based on the presence of community land in a grant, as opposed to a narrower approach which would focus on the legal history of that particular land grant.

Using the GAO definition, about 20 percent of the community land grants in New Mexico still survive after 160 years. And that is really an extraordinary result, when you think about it. They have survived daunting odds. I am not going to spend much time cataloging the long list of those odds, as we have already heard about many of them during today’s other presentations, but I will provide a brief overview and summary.

Survival, of course, does not mean retaining most of the acreage. In fact, the vast majority of land grants have lost a substantial amount of acreage, but that is different from survival itself.
Today, 160 years after the Treaty of Guadalupe Hidalgo, 104 years after the Court of Private Land Claims (CPLC) closed-up shop, we have about 20 land grants that are political subdivisions of the State of New Mexico. We have another five that are political entities as a result of state statute; examples are Las Vegas and Manzano. We have another 11 or so that continue to exist but are unorganized. They do not have the same status as the other ones I just identified, but their communities still maintain a tradition of thinking of themselves as community land grants and participating in activities as community land grants.

Since 2003, we have had an interim land grant committee in New Mexico that has done extraordinary work. The legislation that the committee passed establishing political subdivision status for land grants has really made an important difference in terms of sustaining the longevity of these land grants, and expanding the opportunities for them to organize and leverage outside resources in order to advance their causes.

We all know that land grants have a painful past, but they also have a future. That is one of the points I want to underscore. This is an institution for which perhaps epitaphs have been written too many times, but rumors of their death have been greatly exaggerated, as Mark Twain might put it. There is still a lot of work to do, but clearly, land grants are here to stay.

Now I want to identify some of the sources of disintegration and land loss, because that is one of the themes of my presentation. These are obvious points, and many of them were discussed in depth during today’s presentations, so I will provide only a quick summary of highlights. My goal in summarizing them is to begin a discussion about the relative weight of these different factors.

I want to begin with the Treaty of Guadalupe Hidalgo itself. An initial source of the disintegration of community land grants, as was discussed earlier, was the fact that Article 10 was not included in the ratified Treaty. Article 10 would have protected all grants that were valid under Mexican law. The Querétaro Protocol, which stated that the United States would recognize legitimate grants, was a corrective, but the deletion of Article 10 had an impact from the very beginning with respect to how land grants would be treated, how they would be considered by Congress, and how they would be interpreted in subsequent litigation.

A second point is the adjudication process. Many of today’s presentations have focused on this, from the Surveyors General to the CPLC. One obvious factor that contributed enormously to the disintegration of land grants was the very long period of time over which the adjudication process took place: from 1854 to 1904, an entire half-century. During those 50 years, documents were lost, witnesses died. Land was sold and divided while it was in the process of being adjudicated. Clearly, when a process takes that long, it is extremely difficult for it to meet the standards of
fairness that anybody would desire, independently of whether or not you agree with the result.

At the same time, during that period there was a sharpening bias in favor of incorporating lands into the U.S. public domain and rejecting common lands in land grants. The standards by which community grants were judged and evaluated grew progressively narrower between the time of the decisions of the Surveyors General in the 1850s, 1860s, and 1870s, to the CPLC, and finally, of course, concluding with the Supreme Court decision in *United States v. Sandoval.*

Another set of factors that led to the disintegration of many community land grants is what I would call the socio-political context, or the colonial administration of New Mexico as a Territory. We had different legal systems at work here. The differences between Spanish and Mexican civil law on the one hand, and Anglo common law on the other, and the failure to recognize or reconcile those differences, obviously had an enormous impact in terms of how the adjudication process unfolded. So even with the best of intentions, and even under ideal circumstances, it would have been extremely difficult to handle the adjudication of New Mexico’s land grants in a way that would have satisfied everyone.

We must also consider another factor that is equally obvious, but important to underscore: this process was applied to a population that was universally Spanish-speaking, the vast majority of whom could not read or write.

In my own case, for example, my grandparents went only as far as the first grade in Carnué, although one of my grandfathers eventually taught himself how to read in Spanish. You can do that in Spanish; it is a lot harder to do in English, since Spanish is written as it sounds, while English is not. My grandparents were born between 1896 and 1903. So that generation in New Mexico did not have much education, and to the extent that they did, it was usually one or two years at the most. Then imagine the educational background and context of the previous generation, the one that had to present documents before the CPLC and the Surveyors General.

A final source of disintegration was the economic growth of the state, which took place in the context of a population that was land rich and cash poor. This is a structural condition that had enormous consequences for the way things unfolded. The payment of legal and surveying fees was done with land, and by today’s standards, those payments were exorbitant.

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2. 167 U.S. 278 (1897) (holding that the common lands of community land grants had belonged to the governments of Spain and Mexico, not the communities themselves, and that title had therefore passed from the Mexican government to the U.S. government under the Treaty of Guadalupe Hidalgo).
Although today we would welcome economic growth, imagine a situation where you were engaged in subsistence farming, and had very little in the way of monetary income. Rising land values, as other property owners came around and established industry and commerce of various kinds, would mean that property taxes would also rise. And if you did not have a monetary income of any significance, that would have enormous consequences. We all know stories of people who lost parts of their land, and land grants, as a result of having to pay property taxes.

Moreover, that kind of economic growth combined with rising land values created an incentive to sell. That is another factor that is important here. Over time, people became less land rich, but they did not necessarily become more cash rich. There was the loss of land both before and after the confirmation of land grants. And of course there were the land swindlers, who played a prominent role in breaking apart community land grants.

All of these sources of land loss and the disintegration of community land grants have been the subject of much analysis, both during today’s presentations and in past decades. Far less attention has been placed upon the sources of persistence—how and why community land grants have persisted over such a long period of time—and that is what I want to focus on for the remainder of my presentation.

I would like to start by underscoring the importance of leadership and initiative by land grant heirs. Notwithstanding the extraordinary limitations of language, lack of education, and the other negative structural conditions they faced, throughout the nineteenth century heirs fought the adverse results that they obtained, and they were persistent. The long list of cases where people continued to bring claims, continued to submit documentation, continued to argue their cases, is really quite extraordinary. It is a remarkable history that I believe needs to be documented more fully.

When we turn to the twentieth century, and we look at the time period after the CPLC, the land grant leadership at that time was basically boards of trustees or their equivalents, who acted as stewards of the land in the context of the expanding economic growth that created the increasingly adverse conditions I mentioned earlier, such as property taxes.

But there were also other factors at work. The impact of the Alianza (Alianza Federal de Mercedes) in the 1960s and 1970s goes way beyond the specific set of events usually associated with it. That movement attracted the attention of many people, and it galvanized land grant heirs. I still remember my grandfather talking about Reies López Tijerina. He said, “This guy may be a Texan, but he’s doing things to defend our lands.” At that time, when he was talking about this, I was a teenager and I really did not understand much of what he was talking about. But I was struck, as I thought about it and reflected upon it years later, by just how deeply that movement affected a wide range of people and institutions, and how it catalyzed the next generation of leaders.
Subsequent to that, there was a wave of new organizational efforts, the creation of organizations, the creation of groups, and an amazing number of trips to Washington by all sorts of folks, some of whom are still alive today to talk about their efforts to get Congress to pay attention to the issues that land grants faced. And, of course, there were the efforts in the 1990s that led to the request by our congressional delegation for the GAO Report.

In the first decade of the twenty-first century, the New Mexico Legislature has played a crucial role, as I mentioned earlier, with respect to establishing political subdivision status for community land grants. They have also made progress toward protecting the remaining common lands by setting up procedures that require land grants to go before a judge before they can alienate common lands from the grant.

The second set of factors among the sources of persistence, explaining why land grants were able to survive in such adverse conditions and for such a long time, is culture and values. The oral traditions, passed down from one generation to the next, about events that occurred before, is really fundamental. Without that, very few land grants would have survived. In the absence of any ability to read or write, those oral traditions, the ability of people to come together, is crucial.

There is a book by Robert Putnam (he does not write on land grants), *Bowling Alone*3 where he talks about how Americans are increasingly isolated and not as involved in organizations as they used to be, and that pretty much describes us today. But 50 years ago, 75 years ago, 100 years ago, in these communities there was an extraordinarily vibrant social life that facilitated the transmission of information through oral traditions.

Another point that I did not hear mentioned during earlier presentations is that, for the vast majority of land grant heirs, land was not a commodity. Certainly the common lands of land grants were not. People had individual parcels, and they understood those to be land that was bought and sold. But the notion that there was a portion of the land that would be out of reach—land that was not a commodity, not something to be placed in the market— was almost a universal attitude. And that attitude is something that is fundamentally different, in both cultural and legal terms, between the Spanish and Mexican traditions in New Mexico and the system introduced by the United States after 1848. It is a structural condition that greatly affected the history and survival of community land grants, and that continues to influence the situation that we deal with today.

So this was a population that did not see land as a commodity, and therefore did not see it as something to invest in, nor something that property taxes would be attached to, nor something on which certain kinds of individual profit-making activities would occur. Instead, land was very much attached to one’s individual and community identity. There was a sense of place.

This is perhaps an anecdote, and I hope you’ll indulge me, but I am from the Cañón de Carnué Land Grant, which is just east of here. It is about 13 miles from where we are right now at the law school. At least, that is where the western boundary is—the eastern boundary has yet to be negotiated with the GAO.

In that community in which I grew up, there is a name for every corner, and for every nook and cranny of the land. I discovered to my amazement at about age 10 that the three- or four-acre area where I grew up is called “nicanora.” I was sure my mother was making this up until about 20 years later, when I dug through some petitioner documents and found the last will and testament of Jose de Antonio Garcia, and sure enough, he mentions nicanora. I do not know if the area he referred to coincides with what my mother had in mind, but this is part of that oral tradition that I mentioned earlier.

And such a system of names makes sense—if you have ever been out to Carnué, you know there is a surplus of rocks and a deficit of anything that grows. And the community, in this particular case, was engaged in goat herding. If you are out there, working as a goat herder, running after goats, it is not hard to hurt yourself. If somebody got hurt, and you needed to get help, you needed to be able to say, “You go down by where Eliseo lives, and then up the road, and you turn left by that tree that’s no longer there, and then behind that rock that’s split, you know, with the lightning rod, and it’s a few hundred feet from the beginning of El Coyote.”

That kind of description is not the kind of description that would be consistent with the way we think of land in the twentieth century. But it is very much part of that culture. And I would argue, it is an indigenous culture. It is a group of people who have lived there for generations, who have a sense of place, and who have a sense that this land means something far more than just a commodity that you buy and sell and transfer with a piece of paper.

I believe that this cultural context helps account for the deeply held emotions, for the passion that this issue continues to raise, and for the behavior of land grant heirs that does not seem to fit that of a “rational utility maximizer.” They come from a different context, from a completely different set of cultural norms.

The bottom line is that, without those values, the community land grants would not exist today. Without those values, the community land grants would have been sold a long time ago. Perhaps the people might
have been better off financially, they might be living in Irvine, California, or someplace, but would the land grant communities still exist, and would people still have a sense of identity and still be fighting for them today? I believe they would not. Not without those particular values. This is something that I believe is extremely important and is too often omitted from our discussions about land grants and their persistence in the face of incredible challenges.

Finally, I want to build on a point mentioned earlier by Professor David Correia, when he discussed the importance of the railroads and transportation, and that is the relative isolation of most of New Mexico’s land grants. The vast majority of land grants in the state are isolated from transportation networks. For example, to get to Chilili from Albuquerque—well, Chilili is really a long way away. Torreon, Anton Chico, all of these places are quite distant from major transportation networks, and that isolation has contributed to their persistence over time. Because if they had been in the right-of-way of a railroad, they certainly would not be here today.

A recent example is that Interstate 40 now goes through Carnué. Carnué fought the construction of I-40 tooth-and-nail and lost; I do not know how many acres we lost in the Cañón de Carnué due to the construction of I-40 on top of U.S. Route 66, which cut right through the canyon years earlier. But distance from these kinds of major transportation networks makes a huge difference in terms of the ability of a grant to persist. Structural socio-economic factors make an enormous difference.

Now I want to turn to a final set of factors that, depending upon their context, may either hinder or promote land loss. As such, these are not as easy to classify as either conditions that promote disintegration or that promote persistence of land grants. These are factors like demography.

Let’s start with population, and population change. Compared to elsewhere in the West, American settlers were slow to arrive in the New Mexico Territory. This was quite unlike, for example, California, which had 100,000 people arrive in one year, 1849, due to the gold rush, or Texas, which had a huge influx of people from the South in response to Mexico’s liberal immigration policy during the 1820s. New Mexico simply attracted fewer people. I lived in north Texas for a while, and I reminded my colleagues there that the entire state of New Mexico has a smaller population than the city of Fort Worth. That tells you something about context in terms of population growth—and that is today, not the nineteenth century.

While we are on the subject of demography, New Mexico has also experienced a huge out-migration from the land grants themselves. I am a case in point. I left when I graduated from high school. I went to college on the East Coast. Thirty-seven years after having moved away, I am back here, and I feel like I won the lottery to have been able to come home, and
to have a faculty position at the University of New Mexico. But that is not something that most people have the opportunity to do. Most people move away from this state, acquire professional skills and occupations, and discover that it is very difficult to find work in New Mexico as a professional. Probably even more so if you are an academic.

There is another set of factors that I would label political geography. New Mexico was a backwater for major U.S. historical events in the nineteenth century. I do not mean this as an insult to New Mexico; I am simply saying that it was on the periphery, which in some ways was actually to our benefit. Between 1850 and 1900 there were wrenching changes in the United States. Apart from the Civil War, which is generally considered the major transformative event of this country prior to World War II, there was a huge economic expansion, marked by both railroad construction and industrial growth, in the era we call the Gilded Age. Government was not just at the beck and call of industry, but political corruption was rampant throughout the country. This period began to build after the Civil War and continued into Teddy Roosevelt’s presidency in the early twentieth century.

This was also a time in which New Mexico was a low priority in Washington. We can see that by the fact that the Surveyors General who were sent here were given an impossible task, and not given the resources to do what they were assigned to do. They did what they could. I am neither going to criticize (on this occasion) nor celebrate what they did, but clearly some of them did what they could with the resources that they had. As land controversies gained attention in Washington, and New Mexico rose in prominence, it did not actually help, in my opinion, that the CPLC was created. We have had several discussions today about how the court’s decisions contributed to the disintegration of land grants.

The decisions of the CPLC were part of a set of legal trends that deeply affected New Mexico’s land grants. The post-Civil War period was marked by increasing judicial recognition of federal plenary power in a number of areas. My particular research has focused on international migration and immigration issues. During this time, immigration policy was federalized, with the U.S. government assuming control on the basis of the constitutional power of Congress to establish uniform rules of naturalization.4 It is a pretty thin reed on which to base plenary powers over immigration, and the Supreme Court decisions in this area ultimately turn to international law, the regulation of international commerce, and international legal traditions with respect to sovereignty.

You might wonder what this has to do with land grants, but what one finds by the late nineteenth century is a set of doctrines establishing

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federal plenary power in areas relating to international affairs or foreigners—including the colonial administration of the territories. In fact, there are some striking patterns of similarity between the Court’s decisions on land grants and those relating to immigration.

Immigrants, particularly Asian immigrants after the Chinese Exclusion Act of 1882, challenged many of the rules that the U.S. government had in place. What they found was that the Court defined due process as whatever the federal government said it was. That was the essential nature of many of the rulings of the 1880s and 1890s. By 1892, in *Nishimura Ekiu v. United States*, the Court upheld federal regulation of immigration based on sovereignty in a statement that said, essentially, the federal government can do whatever it wants to foreigners.

This attitude has not changed very much since the late nineteenth century. Jumping forward to *Mathews v. Diaz* in the 1970s, the Court again held that federal plenary power is supreme with respect to immigration regulation. It should not surprise us then that the way the Supreme Court interpreted issues relating to the execution of an international treaty like Guadalupe Hidalgo was very much along those lines: whatever Congress says is due process constitutes due process.

We should not forget that this is the same Supreme Court that, in its wisdom, decided when women sought to get rights that blacks had won after the Civil War, that women were *not* persons within the meaning of the Fourteenth Amendment. And this is the same Supreme Court that found that corporations *were* persons within the meaning of the Fourteenth Amendment. And of course, this is also the Supreme Court that decided black people could be “separate but equal” in *Plessy v. Ferguson*. I have probably gotten myself in trouble here at the School of Law, as a non-lawyer criticizing the judiciary, but those are the trends I have seen in my research.

To conclude, if we consider where all this leads us, although it is a long history with lots of twists and turns, I am really struck more by the
persistence of, than by the disintegration of, New Mexico’s community land grants. I am also struck by the fact that they have a future that, in many instances, looks much brighter than the recent past. There has been some progress—long overdue—particularly with respect to state law and state regulation, which leads me to believe that perhaps the twenty-first century will turn out to be a better one than the twentieth and nineteenth were for land grants.

A factor that has been crucial in all of this has been leadership. I mentioned that earlier, with respect to the persistence of land grants through the nineteenth and twentieth centuries. It continues today. The creation of organizations that represent the interests of land grants is a fundamental part of this. Although the GAO Report is not one that many of us agree with, I think it points in an important direction. For me, it points in the direction of saying that, for too long, we have been arguing that a social injustice has been committed and, therefore, the results of it have to be resolved in the courts.

I agree that there has been a social injustice. But I believe that it is one that has to have a political solution, not a judicial solution. I think that what the GAO Report has done for us is to focus our attention away from the courts and toward the political process, specifically the U.S. Congress. Put another way, federal plenary power was used against us in the nineteenth century; let us see if we can use it on our behalf in the twenty-first.