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The Pajarito Land Grant: A Contextual Analysis of Its Confirmation by the U.S. Government

ABSTRACT

This article tracks the adjudication and ultimate confirmation of the Pajarito Land Grant by the U.S. government. It follows the progress of the Pajarito Land Grant claim through the two systems implemented by Congress to adjudicate Spanish and Mexican land grant claims in New Mexico. The first was a tribunal through the U.S. Surveyor General, and the second was the Court of Private Land Claims, where the Pajarito Grant was ultimately confirmed. The social and political circumstances surrounding the confirmation of Pajarito are also explored including the climate in the tribunals at the time the Pajarito claim was brought before them, the arguments advanced in support of the claim for Pajarito, the background of the petitioners who brought the claim, and a distinct social trend in New Mexico during this timeframe. The overall story behind the confirmation of the Pajarito Land Grant highlights the complexity and inconsistencies in the U.S. government's attempts at adjudicating land grant claims, and also, provides insight to the relationship between land grant confirmation and social power.

INTRODUCTION

Filled with towering cottonwoods, overgrown weeds, endless ditch banks, and summer chile gardens, Pajarito is more than just home to me. My father spends more time on his land in Pajarito, tending to his annual garden, planting fruit trees, and sitting on his porch than he does anywhere else. Thus, my desire to explore the history of Pajarito stems from my personal connection to the community and to the land.

The Pajarito community sits at the southern edge of Albuquerque's South Valley, in Bernalillo County, New Mexico. Technically, Pajarito is just outside of Albuquerque's city limits. It is situated between the South Valley communities of Los Padillas to the south and Atrisco to the north. The Rio Grande sits to the east and the West Mesa is to the west of Pajarito. The origins of Pajarito, Los Padillas, and Atrisco stem from land granted from

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Mexico or Spain prior to the U.S. war with Mexico in 1848. The Pajarito Grant can be traced back to 1746 when Spain was the sovereign of present-day New Mexico.

Fast forward 100 years to when the United States gained control of present-day New Mexico, and the grants of land made under Mexican or Spanish control were promised to be upheld by the U.S. government. This is the point where many land grant histories begin their accounts of failed promises and land loss. However, the story of Pajarito is different. The Pajarito Land Grant was ultimately confirmed by the U.S. government, but the land grant's history is far from being an example of the United States maintaining its promise.

Instead, the story of Pajarito highlights the complexity and inconsistencies in U.S. attempts at adjudicating land grant claims and also provides insight into the relationship between successful outcomes in adjudication efforts and social power. Pajarito's story is at many times ambiguous, and it seems with every explanation, more inconsistencies arise. However, the confirmation of the Pajarito Land Grant is best understood through a contextual analysis.¹ The analysis may not resolve every inconsistency, but it provides for a much richer story of the Pajarito Land Grant.

This article is divided into five sections. The first section provides a foundation for a general understanding of land grants in New Mexico. The second section presents the context surrounding the promise made by the United States to uphold land rights after it gained control of present-day New Mexico. The third section tracks the claim for the Pajarito Land Grant and its ultimate recommendation for approval by the Surveyor General in the first tribunal Congress implemented to adjudicate land claims. The fourth section follows the claim for Pajarito and its ultimate confirmation in the second tribunal, the Court of Private Land Claims, established by Congress to adjudicate land claims in New Mexico. The concluding section attempts to provide a comprehensive analysis of the claim and the ultimate confirmation of the Pajarito Grant by the United States.

1. The phrase "contextual analysis" is used to describe the method for analyzing the confirmation of the Pajarito Land Grant, which includes exploring the circumstances leading up to and surrounding its confirmation. These circumstances include the climate in the tribunals at the time the Pajarito claim was brought before them, the arguments advanced in support of the claim for Pajarito, the background of the petitioners who brought the claim, and a distinct social trend in New Mexico during this timeframe.

I. THE ORIGINS OF LAND GRANTS IN NEW MEXICO

New Mexico land grants are the product of the prior sovereigns of Spain and later Mexico. From the late 1600s until Mexico's Independence from Spain in 1821, the Spanish Crown used *mercedes de tierra* or grants of land to settle and colonize "New Spain," its newly acquired territory.² In this respect, the foundation of the Castilian system of land tenure—public land ownership—was transplanted to the Americas.³ After Mexico's independence, the land policy applied under Spanish rule continued to thrive and was implemented into Mexico's Colonization Law in 1823.⁴ While Spain's communal based land-tenure system was the driving force behind the Spanish Crown's development of the land system in present-day New Mexico, many other factors were also at play.⁵ One scholar describes the other factors as being a "synthesis of cultural influences controlled institutionally by Spanish colonial regulations and policies and by the realities of the frontier."⁶ A combination of factors contributed to the development of the land-tenure system in present-day New Mexico.

A few basic themes are important to understanding land grants in New Mexico. Among these is the role of customary law in the land grant system. According to land grant expert Malcolm Ebright, "the New Mexico land grant was above all the creature of custom—the time-honored way of doing things—and custom has always been a feature of Spanish law."⁷ Essentially, customary law, meaning unwritten law established through consistent practice over a significant period of time,⁸ was the core of Spanish

2. See J.J. Bowden, Private Land Claims in the Southwest 71 (1969) (unpublished Master's thesis, Southern Methodist Univ.) (on file with the Univ. of N.M. Law Library, Univ. of N.M.); see also CHARLES L. BRIGGS & JOHN R. VAN NESS, LAND, WATER, AND CULTURE: NEW PERSPECTIVES ON HISPANIC LAND GRANTS 15 (1987). "New Spain" refers to a specific Spanish colony or viceroyalty, of which present-day New Mexico is a part. WHITE, KOCH, KELLY, MCCARTHY, AND THE NEW MEXICO STATE PLANNING OFFICE, LAND TITLE STUDY 5 (1971) [hereinafter LAND TITLE STUDY].

3. Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039, 1047-51 (1985).

4. Bowden, *supra* note 2, at 71.

5. Gomez, *supra* note 3, at 1047-51. For example, the impact of the indigenous system of land tenure already in place in pre-conquest Mexico has been emphasized as an important component in the development of land tenure in New Spain. At the heart of this pre-conquest system was a village pattern, with established rules of land tenure and common rights of possession. This land system has been characterized as surpassing the Castilian system in terms of politically elaborate stability and economic success. In addition to the native system in pre-conquest Mexico, the physical geography of New Spain affected the development of the land-tenure system. *Id.*

6. *Id.*

7. BRIGGS & VAN NESS, *supra* note 2, at 15.

8. See LAND TITLE STUDY, *supra* note 2, at 12-13.

jurisprudence.⁹ As such, custom played a crucial role in the regulation of the granting of land in New Mexico.¹⁰

The first comprehensive code of legislation that was applicable to the Spanish colonies was the *Recopilación de las Leyes de las Indias* (*Recopilación*), which was published in 1681.¹¹ The *Recopilación* extended *Las Siete Partidas*, the compilation of the laws of Castile, to the Spanish colonies.¹² As such, it established the Spanish legal explanations of custom and usage. According to *Las Siete Partidas*, “usage is that which arises from certain things which men say, and do, and practise [sic], uninterruptedly, for a great length of time...[and] custom is an unwritten law, established by usage during a long space of time.”¹³ Specifically, if a majority of people observed any practice for a period of 10 years, such practice would become unwritten customary law.¹⁴

Custom continued to play an important role in the land grant process even after Mexico’s independence from Spain. Mexico’s Colonization Law of 1824 generally validated the customary procedure that had developed under Spanish rule.¹⁵ Accordingly, during both Spanish and Mexican rule, customary law in New Mexico was not only a crucial part of the land grant process, but land disputes were also settled primarily according to local custom.¹⁶ For example, customary law governed both the substantive and the procedural rules followed by judges, governors, and other political officials in New Mexico.¹⁷

Another component important to the general understanding of land grants in New Mexico is the distinction between “‘community land grants’ and ‘individual land grants,’”¹⁸ which served as the two main categories of land grants. These terms are the product of common terminology and land grant literature rather than language used in granting documents or Spanish and Mexican laws or terminology used in customary law.¹⁹

9. MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 11 (1994).

10. BRIGGS & VAN NESS, *supra* note 2, at 22.

11. LAND TITLE STUDY, *supra* note 2, at 12-13.

12. *Id.*

13. THE LAWS OF THE SIETE PARTIDAS, bk. 1, tit. 2, Law 1, 4, 12-13 (L. Moreau Lislet & Henry Carlton trans., 1820).

14. *Id.* at Law 5, 13.

15. BRIGGS & VAN NESS, *supra* note 2, at 22.

16. EBRIGHT, *supra* note 9, at 27.

17. *Id.* at 67-68.

18. U.S. GEN. ACCOUNTING OFFICE, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 4 (2004) [hereinafter GAO REPORT 2], available at <http://www.gao.gov/new.items/d0459.pdf>.

19. *Id.*

Consequently, some grants do not fit squarely within either category and can be referred to as hybrids.²⁰ Despite the lack of official terminology, the idea of both a community and an individual land grant can be traced to early Spain with further development and adaptation in New Spain.

The individual land grant can be traced to the reconquest of Spain from the Moors,²¹ at which time individual *conquistadores* were rewarded with land.²² The individual grants of land were a way to raise the social status of the conquistadores and were the predecessors to the private land grants²³ in New Mexico.²⁴ In New Spain, the Spanish government made grants of land to colonists as a reward to those who had provided services to the king.²⁵ Originally, such a grant could only be made by the king or by persons authorized to act on his behalf.²⁶ However, this made it difficult for colonists to secure title to land. In order to foster the development of the frontier, authority to grant land was eventually extended to the governor.²⁷

In order to obtain a private land grant, an individual would present a written petition to the governor.²⁸ The petition would include a description of the area requested and a declaration that the area was vacant public domain.²⁹ The governor would then refer the petition to the local *alcalde*,³⁰ who would investigate the petition and make a recommendation

20. EBRIGHT, *supra* note 9, at 25.

21. BRIGGS & VAN NESS, *supra* note 2, at 16–17. The Moors invaded Spain in 711. This marked the third major wave of conquest of the Iberian Peninsula, preceded by invasion and conquest; first by the Romans and later by the Visigoths. The Moors were repelled from Spain in 1492. *Id.*

22. *Id.* at 17.

23. See Robert Urias, *The Tierra Amarilla Grant, Reies Tijerina, and the Courthouse Raid*, 16 CHICANO-LATINO L. REV. 141, 141–42 (1995). The terms “individual land grant” and “private land grant” are often used interchangeably. *Id.* I use the term “individual land grant” to refer to the system in place in Spain, where *individual* conquistadores were rewarded with land. I use the term “private land grant” to refer to the counterpart system in New Spain, as sometimes under this system land was granted to one or two individuals. *Id.* at 142.

24. EBRIGHT, *supra* note 9, at 13.

25. Bowden, *supra* note 2, at 58.

26. *Id.*

27. *Id.* at 61–62. The first governor of New Mexico was Juan de Oñate, who served as governor from 1598–1608. LAND TITLE STUDY, *supra* note 2, at 7. However, the first governor of New Mexico who had written authority to make land grants was General Domingo de Cruzate, who was governor from 1683–86 (and again from 1689–91). *Id.* at 10, 14. At that time, the province of New Mexico encompassed what is now New Mexico, southern Colorado, and part of Texas. *Id.*

28. LAND TITLE STUDY, *supra* note 2, at 10.

29. *Id.*

30. *Id.* An *alcalde* was a political figure who served the governor as the head of a rural subdivision called an *alcaldia*. The *alcalde* was appointed by the governor and usually held office for life. Aside from his role in the land-grant process, he also functioned as justice of the peace, mayor, probate judge, sheriff, notary, tax collector, and as captain of the militia. *Id.* at 9.

as to whether the land should be granted by the governor.³¹ If the governor accepted the recommendation, he would make the grant and possession would be delivered to the grantee at a ceremony attended by the *alcalde*.³² After living and laboring on the grant for four years, the grantee would then obtain title to the land.³³ Of the 295 known land grants made by Spain and Mexico in present-day New Mexico, 141 were made to individuals.³⁴

Like the private land grant, the origin of the community land grant can be traced to the Reconquest of Spain. During this time, Spanish civilization grew with the development of villages or *pueblos*.³⁵ The lands surrounding the pueblo called the *tierras concegiles*, meaning lands of the council, were granted to pueblos by the king and were generally used in common by the entire community.³⁶ The common lands were divided into different classes according to their use. The classes included the *monte*, which was mountainous land used for gathering wood, the *prado* and the *deshesa*, which both served as pasture land, and the *ejido*, which had numerous uses including a place to dump garbage and keep stray animals.³⁷ These common lands of the early Spanish pueblos are the counterparts of New Mexico's community land grants.³⁸

In New Mexico, land grants awarded to towns, groups of settlers, and communities that set aside common lands are known as community land grants.³⁹ The procedure for obtaining a community land grant was the same as the procedure for private land grants with a few extra steps for the actual distribution of the land.⁴⁰ For example, each settler would receive an allotment of land for a house, called a *solar de casa*, and an irrigable plot for a garden, called a *suerte*, and the right to use the remaining land in common with the community.⁴¹ The common lands in New Mexico were referred to

31. *Id.* at 10.

32. *Id.* Also present at the ceremony were neighboring landowners and other witnesses. To complete the act of possession, the *alcalde* would take the grantee by his hand and walk him over the land, while the grantee tore up grass, threw rocks, and shouted "long live the King," *id.*, to signify his dominion over the land. *Id.* After Mexico gained its independence from Spain, the grantee would shout, "Long live the president and the Mexican nation." See *id.* at 51 n.43.

33. LAND TITLE STUDY, *supra* note 2, at 10. The entire proceeding was collectively called the *expediente*. *Id.* at 11.

34. GAO REPORT 2, *supra* note 18, at 14.

35. JEAN A. STUNZ, HERS, HIS, AND THEIRS: COMMUNITY PROPERTY LAW IN SPAIN AND EARLY TEXAS 11-12 (2005).

36. BRIGGS & VAN NESS, *supra* note 2, at 17.

37. *Id.*

38. *Id.*

39. GAO REPORT 2, *supra* note 18, at 17.

40. LAND TITLE STUDY, *supra* note 2, at 11.

41. EBRIGHT, *supra* note 9, at 24-25.

as *ejidos*⁴² and were used in common as pastures and watering places and for firewood, hunting, fishing, and other miscellaneous uses.⁴³ Like the private land grants, after four years of possession, the settler would own his allotment of land entirely, including the ability to sell it as private property.⁴⁴ However, the common lands were owned by the community and could never be sold.⁴⁵ In New Mexico, 154 land grants were made to communities.⁴⁶

While land grant documentation did not explicitly classify a grant as community or private, certain identifiers resolve the status of grants. Grants with language referring to *ejidos*, grants made for the purpose of establishing a new town or settlement, and grants made to 10 or more settlers are considered community land grants.⁴⁷ However, some grant documents failed to mention common land or grant documentation was lost or destroyed. For example, little information is known about land grants made prior to 1680 because the archives of New Mexico were destroyed in the Pueblo Revolt.⁴⁸ Land grant scholars and grant heirs, nonetheless, are often able to identify the status of such grants using the identifiers described above.⁴⁹

Pajarito had been classified as a community land grant by several sources. The U.S. General Accounting Office (GAO), in its recent report on community land grants in New Mexico, lists the Pajarito Grant as a community grant.⁵⁰ Pajarito does not have any grant documentation, thus it cannot be classified as communal based on identifiers in grant documentation. In categorizing Pajarito as a community land grant, the GAO relied on information provided by “grant heirs and others.”⁵¹ The Center for Land Grant Studies⁵² has also classified Pajarito as a community

42. BRIGGS & VAN NESS, *supra* note 2, at 19.

43. *Id.* at 23.

44. *Id.* at 24.

45. *Id.*

46. GAO REPORT 2, *supra* note 18, at 14.

47. U.S. GEN. ACCOUNTING OFFICE, TREATY OF GUADALUPE HIDALGO: DEFINITION AND LIST OF COMMUNITY LAND GRANTS IN NEW MEXICO 8 (2001) [hereinafter GAO REPORT 1], available at <http://www.gao.gov/new.items/d01951.pdf>.

48. EBRIGHT, *supra* note 9, at 23.

49. GAO REPORT 1, *supra* note 47, at 13.

50. *Id.* at 13–14.

51. *Id.*

52. Ctr. for Land Grant Studies, <http://www.southwestbooks.org/index.htm> (last visited Jan. 19, 2009). “The Center for Land Grant Studies is a 501-c-3 non-profit organization devoted to research, education and distribution of books and other materials about the Southwest, with an emphasis on land and water rights issues of traditional communities in New Mexico. The Center focuses on Spanish and Mexican Land Grants made to Hispanics and Native Americans, as well as genealogical materials connected with the rural communities of New Mexico.” *Id.*

land grant.⁵³ While the precise origin of Pajarito cannot be ascertained, an understanding of the historical underpinnings of New Mexico land grants provides the necessary foundation in order to analyze the Pajarito Land Grant claim. Such a foundation includes a general understanding of Spanish customary law, the distinction between community and private land grants, and the identifiers used in categorizing land grants.

II. THE U.S.-MEXICAN WAR AND THE TREATY OF GUADALUPE HIDALGO

The fate of New Mexico's land grants made under Spanish and Mexican rule was ultimately put in the hands of the U.S. government. In the mid-1840s, motivated by the ideology of Manifest Destiny, the United States set out to acquire the present-day Southwest, a plan which led to the war with Mexico.⁵⁴ In 1848, the Treaty of Guadalupe Hidalgo (the Treaty) officially ended the U.S.-Mexican War and ceded most of the present-day Southwest from Mexico to the United States.⁵⁵ Under the express terms of the Treaty, land grants in New Mexico made under Spanish and Mexican rule would be upheld. Article VIII of the Treaty guaranteed that the property rights of the Mexican citizens in the ceded territory would be "inviolably respected."⁵⁶

53. Ctr. for Land Grant Studies, Preliminary List of Grants from the Land Grant Database Project, Grants L-R (Mar. 21, 2005), <http://www.southwestbooks.org/grantslr.htm>.

54. Erlinda Gonzales-Berry & David R. Maciel, *The Nineteenth Century: Overview*, in *THE CONTESTED HOMELAND: A CHICANO HISTORY OF NEW MEXICO* 12, 13 (Erlinda Gonzales-Berry & David R. Maciel eds., 2000).

55. RODOLFO ACUÑA, *OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION* 28 (1972).

56. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 922, 929-30 [hereinafter Treaty of Guadalupe Hidalgo]. Article VIII reads as follows:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

While the Treaty language explicitly provided for the protection of land grants, the actual extent and fulfillment of this protection was an entirely different issue. Any belief that the implementation of the Treaty would be true to its letter and spirit is aptly described by one historian as a “naïve faith...that the guaranteeing of rights in writing should be equivalent in guaranteeing them in practice.”⁵⁷ One explanation for the failure of the United States to uphold the protection of land grants under the Treaty was the deletion of an important article. An earlier draft of the Treaty included a standard to determine the validity of land grants, which served as a comprehensive guarantee. In the deleted Article X, land grants would be valid under U.S. law to the same extent they were valid under Mexican law.⁵⁸ Thus, customary law brought by Spain, and developed further by Mexico,⁵⁹ would be used in determining the validity of land grants. However, before the U.S. Senate ratified the Treaty, Article X was struck.⁶⁰

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

Id. (emphasis added).

57. DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 141 (30th Anniversary ed. 2003).

58. RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 180–81* (1990). Art. X, stricken by the U.S. amendments, reads as follows:

All grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico. But the grantees of lands in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican Government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty: in default of which the said grants shall not be obligatory upon the State of Texas, in virtue of the stipulations contained in this Article.

The foregoing stipulation in regard to grantees of land in Texas, is extended to all grantees of land in the territories aforesaid, elsewhere than in Texas, put in possession under such grants; and, in default of the fulfillment [sic] of the conditions of any such grant, within the new period, which, as is above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void.

Id. (emphasis added).

59. See *supra* text accompanying notes 9–15.

60. ACUÑA, *supra* note 55, at 28–29.

The deletion of Article X can best be understood by examining the Treaty negotiations. Not surprisingly, Mexican officials objected to the U.S. Senate's deletion.⁶¹ However, the United States had just won the war, and thus had the upper hand in the negotiations.⁶² Ultimately, Mexico signed the Treaty under duress with no other choice but to agree to the U.S. proposals.⁶³ Accordingly, despite Mexico's protest, Article X was deleted and the United States in turn issued a Statement of Protocol (the Protocol) in an attempt to subdue Mexico's discontent.⁶⁴ The Statement of Protocol read:

The American government, by suppressing the tenth article of the treaty of Guadalupe, did not in any way, intend to annul the grants of lands made by Mexico in the ceded territories. These grants...preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.⁶⁵

Despite the Protocol, the consequence of striking Article X made it much easier to deprive Mexicans of their lands by making U.S. law and practice determinative, and by refusing to acknowledge Mexican law and custom as the appropriate source for ascertaining the validity of land claims.⁶⁶ Without a standard for determining the validity of land grants, Congress and the courts were free to create their own standards and mechanisms.⁶⁷ Congress's first mechanism was the creation of a new authority, the Surveyor General of New Mexico, followed decades later with the establishment of the Court of Private Land Claims.

III. PAJARITO IN THE SURVEYOR GENERAL SYSTEM OF NEW MEXICO

Congress finally commenced an effort to adjudicate Spanish and Mexican land grant claims in New Mexico six years after the signing of the Treaty of Guadalupe Hidalgo.⁶⁸ An 1854 Congressional Act established the

61. *Id.* at 29.

62. *Id.* at 28.

63. *Id.*

64. *Id.* at 29.

65. LAND TITLE STUDY, *supra* note 2, at 28 (internal quotations omitted).

66. See JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 271 (2000).

67. Gomez, *supra* note 3, at 1068.

68. BRIGGS & VAN NESS, *supra* note 2, at 30-34. New Mexico did not become a state until 1912. So, without representation in Congress, New Mexico had no voice on the method chosen by Congress to adjudicate land grants in New Mexico. This is unlike California, whose status as a state with representation contributed to the promptness in passing the California

Office of the Surveyor General of New Mexico.⁶⁹ Under the supervision of the Secretary of the Interior, the Act gave the Surveyor General the duty to “ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico.”⁷⁰ Under detailed instructions from the Senate, the Surveyor General was also instructed to apply a presumption of a valid community land grant if a city, town, or village existed on the grant at the time the United States took possession of New Mexico.⁷¹

The system commenced by giving notice to the people of New Mexico and requesting that they submit claims to land that existed prior to the ratification of the Treaty to the Surveyor General as soon as possible.⁷² As part of his duties, the Surveyor General would conduct an investigation on land grant claims and, subsequently, report his findings to Congress, along with his recommendations as to the validity of claims.⁷³ “If Congress decided to confirm the grant, a survey would be [conducted] and a patent issued.”⁷⁴

From the beginning, the Surveyor General system was overwhelmed with problems. Among the numerous problems was the lack of resources, including insufficient funding and staff.⁷⁵ For example, when the first Surveyor General of New Mexico⁷⁶ arrived in Santa Fe to begin his duties, he undertook the arduous task, without any staff, of examining the Spanish archives in order to separate out any documents pertaining to land.⁷⁷ He ultimately found 1715 documents pertaining to land, which had to be classified, organized, and indexed.⁷⁸ In addition, he also lacked funding essential for carrying out his duties in investigating land grant

Land Act of 1851, which established California’s mechanism for adjudicating land titles through the Board of Land Commissioners. *Id.*

69. An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes, ch. 103, 10 Stat. 308 (1854).

70. *Id.* § 8.

71. Bowden, *supra* note 2, at 179.

72. *Id.* at 182.

73. LAND TITLE STUDY, *supra* note 2, at 29.

74. *Id.*

75. See Bowden, *supra* note 2, at 180–82.

76. *Id.* William Pelham was the first Surveyor General of New Mexico. He was appointed by President Pierce on August 1, 1854, and served as Surveyor General of New Mexico until 1860. *Id.* at 176.

77. *Id.* at 181. The archives consisted of 168 packets, each of which contained about a thousand documents. *Id.* at 181 n.33.

78. *Id.* at 182.

claims, which included taking testimony, getting affidavits, and summoning witnesses.⁷⁹

The lack of resources led to inefficiency, another major flaw in the Surveyor General system. Another contributor to inefficiency was the fact that adjudicating land grant claims was only a small part of the Surveyor General's job. "The Surveyor General's primary duty was to supervise the [federal land survey system] in preparation for the settlement of the public domain."⁸⁰ Accordingly, the adjudication of land grant claims was not a top priority. Thus, the Surveyor Generals did not devote much time to gaining an understanding of Spanish and Mexican law and customs relating to land titles. This lack of understanding only magnified the already inefficient system.⁸¹

The results of this flawed system were substantial delay and incorrect and inconsistent decisions on land grant claims by both the Surveyor General and Congress.⁸² When the Surveyor General would eventually make a recommendation to Congress, it was uncertain when Congress would take action or if action would be taken at all. For example, by 1856, of 31 land grant claims filed with the Surveyor General, only three had been investigated and reported to Congress.⁸³ Congress did not act on any of the claims until 1860.⁸⁴ Thereafter, Congress continued to take only sporadic action on land grant claims.⁸⁵

When the Surveyor General and Congress managed to take action on claims, the results were as flawed as the system that produced them. For

79. BRIGGS & VAN NESS, *supra* note 2, at 35.

80. LAND TITLE STUDY, *supra* note 2, at 30. The Surveyor General was also responsible for administering the Donation Act, which gave "certain persons...the right to acquire 160 acres of land." *Id.* The Act was "intended to protect the rights of individuals who occupied small tracts of land," which were not land grants. *Id.*

81. See RICHARD WELLS BRADFUTE, *THE COURT OF PRIVATE LAND CLAIMS: THE ADJUDICATION OF SPANISH AND MEXICAN LAND GRANT TITLES 1891-1904* (1975).

82. *Id.*

83. Bowden, *supra* note 2, at 184.

84. *Id.* at 200-02. The surveyor general during this time had urged Congress to create a Board of Commissioners to ascertain and determine the validity of land grant claims in New Mexico. Subsequently, a bill was introduced which provided for the creation of a Board of Commissioners. The bill was heavily debated in Congress, but ultimately was never acted on. Finally, in 1859 a bill was introduced by New Mexico's territorial delegate, Miguel Otero, to confirm all claims which had been reported to Congress by the surveyor general. The bill was referred to the Committee on Private Land Claims, who reported that the land claims before them had "received the most careful attention" that it could give them but that it "has no time to scrutinize the evidence and the application as made by the surveyor general of the Spanish and Mexican laws and usages to each of them in detail." The bill was passed in 1860, which automatically confirmed each of the 36 grants that had been submitted for approval. *Id.* at 184-202 (citing Cong. Globe, 36th Cong., 1st Sess., 3216 (1869)).

85. See *id.* at 184-219.

example, Congress accepted the Surveyor General's recommendation for confirmation of the nearly two-million acre Maxwell grant, even though under Mexican law the grant would have been limited to approximately 97,000 acres.⁸⁶ However, other land grant claims were strictly held to the Mexican acreage limitation law, such as the Las Animas Grant, which was confirmed for 97,000 acres.⁸⁷ In other instances, different land grant claims that encompassed the same land would both be recommended for approval and confirmed by Congress, creating overlapping confirmed grants.⁸⁸ Overall, inequities were abundant, and the entire system became vulnerable to abuse.

In particular, a network of greedy and ruthless land speculators, known as the "Santa Fe Ring," understood the flawed system and used it to their advantage.⁸⁹ The Santa Fe Ring was comprised of mostly Anglo lawyers, politicians, and other powerful men in the territory.⁹⁰ They exploited the uncertain legal status of land grants in order to enrich themselves with money and land.⁹¹ Numerous schemes were employed to accomplish their objectives. One mechanism took advantage of the depreciated value of land grants due to the government's failure to provide for an efficient mechanism to adjudicate land grant claims. Therefore, if a grantee was experiencing financial hardship,⁹² a land speculator could purchase the land for a price that was substantially less than its true value.⁹³ The speculator could then utilize his influence with the Surveyor General

86. *Id.* at 214–18. While severe mistakes such as this were a result of the overall flawed system, another factor at play was the fact that claims were not surveyed until after they were confirmed. So, the surveyor general and Congress essentially did not know how much land was actually being confirmed. BRIGGS & VAN NESS, *supra* note 2, at 36.

87. BRIGGS & VAN NESS, *supra* note 2, at 36.

88. Bowden, *supra* note 2, at 200–02. An example of this is the Town of Las Vegas Grant and the Luis Maria Cabeza de Baca Grant, which were both confirmed despite the fact that they covered the same land. Ultimately, both parties were authorized to institute a suit against the United States. "The land was awarded to the town, and Cabeza de Baca was authorized to select an equal quantity of...land elsewhere in the territory." *Id.*

89. BRIGGS & VAN NESS, *supra* note 2, at 39.

90. LAND TITLE STUDY, *supra* note 2, at 31.

91. *Id.*

92. *Id.* at 31–32. One source of financial hardship for land grant holders during this time was newly formed taxes imposed on real estate. These taxes were the product of New Mexico's territorial government, which was largely controlled by the Santa Fe Ring. These taxes were difficult for land grant holders to meet as farming and ranching on land grants was not commercial, and thus did not produce significant income. *Id.*

93. *Id.* at 32.

to get the land grant confirmed.⁹⁴ Between 1869 and 1884, the Surveyor General was known to be aligned with the Santa Fe Ring.⁹⁵

With the Surveyor General system in a state of chaos, a reform effort was made with the appointment of George Julian as Surveyor General of New Mexico.⁹⁶ Julian vigorously set out to break up the Santa Fe Ring and to discredit decisions on land grant claims made by his predecessors.⁹⁷ He was overzealous in his endeavor, contending that 90 percent of all land grant claims in New Mexico were fraudulent.⁹⁸ As part of his reform effort, he reversed the presumption of validity of community land grant claims,⁹⁹ and instead, required all claims to be strictly construed against the claimant.¹⁰⁰ As a result, in re-examining 35 claims that were previously recommended for confirmation, "[Julian] recommended the rejection of twenty-two."¹⁰¹ While the remaining 13 claims survived, Julian recommended that grantees be given a smaller area of land than what was previously approved.¹⁰²

The Pajarito Land Grant claim was brought for confirmation in the Office of the Surveyor General under Julian's stringent administration. Tomas C. Gutierrez and 16 others petitioned the Surveyor General on September 10, 1877, seeking confirmation of their claim to the Pajarito Land Grant which was known as the "'Sitio of San Ysidro de Pajarito' or '[t]he Pajarito tract.'"¹⁰³ The Petitioners asserted that they were the lineal heirs and descendants of Clemente Gutierrez who died in 1785 owning the Pajarito

94. *Id.*

95. LAND TITLE STUDY, *supra* note 2, at 31. Three Surveyor Generals in particular were known land speculators. They included T. Rush Spencer (1869-74), James K. Proudfit (1872-76), and Henry M. Atkinson (1876-84), two of whom had outright interests in land grants while they were in office. BRIGGS & VAN NESS, *supra* note 2, at 37-39.

96. Bowden, *supra* note 2, at 221-22. Julian was appointed in 1885, at the age of 68. Formerly, he had been the Chairman of the Committee on Public Land Claims in the House of Representatives. He served as Surveyor General until 1891 when the Surveyor General system was finally abandoned and replaced with the Court of Private Land Claims (CPLC). *Id.* at 221, 233.

97. *Id.* at 222.

98. *Id.* at 222-23.

99. See *supra* text accompanying note 68.

100. Bowden, *supra* note 2, at 225.

101. *Id.* at 224.

102. *Id.* at 225.

103. Land Records of N.M., Surveyor General Files, roll 28, report 157, frames 1067-68 [hereinafter Surveyor General Files]. The other petitioners were Ana Maria Gutierrez, Juliana Gutierrez, Francisco Chavez, William Durand, Ramon Ortiz, Ygnacio Peña, Juan Chavez y Peña, Francisco Chavez 3d., Jose Muñes, Corras Tenieta, Estenislao Cerascino, Jose Padilla y Meribal, Cleto Sarrasiano, Silvestre Sarrasiano, Vicente Padilla y Mariano and Francisco Peña. *Id.*

tract.¹⁰⁴ They described the Pajarito tract as being purely agricultural in character and described its location as being “bounded on the North [sic] by the Town of Atrisco Grant, on the South [sic] by the sitio called ‘Los Padillas’ (being 4450 varas in width), on the East [sic] by the Rio Grande, and on the West [sic] by the Rio Puerco.”¹⁰⁵ Although the Petitioners did not know the exact amount of land, they estimated that Pajarito was about four miles north to south and fourteen miles east to west.¹⁰⁶

The basis of the Petitioners’ claim was novel and risky considering the hostile climate of the Surveyor General Office under Julian’s supervision. They claimed that their ancestor, Clemente Gutierrez, held title to the Pajarito tract and, together with their ancestors, they held continuous, exclusive, uninterrupted, and peaceable possession of the land for 151 years.¹⁰⁷ They made no mention of a “land grant” from a sovereign. Instead, they traced their title back to Josefa Baca’s 1746 will¹⁰⁸ through a confusing compilation of deeds, wills, leases, and other documents.¹⁰⁹ In her will, Josefa Baca lists Pajarito with a description of its location¹¹⁰ as the first item in the inventory of her estate.¹¹¹ The Petitioners conceded that it was unknown how Josefa Baca obtained the land or how long she had possessed it.¹¹² From this point, the Petitioners linked Baca’s interest in Pajarito to Clemente Gutierrez’s subsequent ownership, and then to their interest in Pajarito as descendants of Gutierrez. Their Petition summarized the progression of documents. Essentially, Josefa Baca’s children inherited Pajarito. One of her sons, Antonio Baca, consolidated Pajarito by purchasing his siblings’ shares. Eventually, he sold the Pajarito tract to Clemente

104. *Id.* at frame 1067.

105. *Id.* The term *vara* referred to the basic unit of measurement, which was three geometrical feet. Five-thousand varas constituted a *league*, and a *league* square was a *sitio*. Bowden, *supra* note 2, at 71.

106. Surveyor General Files, *supra* note 103, at frame 1067. The claim was later surveyed at approximately 45,000 acres. LAND TITLE STUDY, *supra* note 2, at 31.

107. Surveyor General Files, *supra* note 103, at frame 1067. Although they did not state it in their petition, the claim is essentially a claim under the Spanish law of Ordinary Prescription. *See infra* text accompanying notes 161–63 (while the claimants state that they had been in possession of the land for 151 years, the evidence they presented indicates that they actually were in possession for 141 years; this was probably a mere oversight in their petition, which was drafted by their attorney, Edward L. Bartlett.).

108. Surveyor General Files, *supra* note 103, at frames 1067–68.

109. *Id.* There were approximately 30 documents, and each document was accompanied by a translation. *Id.*

110. *Id.* at frame 1050. The description is similar to the Petitioners’ description of the location. That part of her will reads “Yten [sic] declaro tener un sitio en Pajarito como costara de las esquituras linda por el norte con los positos que llaman por el sur, con el ranho [sic] y tierras de Padilla, por el poniente, con el Rio Puerco, por el oriente con el rio del norte.” *Id.*

111. *Id.*

112. *Id.* at frame 1068.

Gutierrez in 1785.¹¹³ In addition to the documentary evidence, the Petitioners provided supportive oral testimony at a hearing with Surveyor General Julian.¹¹⁴

Overall, the crux of the Petitioners' argument was that they had been in continuous possession of the Pajarito tract from as far back as 1746. They argued that they had built houses and fences, planted orchards and vineyards, constructed an extensive irrigation system, and cultivated the lands during this entire period without anyone ever questioning their right or title to the tract.¹¹⁵ Accordingly, the Petition stated:

[Y]our petitioners and their ancestors have been universally recognized from time immemorial as the owners of said tract, by the Governments of Spain and Mexico; and by the people in the neighborhood. But in order that there may be no question, now or hereafter on the part of any person in regard to their said title, they present this their petition, that you may examine into their said claim, and approve it to them and their heirs for ever, on the part of the United States Government; believing their said claim and rights to be entirely and fully recognized and protected under the provisions of the Treaty of Guadalupe Hidalgo.¹¹⁶

Although the arguments made by the petitioners were ones of first impression according to Surveyor General Julian, he ultimately recommended Pajarito be confirmed as a valid land grant. Initially, however, Julian's assessment of the Pajarito claim was not without reservation. He expressed his initial uncertainty about the claim in his report dated December 30, 1887.¹¹⁷ While he found that the evidence presented supported the petitioners' claim that they held uninterrupted and undisputed possession of Pajarito since 1746, there was still no evidence of a grant.¹¹⁸ Without evidence of a grant, Julian was uncertain if the Surveyor General had any jurisdiction over such claim.¹¹⁹ Julian had other concerns as well. In addressing them he acknowledged:

113. See Surveyor General Files, *supra* note 103, at frame 1068. It is unclear from the evidence if Antonio sold the entire tract to Clemente Gutierrez or if his children and possibly other siblings retained interest in portions of Pajarito. See *id.* While the documents in general show which persons received land by inheritance and which persons acquired an interest by purchase, the relationships between many of the people named in the records are not clear. See *id.*

114. Bowden, *supra* note 2, at frame 1708.

115. *Id.* at frames 1708–09.

116. Surveyor General Files, *supra* note 103, at frames 1067–68.

117. *Id.* at frames 1289–91.

118. *Id.*

119. *Id.* at frame 1290.

The tract is a large one, but a small portion of it only is fit for agriculture, and actually occupied and used for that purpose; and it may be urged that these seventeen claimants might resort to the homestead laws which allows joint entries to be made, in perfecting their title. The plausibility of this statement is strengthened by the desirableness of breaking up large land holdings in New Mexico, and Americanizing its land policy.¹²⁰

Despite these concerns, however, Julian took the claim under consideration. He determined that the petitioners would be overburdened if they were forced to go through the homestead laws to perfect their title.¹²¹ Ultimately, he was “confident that Spain and Mexico would have recognized their title, if New Mexico had not been ceded to the United States.”¹²² His confidence was based on the “fact that Spain and Mexico *did* recognize it from the year 1746 to the year 1848.”¹²³ Thus, the United States was bound to do what the prior sovereigns would have done.

Whatever initial hesitations Julian had in recommending confirmation of the Pajarito Land Grant disappeared by the end of his Report.¹²⁴ In conclusion, he asserted that the confirmation of the claim “would not only be a matter of justice to them, but of peace to the community of which they form a part.”¹²⁵ Despite Julian’s recommendation, Congress did not take any action on the claim,¹²⁶ and Pajarito was subsequently brought before the Court of Private Land Claims.

IV. PAJARITO IN THE COURT OF PRIVATE LAND CLAIMS

After years of widespread dissatisfaction with the Surveyor General system, Congress finally implemented a new tribunal to adjudicate land grant claims in New Mexico. On March 3, 1891, Congress created the Court

120. *Id.*

121. Surveyor General Files, *supra* note 103, at frame 1290. Julian evaluated the possibility that the petitioners would be able to acquire title to all the land covered by Pajarito under the homestead laws. *Id.* at frames 1290–91. He noted that resorting to the homestead laws would be expensive, would amount to a confession that their title was invalid, and would invite others to assert similar rights under the homestead law. *Id.*

122. *Id.* at frame 1291. However, Julian failed to cite any authority for this position. *Id.*

123. *Id.* (emphasis in original).

124. *Id.* at frames 1298–91.

125. *Id.*

126. BRIGGS & VAN NESS, *supra* note 2 at 41. This was typical of Congress. See *supra* text accompanying notes 79–83. By 1889 Congress had a backlog of 116 New Mexico land grant claims, awaiting confirmation. BRIGGS & VAN NESS, *supra* note 2, at 41.

of Private Land Claims (CPLC).¹²⁷ Under the Act of 1891 (the Act), the CPLC had jurisdiction over all land grant claims arising in the Territories of Arizona, New Mexico, and Utah, and the States of Colorado, Nevada, and Wyoming.¹²⁸ It was composed of a chief justice and four associate justices appointed by the President and approved by the Senate.¹²⁹ An attorney was also appointed to represent the United States before the CPLC.¹³⁰ The Act also implemented a two-year time period within which all claims had to be filed or they would be completely barred from consideration.¹³¹ The CPLC convened on July 1, 1891, and completed work on June 30, 1904.¹³²

The CPLC's approach in adjudicating claims has been heavily criticized for being harshly unfair to petitioners.¹³³ Part of this criticism resulted from the Act itself which placed a high burden on petitioners. Primarily, the Act failed to mention custom as a factor to be considered by the CPLC.¹³⁴ Instead the Act proclaimed that, "[n]o claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico."¹³⁵ The burden was placed on the claimant to prove the existence of the grant.¹³⁶ The claimant was required to state the date and form of the grant, who made the grant, the name of any persons who had possession of the land, the size of land claimed (including a map), and whether the claim had been previously considered by Congress or another authority.¹³⁷ The CPLC subsequently implemented

127. An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories, ch. 539, 26 Stat. 854 (1891) [hereinafter Act of 1891].

128. *Id.* § 6, at 856.

129. *Id.* at 855. The chief justice appointed was Joseph R. Reed from Iowa; the associate justices appointed were Thomas C. Fuller from North Carolina, Henry C. Sluss from Kansas, William W. Murray from Tennessee, and Wilbur F. Stone from Colorado. BRADFUTE, *supra* note 81, at 27.

130. Act of 1891, 26 Stat. § 2, at 855. Matthew G. Reynolds, from St. Louis, Missouri was appointed as U.S. Attorney for the CPLC. BRADFUTE, *supra* note 81, at 57. He had the responsibility of protecting the interests of the United States and the general public who held title to land under the United States. *Id.*

131. Act of 1891, 26 Stat. § 12, at 859.

132. LAND TITLE STUDY, *supra* note 2, at 34.

133. BRIGGS & VAN NESS, *supra* note 2, at 41-42; Gomez, *supra* note 3, at 1074-75.

134. BRIGGS & VAN NESS, *supra* note 2, at 42. This was a major departure from the act that created the Surveyor General System, which specifically instructed that claims were to be ascertained under the laws, usages, and customs of Spain and Mexico. See *supra* text accompanying note 68.

135. Act of 1891, 26 Stat. § 13, at 860.

136. *Id.* § 6, at 856.

137. *Id.*

additional rules¹³⁸ that required the petitioner to submit original grant documents or an explanation as to why they could not be produced.¹³⁹ The rules also required an English translation of all Spanish documents and an abstract of title showing the claimant to be the lawful successor in interest to the original grantee.¹⁴⁰ Overall, the requirements set forth in the Act, combined with the additional rules implemented by the CPLC, created a high threshold for bringing a claim.

Under this rigid system, petitioners faced numerous obstacles in proving their cases and often times could not meet the high requirements. For example, the CPLC once rejected a valid land grant claim because, instead of submitting the original grant documentation, the petitioners submitted a certified copy made by an *alcalde*.¹⁴¹ The CPLC admitted that it was a genuine copy, however, it rejected the grant because under Spanish law the *escribano*, not the *alcalde*, was the official authorized to make certified copies.¹⁴² They rejected the claim despite the fact that at the time there were no *escribanos* in New Mexico and the practice of *alcaldes* making certified copies was customary.¹⁴³ Decisions such as this were not surprising given the CPLC's confirmation record. Of the 272 land grant claims from New Mexico, the CPLC only confirmed 69 grants.¹⁴⁴ Overall, the court confirmed only 6 percent of land grant claims before it.¹⁴⁵

Pajarito was one of the successful 69 grants.¹⁴⁶ Despite a couple of key differences, the Pajarito Petition brought before the CPLC was very similar in substance to that of the Petition brought before the Surveyor General. The first noticeable difference was that the named Petitioners changed. In the Surveyor General's office, the petitioners were led by Tomas C. Gutierrez, with 16 others listed in the Petition.¹⁴⁷ The Petitioners before the CPLC were Tomas C. Gutierrez, Frank A. Hubbell, J. Felipe

138. *Id.* Under the Act, the Court had the power to adopt any necessary rules and regulations in order to carry out the provisions of the Act. Act of 1891, 26 Stat, at 855.

139. LAND TITLE STUDY, *supra* note 2, at 35 (citing Rule II as amended, Rules of the Court of Private Land Claims, in MATTHEW REYNOLDS, SPANISH AND MEXICAN LAND LAWS 19 (1895)).

140. *Id.*

141. BRIGGS & VAN NESS, *supra* note 2, at 44. The claim was for the Embudo Grant. *Id.*

142. *Id.*

143. *Id.*

144. BRADFUTE, *supra* note 81, at 95.

145. BRIGGS & VAN NESS, *supra* note 2, at 49.

146. Bowden, *supra* note 2, at 1710-11. The petition for confirmation was filed with the Court on Feb. 7, 1893. *Id.*

147. See *supra* text accompanying note 103.

Hubbell, and Mariano S. Otero who were listed “for themselves and the other owners...of the [Pajarito] tract.”¹⁴⁸

The other key difference was in the substance of their claim to Pajarito. In general, their Petition outlined the same evidence, including Josefa Baca’s will and the subsequent sequence of documents that traced the land to Clemente Gutierrez.¹⁴⁹ They maintained their assertion that they were the “lineal heirs and descendents of Clemente Gutierrez.”¹⁵⁰ Accordingly, they also asserted their continuous and uninterrupted possession of the land.¹⁵¹ However, diverging from their previous argument, the Petitioners explicitly categorized Pajarito as a grant of land from Spain.¹⁵² They claimed that a royal grant was made “by the Kingdom of Spain sometime prior to the year 1746, to one Josefa Baca as evidenced by her will.”¹⁵³ They conceded that they did not have documentation of the grant from Spain, but explained that it was either lost or destroyed because the grant was made so long ago and “the memory of living men does not extend to the time it was seen.”¹⁵⁴

The petitioners retained and reinforced their fundamental contention of continuous and uninterrupted possession. They pointed out that Surveyor General Julian accepted this argument and also provided additional support for it.¹⁵⁵ Their claim under continuous and uninterrupted possession was essentially a claim under the Spanish law of Prescription. Under the *Recopilación*,¹⁵⁶ a person could acquire title to land by continued and uninterrupted possession for a period of 40 years.¹⁵⁷ Previous decisions of the CPLC provided additional authority for recognition of a claim by Prescription. The court previously confirmed the Alameda Grant and the Cubero Grant based on the law.¹⁵⁸ The CPLC’s decision in the Alameda case provided that “title by prescription proceeds upon a presumption and

148. Land Records of N.M., Court of Private Land Claims Files, roll 41, PLC Case 73, frames 0743 [hereinafter PRIVATE LAND CLAIMS FILES]. Edward L. Bartlett remained their attorney. *Id.* at frame 0746.

149. *See id.* at frames 0743–46, 0772–0824.

150. *See id.* at frame 0743 (Their assertion here is a bit of a stretch. Frank A. Hubbell and J. Felipe Hubbell certainly could make this claim as their mother was Juliana Gutierrez, one of the petitioners under the Surveyor General. However, there is no evidence that Mariano Otero was a lineal descendant of Clemente Gutierrez.).

151. PRIVATE LAND CLAIMS FILES, *supra* note 148, at frame 0744.

152. *Id.* at frame 0743.

153. *Id.*

154. *Id.* at frame 0744.

155. *Id.* at frame 0745.

156. *See supra* text accompanying notes 9–12.

157. PRIVATE LAND CLAIMS FILES, *supra* note 148, at frame 0851.

158. *Id.* The Alameda case was decided by the court on Dec. 17, 1892. *Id.* The Cubero case was decided on Aug. 29, 1892. *Id.* at frame 0853.

operates as conclusive presumption of the existence of every fact necessary to transfer the legal title and right of possession from...[the] original rightful owner to the party holding under such prescription."¹⁵⁹ In effect, a claim under Prescription created a presumption that a grant was made by the sovereign.

The CPLC ultimately confirmed the Pajarito Land Grant. By decree dated September 8, 1894, the court held that there was a presumption that a grant had been made to Josefa Baca as the result of the long possession of the land by her and the subsequent successors in interest.¹⁶⁰ The government did not appeal the decision¹⁶¹ and the grant was subsequently patented on November 27, 1914.¹⁶²

V. THE GREATER STORY OF PAJARITO

As a valid property right under the laws of Spain and Mexico, the United States was obliged to recognize the Pajarito Land Grant under the Treaty of Guadalupe Hidalgo.¹⁶³ However, this does not explain the ultimate confirmation by the United States of the Pajarito Land Grant. In practice, the United States failed to effectively fulfill its obligations under the Treaty as evidenced by the numerous valid land grant claims that were rejected.¹⁶⁴ The two tribunals created to fulfill the obligations of the United States were both problematic and controversial. At first glance, the claim to Pajarito brought under both tribunals could be seen as destined for failure. Nonetheless, Pajarito survived in a system that was designed to extinguish such land grant claims.

There is not one key factor or reason that completely explains why the claim for confirmation of Pajarito was successful in the Surveyor General's office and, subsequently, in the CPLC. In the end, the confirmation of the Pajarito Land Grant can be best understood by looking closely at the factors surrounding its confirmation, in other words, through a contextual analysis. A contextual analysis includes the Petitioners' use of the Spanish law of Prescription in their claim to Pajarito, the social status of the Petitioners, and the distinctive relationship between social status and power in New Mexico during this time. While this examination may not resolve every inconsistency, it tells a more comprehensive story about the

159. *Id.* at frame 0851 (alterations to original).

160. *Id.* at frames 0845, 0857.

161. *See id.* at frame 0845. However, U.S. Attorney Matthew Reynolds sought rejection of the claim in his answer to the petition. He offered no special defense or reason for his position. *See id.*

162. Bowden, *supra* note 2, at 1712.

163. Treaty of Guadalupe Hidalgo, *supra* note 56, art. VIII.

164. *See Gomez, supra* note 3, at 1070; *see BRIGGS & VAN NESS, supra* note 2, at 49.

complexities and nuances of the tribunals and social factors that could have easily contributed to the confirmation of the Pajarito claim.

The Petitioners' use of the Spanish law of Prescription in their claim for Pajarito explains in part their ultimate success in both tribunals, yet it also adds more complexity. Overall, their argument under Prescription was legitimate. Under *Las Siete Partidas*,¹⁶⁵ Ordinary Prescription provided title to real property after 30 years of peaceable possession, regardless of how possession was obtained.¹⁶⁶ Under the law of Extraordinary Prescription, title could be obtained after just 10 years of peaceable possession if possession was obtained in good faith and under a just title.¹⁶⁷ The Petition for Pajarito under both tribunals asserted that the Petitioners and their ancestors had been in possession of the land for over 100 years, thus, their claim would have been covered by Ordinary Prescription requiring only proof of possession for at least 30 years.¹⁶⁸ Through their numerous exhibits and testimony, the petitioners were able to prove that they had been in possession of the land for over 100 years. Ultimately, the Petitioners' claim for Pajarito was valid under the Spanish law of Prescription, and in theory, both tribunals were required to recognize that right.

However, a legitimate claim to land did not always produce an equivalent decision in either tribunal. Particularly, confirmation of land grants based on Prescription was rarely used by the tribunals despite its legitimacy under Spanish law.¹⁶⁹ Scholars point out that the few land claims approved by the CPLC based on a law of Prescription were rare "beacons of fairness," in an otherwise unfair system.¹⁷⁰ With this in mind, one may come to the conclusion that the claim for Pajarito falls into the small category of land grant claims that were justly decided by both tribunals, thus the exception to the rule. However, Pajarito's story is not so simple. While the Surveyor General and the CPLC may have ultimately reached a legally valid result, a closer look reveals even more inconsistencies in the tribunals, as well as the uniqueness of Pajarito's confirmation. The favorable recommendation from Surveyor General Julian and the ultimate success of the claim in the CPLC were both highly atypical. The CPLC's lax use of the

165. See *supra* text accompanying notes 9-14.

166. THE LAWS OF THE SIETE PARTIDAS, bk. III, tit. 29, Law 21 (L. Moreau Listlet & Henry Carlton trans., 1822).

167. *Id.* at Law 18.

168. Surveyor General Files, *supra* note 103, at frame 1067.

169. BRIGGS & VAN NESS, *supra* note 2, at 49; Patricia A. Madrid, *A Study of Spanish Prescription in Land Grant Claims*, in 2 LAND, LAW, AND LA RAZA: NEW MEXICO'S LAND GRANT PROBLEMS 1, 5 (1973) (unpublished collection of papers presented for a seminar in comparative law at the Univ. of N.M. School of Law under Associate Professor of Law, Theodore Parnall) (on file with the Univ. of N.M. Law Library).

170. BRIGGS & VAN NESS, *supra* note 2, at 48.

law of Prescription is particularly illustrative of the distinctiveness of Pajarito's confirmation. Thus, the uniqueness of the Pajarito claim will be discussed within the context of the CPLC first, followed by the Surveyor General.

The success of the claim for confirmation of the Pajarito Land Grant in the CPLC was unusual in several ways. From the outset, the odds were stacked against the Pajarito claim. With the CPLC's heightened requirements for claimants, its fixation on land grant documentation, and the overall rate of success of petitions,¹⁷¹ the claim seemed headed for rejection. In addition, at the time the claim for Pajarito was brought before the CPLC, the use of Prescription in confirming land grants was becoming more acceptable. But even with the CPLC's new found acceptance of the Spanish law, the claim was still distinct when viewed in comparison to other claims based on Prescription.

While the Spanish law of Prescription was gaining acceptance as an appropriate justification for the confirmation of land grant claims,¹⁷² it was far from being fully acceptable by all. Matthew Reynolds, the attorney representing the United States before the CPLC, was especially hostile toward the use of Prescription in validating land grant claims.¹⁷³ Under the Act that created the CPLC, and with the subsequent rules implemented by the court, the requirement for actual land grant documentation was at the heart of any petition.¹⁷⁴ As such, Reynolds forcefully opposed claims when land grant documentation was not provided. Most claims made under Prescription lacked the requisite documents.¹⁷⁵ For example, when the CPLC approved the Cubero Grant based on Prescription, Reynolds immediately recommended an appeal, stating:

The precedent established by the ruling of the case at bar, will open the door to every fraud in New Mexico and will place a premium upon the suppression of title papers where they are incomplete and their validity is likely to be attacked and leave the claimants to establish by oral testimony in sweeping terms, that a grant existed.¹⁷⁶

Even though the CPLC approved claims such as the Cubero Grant based on Prescription, there was still a high regard for grant documentation.

171. See *supra* text accompanying notes 130–36.

172. See *supra* text accompanying notes 155–56.

173. BRADFUTE, *supra* note 81, at 107–09.

174. See *supra* text accompanying notes 130–36.

175. BRADFUTE, *supra* note 81, at 107.

176. *Id.* at 107–08 (citing Report, Nov. 16, 1892, Docket No. 1, Catron Box 1). Ultimately his appeal failed as the Supreme Court sanctioned the confirmation of land grant claims based on prescription. *United States v. Chaves*, 159 U.S. 452, 455 (1895).

In the Cubero case, while the claim was based on Prescription, grant documentation still played an important role. A large part of the CPLC's decision was based on testimony from people who had seen the original grant documentation.¹⁷⁷ In addition, the claimants were able to identify the Mexican governor who made the Grant and the specific authorities who put them in possession.¹⁷⁸ This evidence augmented the Cubero claim with respect to the documentation requirements.

Overall, the confirmation of Pajarito did not fit neatly within the overall climate of the CPLC. While the CPLC's approval of the claim for Pajarito was not a complete divergence, there is still some ambiguity in the decision. For example, the extensive testimony and other evidence of land grant documentation that seemed to augment the claim based on prescription in the Cubero case, was completely lacking in the Petition for Pajarito. The Petitioners tried to enhance their argument by asserting that Pajarito was indeed the product of a grant of land made by Spain and that original grant documentation was missing because the grant was made so long ago.¹⁷⁹ However, this was not much of an enhancement compared to the extensive evidence of original grant documentation in the Cubero case.

Additionally, in a departure from character, U.S. Attorney Reynolds never appealed the CPLC's decision in the Pajarito case.¹⁸⁰ The Supreme Court case, that ultimately rejected Reynolds' arguments in the Cubero case and affirmed the use of Prescription in validating land grant claims, was not decided until almost two years after Pajarito was decided.¹⁸¹ Thus, at the time of Pajarito's confirmation, it seemed as if Reynolds was free to appeal Pajarito's confirmation just as he did in the Cubero case. In light of the fact that the Pajarito claim had even less evidence of original documentation than the Cubero claim, it would have been natural for Reynolds to appeal the CPLC's decision. Not only did Reynolds not appeal the Pajarito decision, the CPLC never commented on the deficiency of evidence of the original land grant.¹⁸²

The recommendation for confirmation of Pajarito six years earlier under the Surveyor General was even more incongruent than CPLC's decision. The Petition under the Surveyor General could have easily produced a recommendation of denial to Congress. The low chance of success under the unyielding Surveyor General Julian alone was enough to expect a denial. But the Petition for Pajarito was even more precarious as it

177. *Chaves*, 159 U.S. at 460-62.

178. *Id.*

179. See *supra* text accompanying notes 149-51.

180. See *supra* text accompanying notes 158-59.

181. *Chaves*, 159 U.S. at 452.

182. Bowden, *supra* note 2, at 1711; PRIVATE LAND CLAIMS FILES, *supra* note 148, at frames 0856-58.

treaded new territory by advancing a claim with no mention of an actual land grant, and instead, asserted the theory of continuous and uninterrupted possession.¹⁸³

While the Petition and the decision in the CPLC were also based on Prescription, they were at least supported by authority and precedent.¹⁸⁴ Julian himself admitted that the Petitioners' argument based on "continued and uninterrupted possession"¹⁸⁵ was a question of first impression. In addition, neither the Petition nor Julian's Report¹⁸⁶ to Congress mentioned the Spanish law of Prescription.¹⁸⁷ Thus, there was no authority cited for the Petitioners' position. Nonetheless, Julian, acting on a question of first impression, and without citing an authority for his position, recommended the confirmation of the Pajarito claim.¹⁸⁸

Ultimately, the confirmation of the claim for Pajarito in the CPLC and under the Surveyor General was surprising given the unfavorable circumstances in each tribunal. There may be many reasons why the Petition for Pajarito survived such adverse systems. One factor that stands out as particularly relevant is the social status of the Petitioners. The Petitioners were among the most powerful people and from the most prominent families in New Mexico. First, members of the Gutierrez family served as the Petitioners before the Surveyor General.¹⁸⁹ Tomas, Juliana, and Ana Maria Gutierrez were siblings and part of one of the most prominent and wealthy families in New Mexico at that time.¹⁹⁰ Their mother, Barbara Chavez, came from a very influential family in New Mexico. Members of the Chavez family were part of "the 'upper crust of the Rio Abajo [who] formed a powerful clique that easily dominated political, economic, and social...[life] between Bernalillo and Belen.'"¹⁹¹ The Gutierrez siblings were also the grandchildren of Francisco Xavier Chaves, the first New Mexican governor under Mexican rule.¹⁹²

While there was a change in the named Petitioners when the Pajarito claim was brought before the CPLC, a strong connection remained between both sets of Petitioners. In the CPLC, Tomas was the only Gutierrez to remain in the petition. Frank A. Hubbell, J. Felipe Hubbell, and Mariano

183. Surveyor General Files, *supra* note 103, at frames 1067–68.

184. See *supra* text accompanying notes 152–56.

185. Surveyor General Files, *supra* note 103, at frame 1290.

186. *Id.* at frames 1289–91.

187. *Id.* at frames 1067–68, 1289–91.

188. *Id.* at frames 1289–91.

189. See *supra* text accompanying note 102.

190. See Mary P. Davis & David Brugge, *Historical Background and Context*, in HISTORIC STRUCTURES REPORT (2002) (information found in 1840–86 section).

191. *Id.* (quoting Marc Simmons, Albuquerque, N.M., 1982).

192. *Id.*

S. Otero were added as Petitioners.¹⁹³ However, the addition of the Hubbells was not as much of a change in Petitioners as much as it was a substitution of Juliana Gutierrez with her sons, Frank A. Hubbell and J. Felipe Hubbell.¹⁹⁴ Frank and J. Felipe's father was James L. Hubbell, who was later known as Santiago.¹⁹⁵ Frank and J. Felipe were two of 12 children. J. Felipe was the fourth eldest son, and Frank was two years his junior.¹⁹⁶

The Hubbell family was a distinguished family in New Mexico for generations. Frank A. Hubbell, in particular, was one of the most powerful political figures in New Mexico during his lifetime.¹⁹⁷ A New Mexico historian, Ralph Emerson Twitchell, wrote, "the name Frank Alaric Hubbell is one that stands out conspicuously on the pages of New Mexico history....He has left an indelible impress upon the records of the state where he was born and where he has spent his life."¹⁹⁸ Frank was probably most well known as a prominent figure in the Republican Party of New Mexico.¹⁹⁹ Among the many political positions he held throughout his life, Frank was a territorial representative, a county assessor, a probate judge, a superintendent of schools, and a county treasurer.²⁰⁰ Among Frank's numerous business endeavors, he was most well known as a livestock raiser.²⁰¹ At one point, he was recognized as the largest individual sheep raiser in the United States.²⁰²

Mariano S. Otero was the last Petitioner added to the CPLC claim. Unlike the direct connection between the Gutierrezes and the Hubbells, Otero's addition to the Petitioners is somewhat of a mystery. While there is no evidence of a direct connection to the other Petitioners, Otero too was a prominent figure in New Mexico during that time. He was part of one of the most prominent families in New Mexico during the late nineteenth and early twentieth centuries.²⁰³ Otero was the first cousin of New Mexican

193. PRIVATE LAND CLAIMS FILES, *supra* note 148, at frame 0743.

194. See CAROL N. CALLARY, A POLITICAL BIOGRAPHY OF FRANK A. HUBBELL 1862-1929 1-2 (1967).

195. *Id.* James was born in Salisbury, Conn. He was attending West Point Military Academy, when he was sent to the Southwest as a soldier in the U.S. Army in 1848 during the war with Mexico. *Id.* at 2-3.

196. Davis & Brugge, *supra* note 190.

197. See CALLARY, *supra* note 194 at 1-2.

198. RALPH EMERSON TWITCHELL, THE LEADING FACTS OF NEW MEXICAN HISTORY 412 n.1107 (1917).

199. *Id.* at 412-13 n.1107. Specifically, Frank held the position of State Chairman of the Republican Party of New Mexico from 1900 until 1904, and before that held the position of Chairman of the County Central Committee for 14 years. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. RALPH EMERSON TWITCHELL, THE LEADING FACTS OF NEW MEXICO HISTORY, *supra* note 198, at 407.

governor, Miguel Otero, Jr., who served from 1897 to 1906.²⁰⁴ More importantly, Otero was a prominent political figure in his own right and a successful businessman. He was a Republican territorial representative in Congress from 1879 to 1881,²⁰⁵ and highly involved in the New Mexico banking industry.²⁰⁶ Overall, Otero was not unlike the other Petitioners: he came from a prominent and distinguished family, he was politically connected, and he was involved in successful economic endeavors.

The Petitioners' elevated levels of social, political, and economic power exposes a certain level of influence they had in society in general. It certainly would be of no surprise that such status would be helpful in pursuing an endeavor such as an attempt to get a land grant confirmed. One can only imagine the resources available to such connected people, such as access to attorneys and information. At the least, such resources must have alleviated some of the burden of bringing a claim before such stringent tribunals such as the Surveyor General and the CPLC. However, during this timeframe in New Mexico history, there was an additional layer of influence at work among certain powerful individuals. It was a layer that transcended the conventional advantages associated with heightened levels of social, economic, and political power. Specifically, there was a social phenomenon in New Mexico at this time, and the infamous Santa Fe Ring was the embodiment of this social phenomenon.²⁰⁷

The precise extent of the network of the Santa Fe Ring is largely unknown. The Ring seemed to be at its height and most prominent during the four decades following the signing of the Treaty of Guadalupe Hidalgo (approximately 1848–88).²⁰⁸ While Surveyor General Julian made it his mission to break up the Ring, his actual success has not been examined closely. Given the Ring's established network, it seems unlikely that the Ring could be completely extinguished with the effort of one person. With this realization, it seems possible that the social phenomenon may have continued to operate to a lesser extent under hushed, less public conditions.

With these ambiguities in mind, it is important to point out that the Petitioners fit the description of Santa Fe Ring members. The single fact that they were powerful men in New Mexico makes them suspect of having connections to the Ring. The Ring was not limited to Anglo lawyers. Hispanos were members as well.²⁰⁹ In fact, the Santa Fe Ring encompassed

204. MIGUEL ANTONIO OTERO, *MY LIFE ON THE FRONTIER: 1864–1882*, at 60 (1935).

205. DOROTHY WOODWARD ET AL., *NEW MEXICO: LAND OF ENCHANTMENT* 34 (1941).

206. RALPH EMERSON TWITCHELL, *THE LEADING FACTS OF NEW MEXICO HISTORY*, *supra* note 198, at 264.

207. See *supra* text accompanying notes 88–94.

208. See BRIGGS & VAN NESS, *supra* note 2, at 39–40.

209. *Id.*

judges, politicians, businessmen, governors, and even priests.²¹⁰ The most powerful men in New Mexico were included among its members.²¹¹ So, it is no surprise that the Petitioners, given their heightened social status, were likely connected to this powerful network of individuals whose social and political power could have easily overcome the adverse conditions in the tribunals.

While there was surely some connection between the Petitioners and the Santa Fe Ring, the Petitioners' level of involvement with the Ring is largely unknown. However, Mariano S. Otero, aside from being a powerful political figure in New Mexico, displayed additional characteristics that would align him more closely with the Ring. For example, Pajarito was not the only land grant Otero had an interest in. He is listed as a petitioner in at least five other land grant claims brought before the CPLC.²¹² Additionally, in Miguel Otero's autobiography, Mariano was identified as owning a land grant containing 100,000 acres.²¹³ The autobiography also indicates that Mariano was at least socially involved with some of the most prominent Ring members.²¹⁴

Even with Mariano's close connection to the Santa Fe Ring, the extent that such associations influenced the success of the Petitioners' claim for Pajarito cannot be determined. Their social status and connection to the Ring is but one factor that surrounds the confirmation of the Pajarito Land Grant. It is valuable as part of the comprehensive understanding of the history of the confirmation of Pajarito. Like other factors that contribute to this understanding, the Petitioners' social status does not resolve every inconsistency, and in fact, may raise more.²¹⁵ Overall, the Petitioners' social status when viewed within the context of social power in New Mexico during this time period suggests that influence by prominent petitioners had a role in the decisions made by the tribunals. Thus, any implications drawn from the confirmation of the Pajarito Land Grant must take into consideration the social status of the Petitioners.

210. *Id.*

211. LAND TITLE STUDY, *supra* note 2, at 31.

212. *Id.* at 228-34.

213. OTERO, *supra* note 204, at 237. It is not clear from the autobiography exactly which land grant this was. It was identified only as "Baca Location No. 1" in the text. *Id.*

214. *Id.* at 156-57. In particular, in describing a distinguished social scene, the autobiography explains high stakes poker games that used to take place at a famous hotel in Las Vegas. Among the men who participated in the games were Mariano and Thomas B. Catron, the most notorious member of the Santa Fe Ring. *Id.*

215. See *id.* For example, the social status of the petitioners and their connection to the Santa Fe Ring would seem to be incongruent with Surveyor Julian's reform agenda, which only makes Julian's recommendation for confirmation even more perplexing. See *id.*

CONCLUSION

The story of the adjudication of the Pajarito Land Grant is a successful one; the Pajarito claim was confirmed despite the adversity the claim faced before the Surveyor General and the CPLC. Most other land grant histories expose the clear bias against land grant claims in both tribunals, with many accounts ending with the rejection of a valid claim. A cursory review of these two facts could lead to the conclusion that the Pajarito claim was different; it was the exception to the rule—a valid claim that was legitimately confirmed by the United States. However, when the Pajarito claim is considered within the context of the circumstances leading up to and surrounding its confirmation, it becomes clear that its confirmation was not so straightforward. Ironically, in the end, the Pajarito claim may not have been so different from other land grant claims, the histories of which reveal an abundance of inequities surrounding the adjudication of land grants during this time. The same social factors that contributed to the unbalanced land grant adjudication system may have also been at play in the confirmation of the Pajarito Land Grant. In order to truly understand the adjudication of land grant claims in New Mexico and the extent the social landscape affected such adjudications, more land grant histories must be closely examined. There is an abundance of history that remains hidden away. Perhaps more people, who like me have a connection to land in New Mexico, will attempt to uncover the land grant origins of their own communities.

