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MARK SCHILLER\*

## The History and Adjudication of the Antonio Chávez Grant

### ABSTRACT

*The Antonio Chávez Land Grant was a valid Mexican land claim whose adjudication was the basis for Hayes v. United States, 170 U.S. 637 (1898), one of several pivotal Supreme Court cases that unjustly overturned legal presumptions that protected Mexican land grant claimants. In this case, it was the presumption that the official or government body that made a grant (or a copy thereof) did, in fact, have the authority to do so. The theory behind the reversal of presumption originated in an ungrounded assertion (i.e., one that had no basis in Spanish or Mexican law) that was formalized into a legal precedent by U.S. Attorney for the Court of Private Land Claims, Matthew Reynolds.*

The Court of Private Land Claims (CPLC), (created by a Congressional Act in 1891 “to provide for the settlement of private land claims in certain States and Territories”)<sup>1</sup> whose tenure ran from 1891 to 1904, adjudicated the vast majority of Spanish and Mexican land claims (282) in the New Mexico Territory stemming from the Mexican-American War. Excluding the patently fraudulent Peralta Reavis claim,<sup>2</sup> more than 22 million acres were claimed, but fewer than two million acres were actually confirmed by the court. In its 2004 General Accounting Office report (GAO Report), *Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, the U.S. federal government implies that this gross discrepancy was the result of the reform of a confirmation process that was previously riddled

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1. An Act to Establish a Court of Private Land Claims, 26 Stat. 854 (1891).

2. “The most spectacular forgery case in which [William] Tipton [lead expert for the government concerning archival land grant records] testified was the Peralta-Reavis grant...Tipton testified that the documents through which [James Addison] Reavis was claiming some twelve million acres of land [in Arizona and New Mexico] were entirely forged because they were written with a steel pen and modern ink instead of a quill pen and the ink used in the third quarter of the eighteenth century when the documents were supposed to have been written. In addition the handwriting was a poor copy the of the writing then in vogue.” (The claim was thereby entirely defeated.) MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 236 (1994).

with corruption and fraud. The facts, however, suggest that it was the direct result of a colonialist policy to keep as much land in the U.S. public domain as possible by legislatively and judicially circumventing the terms of the Treaty of Guadalupe Hidalgo. This article examines the history of one land claim that is emblematic of that policy.

Historian Richard Wells Bradfute has characterized the U.S. Attorney for the CPLC, Matthew G. Reynolds, as a man "dedicated to the defeat of as many claims, as possible. If he could not defeat them, he strove to reduce the acreage confirmed as much as possible."<sup>3</sup> In his 1894 Report to the Attorney General summing up the yearly activities of his office, Reynolds boasted:

In New Mexico and Arizona the total area claimed in the suits disposed of...was 4,784,651 acres; amount confirmed, 779,611 acres; amount rejected and not confirmed 4,005,040 acres. The result is very gratifying to me...you will notice that in most of the grants where judgments were obtained, the areas have been much reduced...the amount of land saved in this way alone during the term of court just past will more than compensate the Government for the cost of this court and the salaries of its officials during the entire time for which it was created.<sup>4</sup>

He went on to state explicitly whose interests he represented:

The celebrated Cochiti cases, four in number, were all tried, two defeated entirely and the other two so reduced in area as to make a complete victory for the Government, and this has relieved the public excitement growing out of fear that confirmations might be made so as to include the recently developed mining district covered by these claims.<sup>5</sup>

In his 1892 Report to the U.S. Attorney General, Reynolds acknowledged the government's unjust advantage over impoverished, non-English-speaking Mexican claimants stating, "those holding the small grants and those owned by the communities, I have no doubt are being delayed from

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3. RICHARD WELLS BRADFUTE, *THE COURT OF PRIVATE LAND CLAIMS, THE ADJUDICATION OF SPANISH AND MEXICAN LAND GRANT TITLES (1891-1904)* 220-21 (1975). Land grant historian Victor Westphall states, "[a]rguably...Reynolds was in the position of a public prosecutor. With the code of professional ethics of a later date, a lawyer in such a role would be obligated to see justice was done, not to win." VICTOR WESTPHALL, *MERCEDES REALES, HISPANIC LAND GRANTS OF THE UPPER RIO GRANDE REGION* 261 (1983).

4. ATTORNEY GENERAL OF THE UNITED STATES, *REPORT OF THE UNITED STATES ATTORNEY FOR THE CPLC, ATTORNEY GENERAL'S ANNUAL REPORT, NO. 3318, H. EXEC. DOC. NO. 7, at 3-4* (3d Sess. 1894).

5. *Id.*

ignorance in many cases, and often from inability to obtain counsel to prosecute their claims.”<sup>6</sup>

The bias evident in Reynolds’ reports clearly demonstrates that he was not a public servant dedicated to the “just” prosecution of Spanish and Mexican land claims, but a colonial bureaucrat whose job, during this era of aggressive expansionism and overt racism,<sup>7</sup> was to defeat or reduce all claims, regardless of their validity, in order to make land available for capitalist development and Anglo settlement. Historian Roxanne Dunbar-Ortiz asserts:

When land monopolists overreached themselves, the government stepped in, not to protect the property interests of the Spanish and Mexican grantees under the Treaty [of Guadalupe Hidalgo], but rather to protect its own interest in maintaining control over the public domain. An integral part of the development of capitalism is the role of the state in limiting the accessions of individual monopolists that could hinder the flow and circulation of capital necessary for its continued growth....Speculators did, however, perform the important function of dispossessing the many subsistence owners of the land essential for capitalist development of the area.<sup>8</sup>

Reynolds’ actions in the adjudication of the Antonio Chávez Grant near Socorro graphically demonstrate this colonialist bias. His 1894 Report to the U.S. Attorney General concerning this adjudication states, “I deem this case one of the most important I have tried, as it settles the legal status of quite a number of other claims in the Territory that are pending before this Court.”<sup>9</sup> Reynolds’ message to the Attorney General was prophetic; he went

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6. ATTORNEY GENERAL OF THE UNITED STATES, REPORT OF THE UNITED STATES ATTORNEY FOR THE CPLC, ATTORNEY GENERAL’S ANNUAL REPORT, NO. 3097, H. EXEC. DOC. NO. 7, at 6 (2d Sess. 1892).

7. During an 1847 debate in the Senate regarding the annexation of New Mexico, Senator Lewis Cass of Michigan stated, “Senator Calhoun...has submitted many sound observations respecting the diversity of races and institutions, which exist between us and Mexico, and he deprecates...the union of the Mexican people and ours. I fully agree, sir; in all that. It would be a deplorable amalgamation. No such evil will happen to us in our day. We do not want the people of Mexico, either as citizens or subjects. All we want is a portion of territory...with a population, which would soon recede or identify itself with ours.” CONG. GLOBE, 29th Cong., 2d Session, Vol. 2, 369 (1847). See also REGINALD HORSMAN, RACE AND MANIFEST DESTINY (1981) (discussing this issue thoroughly).

8. ROXANNE DUNBAR ORTIZ, ROOTS OF RESISTANCE, LAND TENURE IN NEW MEXICO (1680–1980) 95, 101 (1980).

9. MATTHEW G. REYNOLDS, REPORT TO THE UNITED STATES ATTORNEY GENERAL REGARDING CPLC CASE 37, THE ANTONIO CHAVEZ GRANT (Feb. 8, 1894) (on file with the Center for Southwest Research, Univ. of N.M., Albuquerque, N.M. (CSWR), Catron Collection,

on to employ the precedent established by the defeat of this legitimate land claim to defeat other legitimate claims. A review of the facts surrounding the Antonio Chávez decision, however, reveals that this legal precedent was predicated on a specious technicality regarding the authority of the Mexican governor and the Mexican Territorial Deputation to make the Grant, and an incredibly narrow interpretation of the court's mandate, which completely ignored Spanish and Mexican custom and practice. It also demonstrates the limits to which credulity and justice were stretched in order to accommodate the demands of colonial expansion.

The history of the Antonio Chávez Grant and its judicial review by the U.S. government is a complicated story that evolved into a battle between the federal government and a powerful capitalist entrepreneur whose collateral victims were the residents of Indo-Hispano community and private land grants. Antonio Chávez was a nineteenth-century elite who lived in the ranching and farming settlement of Belén, about half way between Albuquerque and Socorro, New Mexico. Sometime before February 16, 1825, Chávez petitioned the Mexican Territorial Deputation requesting a tract of land he referred to as the "San Lorenzo Arroyo" for the purposes of pasturing his livestock and expanding his agricultural operation.<sup>10</sup>

He stated that the land was uncultivated and that the Grant would contribute to the general security of the area by thwarting attacks by the Navajos and other nomadic tribes that raided the neighboring settlements and stole their livestock.<sup>11</sup>

On February 16, 1825, the six members of the Mexican Territorial Deputation noted that they were passing the petition on to the "Political Chief [i.e., the governor] of this Territory"<sup>12</sup> in order for him to report whether the land Antonio Chávez requested was part of the Socorro and Sevilleta land grants, and if so, whether the new Grant would impinge upon those settlements or impair their water rights.<sup>13</sup>

On February 25, 1825, Mexican Territorial Governor Bartolomé Baca responded at length, listing five reasons why he felt the Grant should be made. First, and most important, it would provide a cadre of armed herders who would help protect the area from attack by nomadic tribes. Second, although the new Grant overlapped a small portion of the two existing grants, there remained ample land "for pastures, fields, uses, and

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Correspondence, frames 400699–707).

10. Grant papers for the Antonio Chávez Grant (Feb. 16, 1825), Spanish Archives of N.M. (SANM), SG 79, roll 1, frames 221–33 [hereinafter Chávez Grant] (on file with the N.M. State Records Ctr. and Archives, Santa Fe, N.M. (NMSRCA)).

11. *Id.*

12. *Id.*

13. *Id.*

transits so that the land which may be granted to Chávez will cause them not the least scarcity...[and] far from being injurious to those settlements, there results to them a benefit" [from the presence of the armed herders].<sup>14</sup> Third, that the presence of Chávez's armed herders would also "make the desirable vacant lands of the Bosque del Apache and San Pasqual"<sup>15</sup> safe for settlement by local colonists whose land was "full of locusts and worn out by constant cultivation."<sup>16</sup> Fourth, that the petition would allow Chávez to re-establish his livestock business after substantial losses due to Navajo raids. Fifth, rather than the concession damaging the surrounding grants, it would provide employment for the poverty-stricken members of those settlements. "For all these reasons and many others which I omit...I am of the opinion that the petition of Antonio Chávez may be acceded to at once."<sup>17</sup>

Upon receiving the recommendation of the governor, the Mexican Territorial Deputation, on March 3, 1825, approved the Grant and instructed Chávez to "present himself to the Alcalde of Socorro that he may place him in possession...."<sup>18</sup>

On April 20, 1825, Alcalde Juan Francisco Baca, accompanied by two Aldermen of the *ayuntamiento* (the local governing board) and two other residents of the district, all of whom acted as witnesses, signed the act of possession and placed Chávez in possession of the tract with the following boundaries: "on the north, where the small table land of the Alamillo begins; on the east the del Norte River; on the south, a small forked cedar tree in the middle of the bend of the Pablo García Ranch...on the same side [of] the main road which is traveled towards Socorro....[and] on the west, the spring known as the Jara Spring."<sup>19</sup> The document goes on to say that the *alcalde* (a local official with judicial, executive, and police powers) took Chávez by the hand "and he in observance of the customary

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14. Chávez needed water for both his farming and ranching operations. Because the Socorro and Sevilleta grants occupied all the land along the river, it was necessary for them to donate a piece of land to the Chávez tract in order for him to have access for irrigation. This, as the governor references, did not significantly impair those two grants' water rights or agricultural lands. See J.J. Bowden, *Private Land Claims in the Southwest 197-98 n.1* (1969) (unpublished Master's Thesis, Southern Methodist University) (on file with Univ. of N.M. School of Law Library).

15. Chávez Grant, *supra* note 10.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* "[P]or el norte, en donde parte la Mesita del Alamillo; por oriente, el Rio de Norte; por el sur un sabinito orquetudo que esta en la enmediation del rincon del rancho de Pablo García, que commune llaman. Este sabinito esta para el lado del camino real que se transita al direcion Socorro, a la parte de la vega; y por el poniente, el ojo conocido de la Jara." *Hayes v. United States*, 170 U.S. 637 (1898) (Spanish language included as "Exhibit B").

ceremonies shouted long endure the nation and our independence and long live the sovereign, and he shouted and plucked up herbs, cast stones, and praised the name of God...."<sup>20</sup>

As these carefully recorded procedures demonstrate, the granting process was a highly formalized, thoroughly documented, official procedure. More importantly, it addressed the two fundamental criteria the Spanish and Mexican governments had for making land grants: (1) to expand the areas of settlement in order to provide protection against the incursions of hostile nomadic tribes and other intruders, and (2) to provide for the subsistence needs of the colonists.<sup>21</sup> According to land grant historian Malcolm Ebright, continuous settlement and/or use of a grant were the most important criteria for land title validation under both Spanish and Mexican governance.<sup>22</sup> These criteria would be completely ignored by the CPLC and the Supreme Court when they adjudicated the claim.

Antonio Chávez remained in possession of the Grant until February 12, 1835, when he transferred ownership to his wife, Monica Pino de Chávez.<sup>23</sup> She maintained possession until October 26, 1850, at which time she sold the Grant to Anastacio García, Rafael Luna, and Ramon Luna.<sup>24</sup> The two Lunas were members of the elite family that founded Los Lunas, just south of Albuquerque.

The new owners began the process to confirm title under U.S. governance on August 15, 1873, when Ramon Luna and Anastacio García submitted a petition to Surveyor General James K. Proudfit on behalf of "themselves, and the heirs of Rafael Luna and all others interested in said

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20. *Id.*

21. Regarding the establishment of the Las Trampas Grant in 1751, for example, Governor Tomás Veléz Cachupín wrote, "it appears that the inhabitants of this said city [Santa Fe] have increased to a great extent...[and] there is not land or water sufficient for their support. Neither have they any other occupation...excepting agriculture and the raising of stock and whereas in the King's domains which are unoccupied there are lands which up to this time are uncultivated and which will yield comforts to those who cultivate them...[and] from which the further benefit will result that hostile Indians will not travel over them and will serve as a barrier against their entrance to despoil the interior settlements...I hereby assign and distribute said site...." Town of Las Trampas Grant by Governor Tomás Veléz Cachupín (July 15, 1751), SANM, SG 27, roll 16, frame 298 (on file with NMSRCA).

22. "The decisions of *alcaldes*, governors, and the Mexican *asesor*, on land grant issues emphasized settlement and continuous occupation of the land as the most important factors in land grant validity." EBRIGHT, *supra* note 2, at 133.

23. Conveyance of title to the Antonio Chávez Land Grant from Antonio Chávez to his wife, Monica Pino de Chávez (Feb. 12, 1835), SANM, PLC 37, roll 36, frames 776-78 (on file with NMSRCA).

24. Conveyance of title to the Antonio Chávez Grant by Monica Pino de Chávez to Rafael Luna, Anastacio García and Ramon Luna (Oct. 26, 1850), SANM, SG 79, roll 21, frames 231-33 (on file with NMSRCA).

grant.”<sup>25</sup> The petition gave a very basic outline of the Grant’s origin, its sale to the Petitioners, and the boundaries designated in the act of possession. While the Petitioners included a sketch map of the Grant, they declined to make an estimate of its approximate area.<sup>26</sup>

Some time after the petition was submitted and prior to January of 1874, U.S. Commissioner Joseph C. Hill took a deposition from Juan Francisco Baca, the *alcalde* of Socorro who put Chávez in possession of the Grant. Baca testified that he had placed Chávez in possession “in due form of law” and that both the original and current owners had continuously occupied the Grant.<sup>27</sup>

On January 5, 1874, Surveyor General Proudfit wrote a brief account of the Grant and recommended “that the title to the land according to the boundaries set forth in the act of possession be confirmed to the legal representatives of Antonio Chávez....”<sup>28</sup> Congress, however, did not act upon the Surveyor General’s recommendation and the claim, like dozens of others, remained in limbo.

During this period, the Grant changed hands several times. Although we know from the record in the CPLC file that Anastacio García sold his one-third interest in the Grant in 1884 to New York investor Hiram G. Bond for ten thousand dollars, it is unclear how or when the Lunas’ two-thirds was conveyed to a group of Anglo investors that included Hiram and his wife Laura Bond, Charles D. Arms of Youngstown, Ohio, and Latham A. Higgins of Denver.<sup>29</sup> We also know from the record that they in turn conveyed the Grant, as well as another tract to the south of the Antonio Chávez Grant, in 1886, to Denver investor, Martin B. Hayes, for whom the subsequent Supreme Court case would be named.<sup>30</sup> However, according to

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25. Petition submitted for confirmation of the Antonio Chávez Grant to Surveyor General James K. Proudfit (Aug. 15, 1873), SANM, SG 79, roll 21, frames 236–239; sketch map, frame 241 (on file with NMSRCA).

26. *Id.*

27. Testimony of Juan Francisco Baca, H. EXEC. DOC. NO. 149, at 3–4 (1st Sess. 1873).

28. Recommendation for confirmation of the Antonio Chávez Grant by Surveyor General, James K. Proudfit (Jan. 5, 1874), SANM, SG 79, roll 21, frame 248 (on file with NMSRCA).

29. Conveyance of one-third interest in the Antonio Chávez Grant from Anastacio García and his wife, Cruz Apodoca de García, to Hiram G. Bond (Mar. 13, 1884), SANM, PLC 37, roll 36, frames 771–74 (on file with NMSRCA).

30. There are two conveyances in the CPLC file, one from the Bonds to Hayes (June 2, 1886), SANM, PLC 37, roll 36, 764–66 (on file with NMSRCA), and the other from the Arms to Hayes, (June 3, 1886), SANM, PLC 37, roll 36, frames 768–69 (on file with NMSRCA). These contracts transferred the land to Hayes for one dollar each. However, on June 2, 1886, Hayes also entered into a contract with the Bonds, the Arms, and the Estate of Higgins to take possession of the Grant and adjoining tract for a consideration of \$60,000 payment which was deferred for two years at an 8 percent interest rate. The Bonds, the Arms, and the Estate of Higgins ultimately brought suit against Hayes for non-payment in 1890, and, in October 1893,



Hayes' testimony before the CPLC in 1893, he actually "became connected" with the Grant in 1873 or 1874.

It is difficult to know exactly what Hayes meant by "became connected," but he did testify that he paid for an 1877 survey of the Grant by the Office of the Surveyor General, which he subsequently protested, claiming it included land that did not belong to the Grant and excluded land that did. He was able to have it resurveyed in 1878.<sup>31</sup> The June 1878 resurvey determined that the Grant included 130,138.98 acres. On August 10, 1878, Surveyor General Henry M. Atkinson, who had succeeded Proudfit, approved that survey.<sup>32</sup> Although there would subsequently be a great deal of testimony and controversy regarding the actual location of the boundaries of this Grant, it played no part in the final outcome of the adjudication.

Congress did not consider the Antonio Chávez claim until 1882, when the commissioner of the General Land Office, N.C. McFarland, reported to the Committee on Private Land Claims that "[t]he grant is valid and legal, inasmuch as it was made by a legally constituted body – the provincial deputation – with the approval of the governor or *jefe político*, the highest civil authority of the province." He went on to say, "I would suggest that confirmation be made, as recommended by the surveyor general, as such confirmation embraces representatives of such grantee by contract, as well as by operation of law."<sup>33</sup>

Congress, however, still took no action on the claim and the Surveyor General files on this case conclude with a third Surveyor General, George W. Julian, re-examining the claim on November 5, 1886. Julian was appointed by President Grover Cleveland ostensibly to "reform" the

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an auction of the tract was ordered. Hayes somehow managed to maintain control of the tract, however, because he was still the ostensible owner when the Supreme Court heard the case in 1897. Compounding the complexity of this arrangement is the fact that the group that brought suit against Hayes for non-payment was represented by John H. Knaebel, who represented Hayes before both the CPLC and the Supreme Court. The agreement between Hayes and the other investors was obviously suspicious. See Records of the Fifth Judicial District of the Territory of N.M., County of Socorro, Case No. 2381, SANM (on file with NMSRCA). Further complicating an understanding of the chain of title of the Grant is a brief article found in the *Silver City Enterprise* from July 11, 1884, when Hayes was the owner of the Santa Rita (Chino) copper mine in that area. See *infra* note 93. The article reads:

Martin B. Hayes, well known in this county through his connection with the Santa Rita copper property, has brought suit against H.G. Bond, of New York, in the second district U.S. court of the territory, for a large interest in a grant of land the sale of which he negotiated.

31. Testimony of Martin B. Hayes before the CPLC (Nov. 1893), Catron Collection, frames 400777-92 (on file with CSWR).

32. Bowden, *supra* note 14, at 200.

33. N.C. MCFARLAND, COMMISSIONER OF THE GENERAL LAND OFFICE, REPORT TO THE COMMITTEE ON PRIVATE LAND CLAIMS, NO. 1501 (1st Sess. 1882).

adjudication process after the scandal caused by the confirmations of the grossly exaggerated Maxwell and Sangre de Cristo land grants. The government's real agenda, however, as evidenced by the fact that Julian reviewed numerous claims previously recommended for confirmation by his predecessors and then recommended rejecting most of them, was to keep as much land in the public domain as possible.

President Cleveland could not have chosen a better man for the job. Formerly a congressman from Indiana and one of the drafters of the Homestead Act, Julian believed, with the self-righteous zeal of a Calvinist minister, that the pastoral life was redemptive and that an army of yeoman farmers would create an agricultural utopia in the west.<sup>34</sup> In his 1887 article "Land Stealing in New Mexico" in the *North American Review*, he suggested that as a result of his reform of the land grant adjudication process

[t]he stream of settlers now crossing the Territory [of New Mexico] in search of homes on the Pacific will be arrested by the new order of things and poured into her valleys and plains. Small land-holdings, thrifty tillage, and compact settlements will supersede great monopolies, slovenly agriculture, and industrial stagnation. The influx of an intelligent and enterprising population will insure the development of the vast mineral wealth of the Territory, as well as the settlement of her lands....<sup>35</sup>

Julian's vision of this "intelligent and enterprising population," however, clearly excluded the Mexican and Native American populations already farming and ranching the territory. In personal journal entries from his New Mexico years he referred to the "stagnation of the natives" and the "prevailing tendency here to degenerate into barbarism."<sup>36</sup> He referred to New Mexican homes as "the piles of mud in which the people of Santa Fe are domiciled" and dismissed the entire Territory, claiming "[t]here is no future for this country in sight, and nothing in fact to keep any civilized

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34. In a speech before Congress during the debate over the Homestead, Bill Julian stated: "The life of a farmer is peculiarly favorable to virtue; and both individuals and communities are generally happy in proportion as they are virtuous. His manners are simple and his nature unsophisticated. If not oppressed by other interests, he generally possesses an abundance without the drawback of luxury. His life does not impose excessive toil, and yet it discourages idleness. The farmer lives in rustic plenty, remote from the contagion of popular vices, and enjoys, in their greatest fruition, the blessings of health and contentment." HENRY NASH SMITH, *VIRGIN LAND, THE AMERICAN WEST AS SYMBOL AND MYTH* 197 (1961); CONG. GLOBE, 31st Cong., 2d Sess. 137 (1851).

35. George W. Julian, *Land Stealing in New Mexico*, 145 N. AM. REV. 17-31 (1887).

36. Journal of George W. Julian, Aug. 2, 1885, Oct. 11, 1885, & Sept. 2, 1888 (on file at the Ind. State Library, Indianapolis, Ind.).

man here but the climate."<sup>37</sup> His actions as Surveyor General reflect these sentiments.

In his zeal to expose what he termed the "systematic robbery of the [U.S.] Government"<sup>38</sup> and ensure New Mexico fulfilled its "manifest destiny," Julian often asserted that legitimate claims were fraudulent and deliberately misinterpreted the facts to underscore his accusations. He then broadcast these hyperbolized accounts in the mainstream media and special reports, whipping up a furor of public and congressional indignation. Julian's biographer, Patrick W. Riddleberger, suggests that for Julian, "stimulation often came more from hatred of his enemies, real or supposed, than from a recognition of social and economic needs."<sup>39</sup>

Julian's actions with regard to the Antonio Chávez claim were typical of many of the cases he reviewed: challenging the legitimacy of the claim and the proceedings of the surveyors general who preceded him by making unsubstantiated accusations based on misinterpretation and innuendo.

Let me cite just a few examples: first, after briefly outlining the history of the Grant and conceding that "[t]he certified copy of the grant and the proceedings thereunder, as taken from the record of said assembly, are duly authenticated and the testimony of one witness, the *alcalde* who delivered the possession, is produced...." Julian, without specifically quoting from the deposition, questioned the legitimacy of the *alcalde's* testimony stating, "[t]his witness, however, makes the date of the juridical delivery three years before the date of the grant."<sup>40</sup> In fact, the *alcalde*, who stated his age as 85 at the time of the deposition and who was recalling events that had occurred almost 50 years before, said, "[T]his was about the year 1822. I am not very certain as to the exact date."<sup>41</sup>

Next, having cast doubt upon the legitimacy of the *alcalde's* testimony, Julian claimed, "There is no evidence that the grantee complied with the conditions of the royal laws under which all such grants were made."<sup>42</sup> Once again, going back to the *alcalde's* testimony we find that he said that Antonio Chávez "took possession and kept continuous possession of the same until his death. His heirs sold the *sitio* [in Spanish "*sitio*" is a place, site, or location] to Ramon Luna, Rafael Luna, and Anastacio García.

37. *Id.*

38. Julian, *supra* note 35.

39. R. Hal Williams, *George W. Julian and Land Reform in New Mexico, 1885-1889*, 41 AGRIC. HIST. 83 (1967) (quoting PATRICK W. RIDDLEBERGER, *GEORGE WASHINGTON JULIAN, RADICAL REPUBLICAN: A STUDY IN NINETEENTH CENTURY POLITICS AND REFORM* 305 (1953)).

40. Surveyor General George W. Julian, Review of the Antonio Chávez claim (Nov. 5, 1886), SANM, SG 79, Roll 21, frames 264-66 (on file with NMSRCA).

41. Testimony of Juan Francisco Baca, *supra* note 27.

42. Julian, *supra* note 40.

They have continuously occupied said *sitio* up to the present time. I am not interested in the said *sitio* or tract of land in any manner whatsoever.”<sup>43</sup> So clearly, according to the *alcalde*, Antonio Chávez and the subsequent owners had complied with occupancy conditions of the colonization laws, and Julian was ignoring the testimony of a witness who had no apparent reason to lie.

Julian went on to say, “Moreover, the grant was made under the Mexican colonization law of 1824, according to which it could not exceed one square league of land, or a fraction over 4,340 acres; but it is surveyed under the direction of this office for 130,000 acres and its confirmation recommended to this extent.”<sup>44</sup> Once again Julian was wrong. The Mexican Colonization Law of 1824 limited each individual grantee to eleven square leagues<sup>45</sup> or approximately 48,000 acres, but even then, under Mexican governance, these laws were tempered by custom, usage, and politics. There were other instances of grants made to elites during the Mexican Period that exceeded the 11 square-league provision, which Congress had, in fact, already confirmed.<sup>46</sup> It is also significant that this Grant was made specifically for grazing Chávez’ livestock herds, which were substantial.<sup>47</sup> In a part of New Mexico as arid as the Socorro area, 130,000 acres was not excessive. By comparison, the Pino Grant, another grazing Grant made to an elite at about the same time and in an area that was less arid, exceeded 300,000 acres and withstood two protests charging impairment of existing grazing rights brought by residents of a neighboring grant to the Mexican Governor and Territorial Deputation in 1824 and 1825.<sup>48</sup>

Julian then went on to question the legitimacy of the survey and the honesty of the surveyors stating, “The facts connected with the survey excite suspicion and distrust as to the entire transaction.”<sup>49</sup> While there definitely had been instances of grossly exaggerated surveys in the past

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43. Testimony of Juan Francisco Baca, *supra* note 27.

44. Julian, *supra* note 40.

45. “It shall not be allowed that more than one square league [sic] of irrigable land, four of temporal land, and six of range land, be united as a property in a single hand.” MATTHEW G. REYNOLDS, *SPANISH AND MEXICO LAND LAWS: NEW SPAIN AND MEXICO* 122 (1895) (quoting Mexican Colonization Laws, No. 12, Decree of Aug. 18, 1824).

46. Grants made under the same authority and which exceeded the 11 square-league provision, but were confirmed by Congress, include the Pino Grant (better known as the Preston Beck Grant) at 318,699.72 acres and the Pablo Montoya Grant, at 655,468.07 acres. Bowden, *supra* note 14, at 677–86, 700–05.

47. Testimony of Jesus Baca before the CPLC (Nov. 1893), Catron Collection, frames 400777–792 (on file with CSWR). See the discussion of Baca’s testimony before the CPLC, *infra* notes 66–67 and accompanying text.

48. See SANM I, Archives 708, 899, 1153 (detailing the formal protest of the Pino Grant in 1824 and 1825) (on file with NMSRCA).

49. Julian, *supra* note 40.

(most notably the Maxwell Grant), the reports contained in the Surveyor General's file simply do not bear out Julian's accusations. In point of fact, the most telling commentary regarding his accusations about the survey came implicitly from Matthew G. Reynolds himself; while all of Julian's accusations regarding the 1878 survey were directed at the location of the southern boundary call, it was the location of the western boundary that Reynolds attacked during the trial before the CPLC.<sup>50</sup> Reynolds, who rarely missed an opportunity to challenge a boundary call and was well aware of Julian's review, never questioned the southern boundary as approved by Surveyor General Atkinson.

Although Julian did not present one shred of valid evidence that substantively challenged the Grant or survey's legitimacy, he concluded his review by recommending the claim be rejected.<sup>51</sup> In his 1887 article "Land Stealing in New Mexico" he went even further, charging that in the case of the Arroyo de Lorenzo (an alternate name for the Antonio Chávez Grant) the government was "defrauded" by the claim and boasted, "In dealing with the enormous theft of the national patrimony, I do not speak at random, but on the authority of ascertained facts."<sup>52</sup>

Julian's bombastic denunciation of the Antonio Chávez claim and other legitimate claims, including the Town of Las Vegas Grant in which he first promulgated the theory that title to the common lands did not vest in the communities to which they pertained, set the stage for Reynolds, who continued Julian's crusade when Congress created the CPLC in 1891 to adjudicate all unresolved land claims.

On September 24, 1892, Martin B. Hayes submitted a petition for the Antonio Chávez Grant to the CPLC. His petition recited the outline of the Grant's history and stated that "title to the said tract of land...was complete and perfect before and at the time of the cession of New Mexico to the United States of America,"<sup>53</sup> asserting it therefore met the Court's mandate for approval. Hayes' petition also noted the previous reviews of the Grant, including the favorable opinions of Proudfit and McFarland and the negative opinion of Julian, which it discounted as "perfunctory and unjudicial...and without any lawful authority."<sup>54</sup> It stated, "The said granted tract of land has been correctly surveyed by the said United States," included a map of that survey, and traced Hayes' line of title.<sup>55</sup>

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50. Testimony from the trial of the Antonio Chávez land claim before the CPLC (Mar. 16, 1893) SANM, PLC 37, roll 36, frames 685-710 (on file with NMSRCA).

51. Julian, *supra* note 40.

52. Julian, *supra* note 35, at 17.

53. Petition, CPLC for the Antonio Chávez Grant, (Sept. 2, 1892) SANM, PLC 37, roll 36, frames 651-57; Map, frame 674 (on file with NMSRCA).

54. *Id.*

55. *Id.*

The trial commenced on December 13, 1892, and ran through several terms of the Court, with the decision coming in November of 1893. While the trial itself focused primarily on determining the western boundary of the Grant and establishing whether occupancy requirements had been met, Reynolds' March 9, 1893 Answer to the Hayes petition contested the legitimacy of the Grant on a variety of grounds. Most importantly, he asserted that the Grant "was without any warrant or authority of law, and in violation of the laws in existence, and contrary to the policy as declared by the Mexican Republic."<sup>56</sup> Apparently Reynolds had been waiting for the right land claim to present itself in order to test a loophole he believed he had found while compiling his book, *Spanish and Mexican Land Laws*.<sup>57</sup> That is, between August 18, 1824, when the Mexican congress passed a general colonization law stating, "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic"<sup>58</sup> and November 21, 1828, when the Mexican congress passed more specific rules for that colonization stating, "The governors of the territories are authorized...to grant vacant lands in their respective territories to such contractors, families, or private persons, whether Mexicans or foreigners who may ask for them for the purpose of cultivating and inhabiting them,"<sup>59</sup> only the chief executive of the federal government had the authority to make a grant.<sup>60</sup>

I will withhold comment on this theory for the time being and finish discussing the other deficiencies in the claim Reynolds listed in his Answer. Reynolds' Answer went on to challenge the location of the boundaries and the quantity of land included therein. He asserted that the Mexican government had already severed the portion of the Chávez Grant that overlapped the Socorro and Sevilleta grants from the public domain and therefore the Territorial Deputation had no authority to redistribute it.<sup>61</sup> He claimed that Antonio Chávez never fulfilled the residency requirement to

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56. Answer for the U.S. Attorney of the Court, CPLC, Case No. 37 [hereinafter Answer to Case No. 37] (Mar. 9, 1893), SANM, PLC 37, roll 36, frames 722-25 (on file with NMSRCA).

57. REYNOLDS, *supra* note 45. Historian Malcolm Ebright says of this book: "The compilation has a substantial bias, both in the selection of the laws included and in the summary of those laws in the prefatory 'historical sketch.' No mention is made of laws making custom applicable to a particular situation or laws defining custom, and no mention is made of the important rules of evidence and presumptions under Spanish and Mexican law. When the courts accepted Reynolds' book as the definitive statement of Spanish and Mexican law, they adopted these biases, giving the government another substantial edge over land grant claimants." EBRIGHT, *supra* note 2, at 135-36.

58. FREDERIC HALL, THE LAWS OF MEXICO 149 (1885).

59. *Id.* at 150.

60. Answer to Case No. 37, *supra* note 56.

61. *Id.*

perfect title and that the Grant was not as large as claimed.<sup>62</sup> He finished by requesting that the "plaintiff be put to his proof of all allegations in his petition...[so] that a Decree may be entered rejecting the confirmation of said alleged grant..."<sup>63</sup>

Clearly Reynolds had thrown down the gauntlet and, despite the regularity of the granting process and the fact that Congress had already confirmed and patented grants such as the Preston Beck, the Pablo Montoya, and the Domingo Fernández (Eathan W. Eaton), which were granted on similar authority and exceeded the 11 square-league provision, was hopeful that the court would sustain his main argument challenging the presumption that the Governor and Territorial Deputation had the authority to make the Grant.<sup>64</sup> Attacking the claim on multiple fronts, however, was typical of his strategy to reduce the claim as much as possible if he could not entirely defeat it.

The trial continued on March 16, 1893, with Reynolds calling three witnesses in order to establish two things: first, that there were two springs in the area west of the Rio Grande both known or formerly known as *La Jara*, which was the western boundary call of the Grant, with one spring significantly further west than the other; and second, that neither Antonio Chávez, nor the three men to whom his widow conveyed the Grant, had ever fulfilled the occupancy requirement needed to perfect title to the Grant. Although the issue of the granting authority's power to make this Grant would be decisive, the boundary and residency questions became the focus of the trial testimony and the other issues were briefed.<sup>65</sup>

Nine witnesses appeared during the court's following term (four for the government and five for the plaintiffs), the most important of whom was a local rancher named Jesus Baca. Baca, who was 75 at the time of the trial, had been Antonio Chávez's chief herdsman and was the only witness

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62. *Id.*

63. *Id.*

64. The Preston Beck Grant was made by the Territorial Deputation on Dec. 23, 1823, and the Grantee was placed in possession on Aug. 29, 1825. It was confirmed by Congress in 1860 and patented in 1883 for 318,699.72 acres. The Pablo Montoya Grant was recommended by Governor Bartolome Baca on Nov. 19, 1824, and granted by the Territorial Deputation that same day. It was confirmed by Congress in Mar. 3, 1869, and patented in 1877 for 655,468.07 acres. The Domingo Fernández Grant was recommended by the Provincial Deputation on Aug. 8, 1827, and made by Governor Manuel Armijo on Aug. 9, 1827. It was confirmed by Congress on June 21, 1860, and patented in 1880 for 81,032.67 acres. The Bosque del Apache Grant, whose desired settlement Governor Baca claimed was contingent on the protection the Chávez Grant would afford, although granted in 1845 under a different authority, was also theoretically subject to the 11 square-league provision. It was confirmed by Congress in 1860 and patented in 1877 for 60,117.39 acres. Bowden, *supra* note 14, at 677-86 (Preston Beck), 700-05 (Pablo Montoya), 272-81 (Domingo Fernandez), 171-74 (Bosque del Apache).

65. Testimony from the trial of the Antonio Chávez, *supra* note 50.

who could actually provide first-hand information regarding Chávez's use of the Grant and the location of its boundaries. Baca testified that Chávez kept 3,000 sheep, 1,000 cattle, over 40 horses and 16 pigs on the Grant during the almost nine years he worked for him. He further testified that Chávez employed fourteen herdsmen who resided on the Grant and were armed to prevent theft of the livestock by nomadic bands of Navajos, who, he said, "were making a great deal of harm."<sup>66</sup>

Baca then went on to discuss the western boundary of the Grant, which he told the court Antonio Chávez himself had shown him. He indicated that it was the La Jara Spring as shown on the 1878 Surveyor General's survey plat. In regard to the Ariveche Spring, which several of Reynolds' witnesses claimed was formerly known as La Jara and avowed was the western boundary call of the Grant, Baca testified that the Ariveche Spring was "inside of the Antonio Chávez grant" and that before it was called Ariveche, because of the murder at the spring of an Apache herdsman by that name, it was known as Chupidero, not La Jara.<sup>67</sup> Hayes' lawyer asked Baca if there were any willows (*jaras* in Spanish) growing around the Ariveche. Baca responded, "There never have been any, neither will there be any while there is a world."<sup>68</sup> He claimed that, because of the small amount of water produced by that spring, "willows could not grow there in those times when it would rain, much less grow there now when it is so dry."<sup>69</sup>

In response to further questioning about defending the Grant against marauding Indians, Baca stated that the herdsmen defended the Grant "[a]gainst the Indians and against the Spanish. I had orders as *Caporal* [head herdsman] to drive from it all kinds of stock belonging to other parties, and when the Indians came there, as a matter of course we had to drive them out, [and] defend our homes against them."<sup>70</sup>

Baca's testimony clearly resolved the occupancy issue: although Antonio Chávez did not himself reside on the Grant, he maintained a cadre of armed herdsmen who lived there and defended it against livestock theft, unauthorized grazing, and attack as he had promised in his petition. Moreover, although there was a great deal of conflicting testimony regarding the western boundary call, all of it except Baca's was based on hearsay; Baca's testimony, based upon direct experience with Chávez himself, should have been given more credence and, in fact, made far more

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66. Testimony of Jesus Baca, *supra* note 47.

67. According to Baca's testimony this meant "water-can" because "the quantity of water taken from it was very small, and was only sufficient to be taken and put in barrels and not sufficient to water the burros." *Id.*

68. *Id.*

69. *Id.*

70. *Id.*



sense since no one contested that the La Jara Spring, indicated in the 1878 survey as the western boundary, had substantially more water than the Ariveche Spring. This water source obviously would have been critical for grazing thousands of animals in this otherwise arid area. Adding credibility to Baca's testimony was the fact that he had no interest in the Grant and was unflappable when cross-examined by Reynolds.

On December 4, 1893, the CPLC rendered a split decision, three to two, finding the Grant was invalid for want of authority and dismissing the claim.<sup>71</sup> Hayes appealed the decision to the Supreme Court and, on May 23, 1898, the decision of the CPLC was upheld.<sup>72</sup>

The decisions made in this case speak to this article's central point: they reflect the colonialist bias of the U.S. government in regard to the New Mexico territory. Specifically, the decision by the CPLC and its affirmation by the Supreme Court were based on a specious legal technicality regarding the granting authority of the Mexican governor and the Territorial Deputation, a failure to consider Spanish and Mexican usage, and an extraordinarily narrow interpretation of the authority of those two courts.

As previously noted, the decisions of both courts were predicated on Reynolds' assertion that between August 18, 1824, and November 21, 1828, only the chief executive of the Republic of Mexico had the authority to sever land from the public domain, and that the executive had not conferred that authority on anyone in the provincial government of New Mexico. This position not only misreads the intent of the Mexican government in promulgating the colonization laws of 1824 and the historical context in which they were made, but also ignores the whole body of customary law and usage that had developed in New Mexico since its re-colonization in 1692.

Let us first examine the historical context leading up to the colonization laws of 1824 and 1828 as outlined in Reynolds' "Historical Sketch," which prefaces his own compilation, *Spanish and Mexican Land Laws*. Mexico declared its independence from Spain on February 24, 1821, when a group of revolutionaries formulated the Plan of Iguala. Their battle for independence was consummated September 27, 1821, when General Agustín de Iturbide captured Mexico City. A provisional government was then established with Iturbide as the president. On February 24, 1822, a congress elected according to the Plan of Iguala met in Mexico City and appointed Iturbide emperor. On January 3, 1823, Iturbide, along with the

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71. Decision, CPLC regarding the Antonio Chávez claim (Dec. 4, 1893), SANM, PLC 37, roll 36, frames 864-73 (on file with NMSRCA). Unfortunately, Justices Fuller and Stone, who dissented, filed no dissenting opinion, so there is no way of knowing what reservations existed about the decision.

72. *Hayes v. United States*, 170 U.S. 637, 655 (1898).

National Council, which had replaced the congress, promulgated the Colonization Law of Iturbide. This law, among other things, authorized *ayuntamientos* (local councils) to make grants to individuals. However, on March 7, 1823, Iturbide abdicated and, on January 31, 1824, a new congress adopted a new constitution. On August 18, 1824, the new congress adopted the Colonization Law of 1824, whose sixteenth article provided, "The government, under the principles established in this law, shall proceed to the colonization of the territories of the Republic."<sup>73</sup>

In his brief to the Supreme Court regarding this issue, Reynolds argued:

It does not seem that the executive branch of the Government took any steps to carry into execution the powers conferred by this article of the colonization law until November 21, 1828, when a very complete system of regulations was promulgated, conferring authority upon the governors of the Territories, with the approval of the Territorial deputations, to grant the public lands subject to the restrictions imposed by the colonization law under which regulations were issued.<sup>74</sup>

He went on to say:

If therefore we are to look to the law of August 18, 1824, for authority, the [Antonio Chávez] grant having been made in March, 1825,...it should appear that some regulation under the sixteenth article of the colonization law had been promulgated by the executive, but I do not believe that it has been contended, at any stage of this litigation...that any action on the part of the executive branch of the Mexican Government looking to the disposition of the public lands in the Territories had ever been taken prior to November 21, 1828; therefore it must resolve itself to the fact that within the Territories between August 18, 1824, and November 21, 1828, there was no Territorial official or official body authorized to dispose of the public lands for the nation. It is true the executive could have authorized any one he saw proper to designate, but it fully appears that he did not exercise this power.<sup>75</sup>

Reynolds' assertion that no one but the federal executive had the power to grant land from the public domain for a period of over four year's is pure sophistry. Even Reynolds' own recital of this history concedes that

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73. Reynolds, *supra* note 45, at 25-41.

74. Statement, Brief & Argument by the U.S. Government at 23, *Hayes v. United States*, 170 U.S. 637 (1898) (on file with the Natural Resources Journal).

75. *Id.* at 25.

before and after this four-year period local officials had the authority to grant land from the public domain. Why would the Mexican government, which explicitly stated in the 1824 Colonization Law that it "shall proceed to the colonization of the territories of the Republic," because fortifying its frontiers was critical to legitimizing its authority and protecting its frontiers from the attacks of nomadic tribes and the colonialist intervention of France and the United States, suddenly suspend the practice of empowering territorial officials to make land grants when that process had been the basis for consolidating and extending governmental authority in the region for over 130 years? And why would it, after a period of four years, then reinstitute and formalize that policy? Clearly the newly constituted federal government, plagued by continuing civil, political, and military unrest following the change in sovereignty from Spain to the Mexican Republic, presumed that local authorities, especially in a Territory as remote as New Mexico, would continue to make decisions critical to meeting their own subsistence needs. Historian Marc Simmons asserts:

For twenty-five years, New Mexico was to remain part of the Mexican nation, but as a close appendage rather than an integral component. Self-reliance had become so inbred among her people that they tended to exhibit a combination of distrust and disinterest in matters of government unfolding beyond the bounds of their own province. In fact, the political unrest that kept Mexico City in perpetual turmoil throughout this era confirmed New Mexicans in the belief that they should manage their own affairs with as little outside interference as possible. As it turned out, they were able to achieve that because the repeated and often violent changes of administration in the national capital so disrupted functioning of the central government that outlying areas of the country were left for long periods of time to their own devices.<sup>76</sup>

In point of fact, Reynolds deliberately misconstrued the intent of the colonization law by insisting it be interpreted in an absurdly narrow manner rather than within its historical context.

This conclusion is further supported by information contained in the Antonio Chávez Grant documents and the documents of other grants made during this period under similar authority. As noted in the previous discussion of the Antonio Chávez Grant papers, Governor Bartolomé Baca listed several critical reasons for the Territorial Deputation to make the grant: guarding the area against the depredations of marauding nomadic tribes; inducing settlement on the neighboring Bosque del Apache and San

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76. MARC SIMMONS, *NEW MEXICO, AN INTERPRETIVE HISTORY* 109 (1988).

Pasqual tracts in order to provide new, more fertile land to cultivate; and creating employment for the impoverished settlers on neighboring grants.<sup>77</sup> And, despite Reynolds' protestations, all of this was accomplished by making this Grant.

Another case in point is the Pablo Montoya Grant, also recommended by Governor Baca and granted by the Territorial Deputation on November 19, 1824. In his recommendation of that Grant, Baca "reported that the primary cause for the decline of the livestock industry in New Mexico was the failure of the government to grant sufficient pasture lands to foster and encourage the expansion of that industry."<sup>78</sup>

A third example is the Maragua Grant made March 6, 1826. In its report to the Territorial Deputation, the Santa Fe *ayuntamiento* recommended that body make the Grant "in order to promote the agricultural industry."<sup>79</sup> In recommending the neighboring Gotera Grant four years later, the local *alcalde* told the Territorial Deputation that if it "continued to neglect the development of agriculture, Santa Fe would never acquire sufficient supplies and would continue to be exposed to the indigence, misery and wants which are so prevalent."<sup>80</sup> Clearly, the Territorial government had to continue to grant land simply to meet the subsistence needs of its colonists.

Moreover, all land grants made in New Mexico during this period, and there were more than a dozen, had been made under the same local authority and several had been confirmed by Congress. A reasonable test of the Antonio Chávez Grant's validity, for which there was a whole body of legal precedent, would have been the question: Did the Mexican government, during the 23 years (1825–48) from the time of its granting to the time it was ceded to the United States, question its legitimacy or revoke it? The answer, of course, is that it did not. Yet there is ample documentation that both the Spanish and Mexican governments were not reluctant to suspend or revoke grants when they thought it was warranted.<sup>81</sup> Furthermore, there is not a single instance in which the Mexican government rescinded a grant made during its tenure because it asserted that territorial officials exceeded their authority.

It should also be noted that in a previous Supreme Court ruling, *United States v. Peralta*, 60 U.S. 343 (1856), the Court ruled, "The

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77. Chávez Grant, *supra* note 10.

78. Bowden, *supra* note 14, at 700.

79. *Id.* at 458–59.

80. *Id.* at 451–52.

81. Under Spanish authority, the Diego de Velasco, Barranca, Manuel García de las Ribas, José Antonio Torres, Juan Estevan García de Noriega, and Antonio de Ulibarri grants were all revoked. Under Mexican authority, the Heath Grant in Texas was revoked, and the Maxwell Grant was suspended pending an investigation, but was reinstated.

presumption arising from the grant itself makes it prima facie evidence of the power of the officer making it, and throws the burden of proof on the party denying it." Reynolds theory clearly did not fulfill that burden of proof.

Regarding grants made during the same period under the same authority that Congress had already confirmed, the CPLC, in keeping with its policy of interpreting its mandate as narrowly as possible, stated in the Antonio Chávez decision:

If this cause was pending before Congress, the position assumed by counsel [for the plaintiffs] might be entitled to favorable consideration. Congress, in its sovereign capacity, has unlimited power over all questions growing out of treaties made by the United States with foreign nations...[b]ut this court has only such power and jurisdiction to try to determine the rights of parties claiming grants to lands from Spain and Mexico, as was conferred upon it by the act of March 3, 1891.<sup>82</sup>

Both the CPLC and the Supreme Court's authorities were limited by the 1891 Act to confirming grants whose title was "complete and perfect at the date of the acquisition of the territory by the United States..."<sup>83</sup> The Grant's history, I believe, indicates this claim met that standard and the language of the 1891 Act demonstrates both courts had the authority to acknowledge it. Section 7 of the 1891 Act stated:

That all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the *courts of equity* of the United States....The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land...*according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe Hidalgo...and the laws and ordinances of the Government from which it is alleged to have been derived here....*"<sup>84</sup>

Interpreting this section of the Act in the 1898 Supreme Court case *Ely's Administrator v. United States*, the Court stated:

It must be remembered...that by section 7 of the act creating the Court of Private Land Claims, it is provided 'that all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the...courts of

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82. Decision, *supra* note 71.

83. An Act to Establish a Court of Private Land Claims, 26 Stat. 854, 860 (1891).

84. *Id.* at 857 (emphasis added).

equity of the United States.' Therefore in an investigation of this kind that court is not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico. It was doubtless the purpose of Congress, by this enactment, to provide a tribunal which should examine all claims and titles, and that should, so far as was practicable in conformance with equitable rules, finally settle and determine the rights of all claimants.<sup>85</sup>

Clearly both courts had the authority and the obligation to decide this issue as the government of Mexico would have during the period when the Grant was made.

Ironically, the decision of the CPLC in the Antonio Chávez case explicitly states, in defense of its decision, that in order for the court to confirm title it must appear "that the claimant could have gone into the courts of Mexico and demanded as a matter of right that his title be made complete and perfect, had the territory not been acquired by the United States."<sup>86</sup> As this article has discussed, continuous settlement and/or use of a grant were the most important criteria for perfecting title under both Spanish and Mexican governance.<sup>87</sup> Although Reynolds asserted "the conditions of occupation, settlement and cultivation by the original grantee, prior to the Treaty of Guadalupe Hidalgo, had not been complied with,"<sup>88</sup> testimony before the Surveyor General and at the CPLC trial, particularly that of Jesus Baca and the *alcalde* who placed Chávez in possession of the Grant, contradicts that assertion. Title to the Grant had clearly been perfected under both customary and formal usage.

Moreover, if the court wished to assert that the claimant must have been able to "go into the courts of Mexico and demand as a matter of right that his title be made complete and perfect," why was the large body of Spanish and Mexican case law regarding land grants not applied to these adjudications by the CPLC and the Supreme Court? Land grant historian Malcolm Ebright asserts:

In New Mexico prior to United States occupation, evidence of custom was found in the decisions of the *alcaldes*, *ayuntamientos* and the acts of the government. Since English [Anglo] common law is also composed of decisions in actual cases, it should not have been difficult for Anglo-American lawyers and judges to understand Hispanic customary law.

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85. Ely's Admin. v. United States, 171 U.S. 220, 240-241 (1898).

86. Decision, *supra* note 71, at 864-73.

87. EBRIGHT, *supra* note 22.

88. REYNOLDS, *supra* note 9.

The problem, then as now, was that these decisions were never translated, organized and studied the way common-law cases are. The United States government had the expertise to do this, but...it was not in its interest to do so.<sup>89</sup>

In other words, the CPLC and the Supreme Court did not reference Spanish and Mexican case law because those courts represented the expansionist interests of the United States rather than interests of justice and equity. The Mexican courts would unquestionably have upheld the validity of the Antonio Chávez claim, and the U.S. government exploited an ungrounded legal technicality to defeat it.

Reynolds went on to use this case as a precedent to defeat other valid claims, just as his report to the Attorney General indicated he would. The June 2004 GAO Report lists eight community land grants that were rejected by the CPLC "because the granting official lacked authority to make land grants under Mexican law."<sup>90</sup> Other community claimants actually abandoned their claims after this decision because their lawyers advised them it was futile.<sup>91</sup> Several private grants were also rejected as a result of this decision.

A trenchant example of the absurd lengths to which Reynolds, the CPLC, and the Supreme Court pushed the *Hayes* decision is the adjudication of the Nerio Antonio Montoya claim. The Nerio Antonio Montoya Grant was made on November 12, 1831, so the Colonization Law of 1828, which explicitly delegated the authority to make grants to the Territorial Governor, was in effect. Although the Grant was officially made by the Territorial Delegation, Santiago Abreu, the Territorial Governor and also the president of the Territorial Delegation, signed the authorization papers. Reynolds, nevertheless, asserted that only the Territorial Governor and not the Territorial Delegation was authorized to make the Grant, even though the Governor presided over the Delegation and signed the concession. Both the CPLC and the Supreme Court unaccountably upheld this ridiculous argument and the claim was denied.<sup>92</sup>

Reynolds was also able to apply this precedent to a group of land claims whose original grant papers had been lost or destroyed and certified

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89. EBRIGHT, *supra* note 2, at 133.

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

91. See Los Manuelitas claim, SANM, PLC 242 (on file with NMSRCA); Mesita Blanca claim, SANM, PLC 159 (on file with NMSRCA).

92. Decision, CPLC regarding the Nerio Antonio Montoya Grant (Mar. 25, 1896), SANM, PLC 20, roll 34, frame 1680 (on file with NMSRCA); Chavez v. United States, 175 U.S. 552 (1899).

copies had been made by subsequent territorial officials. Claiming these officials did not have the authority to make copies, he was able to discredit the grant papers and defeat several community claims for which, paradoxically, there was other archival documentation, besides the copies of the grant papers, to underwrite their legitimacy.<sup>93</sup> Ironically, in the 1863 Supreme Court case, *United States v. Auguisola*, 68 U.S. 352 (1863), the Court asserted:

The United States never sought by legislation to evade the obligation devolved upon them by the Treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow or illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the

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93. GAO REPORT, *supra* note 90, at 118–23 (listing three community land grants that were rejected because the official who made a certified copy of the grant papers, due to loss or deterioration of the originals, lacked the authority to certify the copies). See also EBRIGHT, *supra* note 2, at 127–42, for a discussion of how the *Hayes* decision was used to defeat the Embudo land claim, whose original Grant papers were lost and a certified copy was submitted to the court as proof of the Grant's authenticity. Also note that the court was inconsistent in the standards it applied to parallel cases. Regarding claims whose grant papers were represented by certified copies rather than originals, in the Town of Bernalillo adjudication (1897), the CPLC ruled: "We know from our examination of many claims under Spanish grants...that the practice of perpetuating in this manner the evidence of title...was common. Indeed, that was the only way that evidence of title in the hands of the people could be perpetuated....The papers were passed from hand to hand as the ownership of the property changed and necessarily in the lapse of time, they became mutilated. It is true that public records of the proceedings relating to the grants of land were required to be made. But the sovereignty over the country has been twice changed, once by revolution and once by military conquest and in addition to that it is a matter of history that there have been times of turmoil in which all civil government in the country has been endangered. In view of these facts, it is not remarkable that the ancient records should now be in an unsatisfactory and imperfect condition. It has also many times been proven before us that spoiliations of the records have occurred since our own government acquired jurisdiction over the country. It is manifest that if claimants should now be held to the strictness of proof which would be required in the establishment of a title of American origin, great injustice would be done, and the measures established by the government for the purpose of carrying out its treaty stipulations, would be made the instrument of defeating that purpose." Decision, CPLC regarding the Town of Bernalillo Grant, SANM, PLC 258, roll 53, frames 392–94 (on file with NMSRCA). However, in the Embudo Grant adjudication (1898), which was also represented by a certified copy of the original Grant papers, despite a preponderance of other archival evidence that demonstrated the legitimacy of the claim, the CPLC, in a divided decision, apologetically asserted that within the restrictions of its mandate and because of the precedent of the *Hayes* decision it had no choice but to reject the claim. Chief Justice Joseph R. Reed and Justice Wilbur F. Stone, acknowledging the blatant injustice of the decision, wrote a dissenting opinion reminding the other Justices that the Court had confirmed the Town of Bernalillo Grant on "substantially the same character of evidence which the court now rejects." Bowden, *supra* note 14, at 1201.



stipulations of the treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme Court so far as they are applicable. *They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.*<sup>94</sup>

An essential element in the practice of imperialism is the fabrication of spurious rationales that purport to legitimize invasion and dispossession. The dispossession of Indo-Hispano New Mexicans through the chicanery of men like Matthew G. Reynolds and George W. Julian, and the attempt by the General Accounting Office to justify their actions in its 2004 Report should, I believe, be viewed in that light.<sup>95</sup>

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94. *United States v. Auguisola*, 68 U.S. 352 (1863) (emphasis added).

95. GAO REPORT, *supra* note 90.