

**THE FAILINGS OF THE UNITED STATES  
JUSTICE SYSTEM: *LOBATO V. TAYLOR*  
AND MEXICAN COMMUNITY LAND  
GRANTS**

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INTRODUCTION

Life in the San Luis Valley of Colorado’s Sangre de Cristo Mountains is often hard. The Valley is located in Costilla County, one of the poorest counties in the state.<sup>1</sup> The county is populated primarily by farmers and ranchers who, for over a century, relied on the resources provided by a historic plot of land accessible to all members of the community to keep their agriculture-based economy stable.<sup>2</sup> But in the early 1960s, a new private landowner in the area closed off that land from the community. This loss drove an estimated 7,500 residents out of the area and kicked off a decades-long court battle over the community’s rights to access the land.<sup>3</sup>

The 2002 case of *Lobato v. Taylor*,<sup>4</sup> which restored community access to the contested land, has been described as many

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1. Ryan Golten, *Lobato v. Taylor: How the Villages of the Rio Culebra, the Colorado Supreme Court, and the Restatement of Servitudes Bailed Out the Treaty of Guadalupe Hidalgo*, 45 NAT. RES. J. 457, 493 n.165 (2005).

2. *Id.*

3. *Id.*

4. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 943 (Colo. 2002). There were two Colorado Supreme Court decisions in *Lobato v. Taylor*. The decision referenced here is commonly known as *Lobato I* and will be cited as such in this Comment.

things: “astounding,”<sup>5</sup> a “stunning” victory,<sup>6</sup> “historic,”<sup>7</sup> and the first real consideration of the valley’s relevant history by a court in decades.<sup>8</sup> The case, and the sixty years of litigation that precede it, deals with the historic rights of landowners on the Sangre de Cristo Land Grant (“Grant”), known locally as La Sierra, to access the aforementioned plot of land. These historic access rights date back to the 1840s, when the Grant first became part of the United States after the Mexican-American War, and to 1863, when certain areas of the Grant were set aside by the Grant’s owner as a community land grant for settlers to use.<sup>9</sup> Community land grants—a Spanish and Mexican property convention—are held by a town for the free use of everyone in the community.<sup>10</sup>

At the end of the war, the United States promised to respect Mexico’s designations of land ownership, including community land grants, in the freshly ceded American Southwest.<sup>11</sup> And yet, despite U.S. treaty obligations, community land grants have found no place within the American legal system. The U.S. government effectively banned the validation of community land grants during the second half of the nineteenth century through

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5. Golten, *supra* note 1, at 458.

6. David Benavides & Ryan Golten, *Righting the Record: A Response to the GAO’s 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico*, 48 NAT. RES. J. 857, 895 n.166 (2008).

7. *Land Rights Case Headed Back to Court*, VALLEY COURIER (Aug. 29, 2018), <https://alamosanews.com/article/land-rights-case-headed-back-to-court> [<https://perma.cc/NZ99-V6S2>].

8. Placido G. Gomez, *Bringing Reason and History onto the Same Page: Lobato v. Taylor and the Struggle over the Common Lands of Spanish and Mexican Land Grants*, 17 ST. THOMAS L. REV. 83, 92 (2004) (stating that the case was “the first time in over forty years of litigation that any court was willing to look at the reality of the land and its history”).

9. *Lobato I*, 71 P.3d at 943; *see also* Marianne L. Stoller, Report on the History and Claims for Usufruct Rights by the Residents of the Culebra River Villages on Portions of the Sangre de Cristo Land Grant (1998) (unpublished manuscript) (on file with author); Myra Ellen Jenkins, The Beaubien Concession of 1863 (unpublished manuscript) (on file with author). These two reports detail the history and settlement of the Grant and will be discussed in detail below. The Stoller report was included as an exhibit in the *Lobato* litigation.

10. Benavides & Golten, *supra* note 6, at 871–78. For a more detailed discussion of the legal and historical bases of community land grants, *see infra* Section I.A.

11. *See* Section I.B, *infra*, for a discussion of the U.S. promises regarding Mexican land ownership.

a combination of caselaw,<sup>12</sup> congressional action,<sup>13</sup> and disregard for international and treaty law.<sup>14</sup>

*Lobato* is astounding because the Colorado Supreme Court upheld the rights of the Grant landowners to access the historically communal land after it was enclosed and sold to a private party,<sup>15</sup> whereas the overwhelming majority of courts in similar cases have denied these rights.<sup>16</sup> *Lobato* affirmed the Grant landowners' right to access the land by constructing implied easement rights from the original establishment of the land grant as "communal."<sup>17</sup> In this way, *Lobato* used implied easements to create a substitute for true Mexican communal land rights that had so long been denied under U.S. jurisprudence.

Unfortunately, *Lobato* was not as stunning a victory as it initially seemed. The court relied on the unique circumstances under which the Grant was created in order to reach a decision that, while favorable to the Grant's community, left the firmly established precedent of denying community land grants unchanged. This Comment argues that, contrary to the opinions of the few legal scholars who engage with community land grants, the near-impossibility of replicating the historical circumstances of *Lobato* means that the case's precedent actually limits the chances that other community land grants have of achieving similar results.<sup>18</sup> The Comment first analyzes the framework within which *Lobato* was decided by examining both the legal

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12. *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1876); *Botiller v. Dominguez*, 130 U.S. 238 (1889); *United States v. Sandoval*, 167 U.S. 278 (1897). For a more detailed discussion of these cases, see *infra* Section II.C.

13. Act of June 21, 1860, ch. 167, 12 Stat. 71. This Act formally recognized the Sangre de Cristo Land Grant. For an explanation of why a congressional act recognizing a land grant prevented communities from establishing their rights to land grants, see Section I.C.1.

14. Guadalupe T. Luna, *Chasing Treaty Promises*, 18 BERKELEY LA RAZA L.J. 105, 109–13 (2007). In this article, Luna describes the "sacred character" of treaties and the internationally respected continuity of property rights regardless of international hostilities. *Id.* at 109, 111.

15. See *Lobato I*, 71 P.3d at 953–56.

16. See *e.g.*, *Flores v. Bruesselbach*, 149 F.2d 616 (10th Cir. 1945); *Martinez v. Rivera*, 196 F.2d 192 (10th Cir. 1952); *Martinez v. Mundy*, 1956-NMCA-037, 61 N.M. 87, 295 P.2d 209; *Payne Land & Livestock Co. v. Archuleta*, 180 F. Supp. 651 (D.N.M. 1960).

17. *Lobato I*, 71 P.3d at 953–56. For an analysis of the way in which the *Lobato I* court reached its decision and the methods it used to do so, see Golten, *supra* note 1, at 486–90.

18. See discussion *infra* Section III.A (discussing the legal community's general, and unfortunately incorrect, positive interpretation of the precedent set by *Lobato I*).

precedent regarding community land grants and the unique historical circumstances surrounding the Grant. Next, it illustrates how that framework led to a holding that makes it more difficult for other communities to achieve recognition for their communal land rights. This Comment ends with an exploration of how *Lobato* plays into the American judicial system, which has disregarded U.S. treaty obligations for over a century.

#### I. THE BROKEN PROMISES OF THE TREATY OF GUADALUPE-HIDALGO

The story of *Lobato v. Taylor* begins over a century before the first legal action in the case was brought. The Sangre de Cristo Land Grant was part of Spain's colonial project in the New World, but the first settlements on the Grant were established under the Mexican government<sup>19</sup> at the expense of the Ute bands who already lived on the land.<sup>20</sup> Mexico held the land until the conclusion of the Mexican-American War in 1848. The Treaty of Guadalupe-Hidalgo ("Treaty"), which ended the war, forced Mexico to turn over the Grant to the United States as part of a huge land cession that created the American Southwest.<sup>21</sup> The Grant then wound its way through the legal process by which the United States sorted out who owned which parts of its new territory.<sup>22</sup> This process functioned largely to deprive Mexican communities of the land granted to them by the Mexican government before the war and set up the legal precedent that forced the Sangre de Cristo community off of their land for decades.

This Part explains the Mexican property system and the Treaty's impact upon it and finishes by detailing the myriad ways in which the United States has failed both community land grants and its obligations under the Treaty.

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19. See Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RES. J. 1039, 1066 (1985). Mexico gained its independence from Spain in 1821. *Id.* at 1059.

20. See Stoller, *supra* note 9, at 8.

21. Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe-Hidalgo].

22. 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).

*A. Communal Land Ownership in Mexico*

Under mid-nineteenth-century Mexican law, which derived from Spanish colonial law, land was granted in two ways. The first way—via private grants—is analogous to land grants to individuals under the Anglo-American legal system.<sup>23</sup> Private grants belonged solely to the grantee, who was free to dispose of the granted land as they saw fit.<sup>24</sup> The other way that the Mexican government granted land was in the form of community land grants. These grants were given to a community, often a town or a village, to be held for the benefit of all residents living around the grant.<sup>25</sup> Community land grants were “designed to directly provide the necessary resources to sustain an entire community.”<sup>26</sup> Uses of community lands included grazing, hunting, fishing, water use, and recreating.<sup>27</sup> These grants contained all of the ecological features necessary to support the small-scale farming and livestock rearing that formed the basis of community life.<sup>28</sup>

In order to obtain a community land grant, a town would have to apply for a land grant from the Mexican government. In most cases, Mexico would then grant a plot of land directly to the town itself.<sup>29</sup> However, in other cases, the leader of the community would apply for a grant on behalf of the community.<sup>30</sup> In

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23. Benavides & Golten, *supra* note 6, at 872.

24. *Id.*

25. *Id.* at 871; *see also* Gomez, *supra* note 19, at 1043. Gomez details the early modern Castilian-Spanish agricultural system, which was based on “the principle that ‘no individual had the right to appropriate for himself and monopolize a part of the resources of Nature that were produced without the intervention of man,’” and further explains that “idle land remained ‘at the disposition of anyone who wished to benefit from it.’” *Id.* (quoting David E. Vassberg, *The Tierras Baldias: Community Property and Public Land in 16th Century Castile*, 48 AGRIC. HIST. 383, 384 (1974)).

26. Benavides & Golten, *supra* note 6, at 871–72; *see also* MATTHEW GIVENS REYNOLDS, SPANISH AND MEXICAN LAND LAWS 47 (St. Louis, Buxton & Skinner Stationery Co. 1895) (“[A]ll the land which is held without just and true titles be restored . . . for public squares . . . pastures, and commons, to be granted to the villages and councils already settled.” (quoting Laws of the Indies Relating to Towns and Communities, Book IV, Title XII, Law XIV)).

27. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 958–59 (2002) (Martinez, J., dissenting in part).

28. *Id.*

29. *Cf.* Benavides & Golten, *supra* note 6, at 873 (explaining that, in some land-grant documents, an individual was named as grantee rather than the town itself).

30. *Id.*

either scenario, the land granted would then belong to the town in its “capacity as a quasi-public entity” in perpetuity.<sup>31</sup> The community lands could not be sold, partitioned, or distributed to the community’s residents—that would require a degree of private ownership utterly alien in the community-land-grant system.<sup>32</sup>

### *B. The Treaty and its Import to Community Land Grants*

The Treaty of Guadalupe-Hidalgo was of great import to preserving communal land granted by the Mexican government. The Treaty has been the subject of much debate as to the way it regulates the disposal of territory ceded by Mexico.<sup>33</sup> This includes the disposal and treatment of territory containing

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31. *Id.* at 872.

32. *Id.* at 876; *see also* REYNOLDS, *supra* note 26, at 324 (“[T]he public lands, as the exclusive property of the Nation, never could have been alienated under any title by virtue of decrees, orders and enactments of the Legislature . . . [S]ales, cessions, or any other class of alienations of said public lands that have been made without the express order and approval of the general powers . . . are null and of no value or effect.” (quoting *Annals Sales of Lands Made by States, Etc.*, Decree of November 25th, 1853)). The original Castilian agricultural system upon which Mexican community land grants were based did allow for the alienation of public lands, but the invaluable nature of these lands meant they were rarely sold. Gomez, *supra* note 19, at 1044. However, public land ownership and common rights were deeply ingrained in the Spanish legal system, and pre-conquest indigenous Mexican land tenure included a similar sense of public land. *Id.* at 1046–49.

33. Treaty of Guadalupe-Hidalgo, *supra* note 21. For an excellent analysis of the caselaw surrounding the Treaty, the rights that the Treaty may or may not have established, and the current status of community-land-grant claims under it, *see* Benavides & Golten, *supra* note 6.

The seminal article on the topic of the disposition of Mexican land grants in the modern era was written by Federico M. Cheever in 1986. Federico M. Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364 (1986). Cheever suggests that the courts take an “equal treatment” approach to settling Spanish and Mexican land-grant claims. *Id.* at 1375. Cheever states that, under this approach, “[r]ights not included in United States grants would not be protected by treaty,” and “the spectre of Mexican property rights that some believe may disrupt the orderly process of real estate development” would be laid to rest. *Id.* at 1403. Cheever makes clear that his suggested approach “would effectively extinguish most dormant land rights descended from the Spanish or Mexican government.” *Id.* Cheever’s proposed treatment of these rights would thus further the process of depriving communities of their communal land grants. This Article is based around the concept that such deprivation is unjust and should be reversed to the greatest extent possible. While this author recognizes the significant impact that Cheever has had on the subject of Spanish and Mexican land grants, the disparate goals of his article and this one mean that Cheever’s perspective is not relevant to this Article.

communal land that had been previously granted by the Mexican government.

Article VIII of the Treaty ensured that “property of every kind” belonging to Mexicans would be “inviolably respected.”<sup>34</sup> Under long-standing international law principles, a change in sovereignty over a territory—here, from Mexico to the United States—should not affect the title of property holders.<sup>35</sup> An early draft of Article X of the Treaty would have gone even further to protect communal land rights, stating that all land grants made by Mexico would “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.”<sup>36</sup> However, Article X was removed from the Treaty, and the Protocol of Queretaro (“Protocol”) was added.<sup>37</sup> The Protocol’s second provision states that the “American Government, by suppressing the Xth article of the Treaty of Guadalupe did not . . . intend to annul the grants of lands made by Mexico in the ceded territories. These grants . . . preserve[d] the[ir] legal value,” and, as the Protocol explicitly provided, were to be acknowledged and legitimized by American courts.<sup>38</sup>

This language seemingly preserved the U.S. government’s duty to recognize and validate community land grants that predated the Treaty. Further, in order to adhere to the Treaty, in an 1854 Act, Congress established a surveyor general’s office to evaluate each land grant and recommend its approval or denial to Congress.<sup>39</sup> However, this Act—and the often shoddy grant-

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34. Treaty of Guadalupe-Hidalgo, *supra* note 21, art. VIII, at 929.

35. *See, e.g.*, *United States v. Wiggins*, 39 U.S. 334, 334 (1840) (holding that titles perfected under a foreign sovereign were “intrinsically valid . . . and . . . need[ed] no sanction from the legislative or judicial department of the United States”); *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857) (stating that, after a change in sovereignty, “private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged . . . . This is the principle of the law of nations . . .”).

36. Vernellia R. Randall, *Treaty of Peace, Friendship, Limits, and Settlements Between the United States of America and the United Mexican States Concluded at Guadalupe Hidalgo: Protocol of Queretaro*, U. DAYTON SCH. L., <https://academic.udayton.edu/race/02rights/guadalu.htm#art8> [<https://perma.cc/JY29-F8QV>] (Apr. 24, 2012). The full text of the Treaty, the stricken Article X, and the Protocol of Queretaro can be found at this site. The Treaty as enshrined into American law does not contain the latter two sections.

37. Benavides & Golten, *supra* note 6, at 863–64.

38. Randall, *supra* note 36.

39. 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).

approval process that it created—set up numerous legal battles that would test the United States’ commitment to abide by the terms of the Treaty.

*C. Disregard of Community Land Grants and Treaty Violations*

Despite the complications with the Treaty of Guadalupe-Hidalgo’s drafting, it seemed clear that, in signing the Treaty and ending the war, the United States agreed to respect Mexico’s land grants and uphold the titles of grantees, both individual and communal. However, the Supreme Court ensured that this was not so. In two landmark cases, *Tameling v. United States Freehold & Emigration Company* and *United States v. Sandoval*, the Court made it substantially more difficult for community land grants to secure recognition by effectively removing the judicial system from the grant-confirmation process.<sup>40</sup> Thus, when community land grants were incorrectly confirmed as private, there was no recourse for communities that lost their lands despite Treaty promises to respect their titles. Under this legal regime, the majority of community land grants were lost. *Tameling* and *Sandoval* created powerful precedent, the details of which are crucial to an understanding of the overall loss of judicial involvement in land-grant confirmation. These cases, in turn, allowed the grant-confirmation system, riddled as it was with failures, to inflict uncorrected damage for years. Together, these legal frameworks resulted in the United States essentially abandoning its obligations under the Treaty.

1. *Tameling* and the Removal of Courts from the Land-Grant Confirmation Process

In 1876, the U.S. Supreme Court ruled on *Tameling* and took the first step in establishing the precedent that made *Lo-bato*’s results so surprising. The Court held that it had no jurisdiction to rule on the merits of land claims because Congress vested the authority to adjudicate those land claims in the surveyor general as subject only to Congress’s final approval.<sup>41</sup> In

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40. *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1876); *United States v. Sandoval*, 167 U.S. 278 (1897).

41. *Tameling*, 93 U.S. at 662–63. This case coincidentally revolved around the confirmation of the Sangre de Cristo Land Grant. The legitimacy of the Grant was

essence, Congress's 1860 Act affirming the possession of land grants by grantees effectively created a de novo land patent that passed title from the United States to the grantees.<sup>42</sup> This result was affirmed in many cases that followed, forcing grantees to affirmatively seek to have their land "patented," or confirmed by Congress under the existing surveyor general process.<sup>43</sup>

These cases established that if a Mexican community had not received title to its land under the surveyor-general process, there was no chance of recovery. Since that process was full of flaws—including insufficient notice to potential claimants of land grants, general lack of opportunity for adverse parties to be heard, and the language barrier between Spanish-speaking communities and almost entirely English-speaking government officials—it was very unlikely that communities would be able to get their land grants patented.<sup>44</sup> In addition, wealthy speculators interested in obtaining land for cheap often inserted themselves into grant-confirmation proceedings to prevent communities from obtaining patents for their land grants.<sup>45</sup> When land grants were not properly patented as communal, communities were stripped of legal rights to their lands established under Mexican law.<sup>46</sup> Given these circumstances, the success of the few land grants that were properly confirmed is itself a surprise.

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challenged on the basis that it was much larger than permitted by the Mexican law that established it. The Court upheld the Grant's confirmation, stating that Congress's approval of the Grant served as a formal transfer of title, making the Mexican legal issue moot. *Id.*

42. *Tameling*, 93 U.S. at 663; An Act to Confirm Certain Private Land Claims in the Territory of New Mexico, ch. 167, 12 Stat. 71 (1860). A land patent "conveys whatever interest the government has in the soil and the land" of any given tract of land. 63C AM. JUR. 2D *Public Lands* § 49, Westlaw (database updated Aug. 2021).

43. *See, e.g.*, Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887); *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569, 578–80 (1891). There are numerous other cases which state the same rule, many of which cite *Tameling*. For an impressive list of such cases, see *H.N.D. Land Co. v. Suazo*, 1940-NMSC-061, 44 N.M. 547, 105 P.2d 744 (1940).

44. Benavides & Golten, *supra* note 6, at 921–22.

45. *Id.* at 878–79. For a deeper discussion of the ways in which American speculators acquired land during the grant-confirmation process, see Gomez, *supra* note 19; David Correia, *Appendix: Land Grant Speculation in New Mexico During the Territorial Period*, 48 NAT. RES. J. 927 (2008).

46. *See e.g.*, Benavides & Golten, *supra* note 6, at 895 ("Consequently, when community grants were wrongly patented . . . these decisions were nonetheless set in stone."); Golten, *supra* note 1, at 471 (explaining that after a land grant was confirmed by Congress, no "other rights to the land [that] may have existed prior to Congress's confirmation" remained).

After *Tameling*, there was no remedy, short of an act of Congress, available to grantees and landowners not properly included in grant confirmations. Yet, Congress did not devote its time to adjudicating minor land disputes in the American Southwest. Worse, after another Supreme Court case nearly thirty years later, even pre-existing Mexican communal land grants that were previously not subject to congressional approval were taken from the grantees—who also never got their day in court.

## 2. *Sandoval* and U.S. Ownership of Community Land Grants

In the 1897 case of *United States v. Sandoval*, the Supreme Court further restricted recognition of land grants by holding that all common lands—that is, lands not already granted to private individuals, which included community land grants—passed to the federal government when the United States took over the territory ceded by Mexico under the Treaty.<sup>47</sup> The Court ignored that the titles to community land grants it had just transferred to the United States were already vested, generally in the community that had applied to the Mexican government for the grant.<sup>48</sup> It extinguished these titles without any semblance of due process, which left community members with no legal claim to land that the Mexican government had granted them.<sup>49</sup>

Due to these cases, the system of community land grants was destroyed. Not only were communities barred from challenging the results of an unjust land disposition system, but even the chance to do so was rendered meaningless. The Court thus affirmed the freedom of the U.S. government to dispose of community land grants as it wished, regardless of preexisting titles and its Treaty commitments to honor Mexican grants.<sup>50</sup> In

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

48. Benavides & Golten, *supra* note 6, at 890 (“[F]rom a strictly legal perspective . . . scholarship has concluded that those communities possessed *legal* rights to ownership of the common lands—as opposed to merely equitable rights—under the very Spanish and Mexican law upon which the Court professed to rely.”).

49. *See Sandoval*, 167 U.S. at 295–98. For a discussion of the due process concerns related to the confirmation process, see Benavides & Golten, *supra* note 6, at 916–25.

50. The Court, through these cases, firmly removed itself from any kind of Treaty-related adjudication. The political branches of government were left with free rein to distribute community lands in any manner they saw fit.

theory, the U.S. government could have held its newly acquired land in trust for the communities to which those lands had originally been granted. But in practice, the United States dispensed of its public lands—including those newly acquired from Mexico—as quickly as possible.<sup>51</sup> Claimed land grants were routinely distributed to other individuals as homesteads despite legislation prohibiting this treatment.<sup>52</sup>

### 3. Unfavorable Disposition of Community Land Grants

After *Tameling* and *Sandoval*, the law surrounding land-grant confirmation was decidedly unfavorable to community land grants. Had the surveyor general's process worked to appropriately confirm valid grants, community land grants would have glided through the process with ease; because all members of the community could access the land, there was no motivation for one individual landowner to submit an adverse claim. In reality, the confirmation process consistently stripped communities of title to their lands, imposing structures of property ownership foreign to the community-land-grant system. While there were a few cases in which community land grants were properly confirmed, the majority of these grants were destroyed during the confirmation process.

In some cases, the community land grants were converted into tenancies in common through the surveyor-general process.<sup>53</sup> In a tenancy in common, the land is jointly held by a number of co-owners, each of whom has an interest in the land.<sup>54</sup> While this type of land ownership is clearly different from community ownership—where no individual owns any part of the designated land—the real problem with tenancies in common, in this context, is that individuals with an interest can force a sale of their portion of the property. As detailed above, community

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51. Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RES. J. 229, 232 (2000). The United States has the right to hold and dispose of property under the Property Clause of the Constitution. U.S. CONST. art. IV, § 3, cl. 2.

52. Beaudoin, *supra* note 51; Benavides & Golten, *supra* note 6, at 881 n.105 (citing S. EXEC. DOC. NO. 106 (1885)). Many settlers were accused by government investigators of falsifying homestead and donation entries and thereby claiming land they had never even seen. *See, e.g.*, S. EXEC. DOC. NO. 106, at 19–20.

53. Benavides & Golten, *supra* note 6, at 875–82.

54. *Id.* at 875.

land grants could not be sold by individuals.<sup>55</sup> When certified as tenancies in common, community lands could be—and ultimately were—divvied up via forced partition sales.<sup>56</sup> Once a tenancy in common was established, the purpose of community land grants was defeated; an individual could buy up a number of interests in the tenancy in common and then exclude the rest of the community from the privatized land.<sup>57</sup> In a few cases, land-grant residents explicitly opposed the confirmation of their lands as tenancies in common. They were ignored by the grant-confirmation process, and their community lands were transformed into tenancies in common despite their opposition.<sup>58</sup>

Another way that community land grants were improperly confirmed was through the granting of the land at issue to an individual.<sup>59</sup> In these cases, grants were generally awarded to the person who originally petitioned for the grant.<sup>60</sup> The Tierra Amarilla Grant, which was at issue in *H.N.D. Land Co. v. Suazo*, is a famous example of this type of confirmation.<sup>61</sup> The land grant in question was “made by the Mexican government . . . ‘unto Manuel Martinez, together with . . . some others.’”<sup>62</sup> Congress confirmed the grant in favor of Martinez’s heirs alone, despite the fact that title was held by “some others” mentioned by the original granting document.<sup>63</sup>

In a small handful of cases, the United States properly awarded community land grants to the communities that petitioned for them.<sup>64</sup> In *Reilly v. Shipman*, the Eighth Circuit noted that the Mexican government granted the land to the town itself, not just to the named petitioner.<sup>65</sup> The court, however, only upheld the communal status because Congress affirmed the grant “as recommended for confirmation by [the] surveyor general,” who had received the petition from the town as a singular unit.<sup>66</sup> It seems, therefore, that the success of a community-land-grant

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55. See *supra* note 32 and accompanying text.

56. Benavides & Golten, *supra* note 6, at 878.

57. See *id.* at 878–79 nn.98–99 for examples of such cases.

58. *Id.* at 883 n.112.

59. *Id.* at 873–75.

60. *Id.* at 873.

61. *H.N.D. Land Co. v. Suazo*, 1940-NMSC-061, 44 N.M. 547, 105 P.2d 744.

62. *Id.* at 548.

63. *Id.* at 556.

64. For a list of such grants, see Benavides & Golten, *supra* note 6, at 879 n.100.

65. *Reilly v. Shipman*, 266 F. 852, 858–59 (8th Cir. 1920).

66. *Id.* at 856–58.

claim rested on the language of the petition and the way in which the surveyor general chose to interpret it, instead of on the laws of Mexico and that government's intent in distributing land. Even when the United States upheld the practical effects of Mexican community land grants, the government did so in a way that disregarded the true nature of the grants and the Mexican law under which they were established.

#### 4. The Abrogation of Treaty Responsibility and Its Impact on Community Land Grants

The myriad ways in which the United States government consistently denied historic community-land rights to Mexican communities belies the government's treaty commitment to respect Mexican property rights. The ruling in *Interstate Land Company v. Maxwell Land Grant Company* reduced the number of land claims that qualified for validation,<sup>67</sup> despite the Protocol of Queretaro's guarantee that "[t]he American Government, by suppressing the Xth 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."<sup>68</sup> The Court in *Interstate Land Co.* quoted President Polk, whose "objection to the tenth article of the original treaty was not that it protected legitimate titles" but that it allowed grantees without perfect title to their lands a fresh start to perfect their titles.<sup>69</sup> Under *Interstate Land Co.*, a whole class of unperfected land claims "was expressly refused to be recognized by the treaty" because these claims lacked documentation granting perfect title.<sup>70</sup> This ruling made it extremely difficult for communities without specific documentation, like the one found in *Reilly*, to have their land grants recognized.<sup>71</sup> The addition of the near-constant misinterpretation of who held title to community land grants further narrowed the pathway to land-grant confirmation.

In the 1889 case of *Botiller v. Dominguez* that dealt with Mexican land grants in California, the Court held that land claims not presented within the two-year period established by

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67. *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569, 589–90 (1891).

68. Randall, *supra* note 36.

69. *Interstate Land Co.*, 139 U.S. at 589.

70. *Id.* at 588.

71. *See Reilly v. Shipman*, 266 F. 852, 857–58 (8th Cir. 1920).

Congress for land-grant adjudication in California would be null and void.<sup>72</sup> While this issue of timing did not directly impact Southwestern land grants, the attitude of the case certainly did; the Court ruled that if this new time limit on land-grant claims was in violation of the Treaty, the Court need not address this because it was a matter of international law.<sup>73</sup> This part of the *Botiller* ruling indicated that the Supreme Court would not enforce the Treaty of Guadalupe-Hidalgo as originally intended. The Court frankly stated that it did not “see any injustice . . . or any violation of the treaty” in stripping legitimate claimants of their lands via a procedural technicality that violated both customary international law and the Treaty itself.<sup>74</sup>

Between *Tameling*'s bar on challenging improperly confirmed grants, *Sandoval*'s unilateral shifting of title to community land grants to the United States, the improper confirmation of many community land grants, and the Court's blatant disregard for the Treaty and international law, there was very little hope for communities looking to preserve both legal title to their lands and their traditional way of life. This morass of legal complications is what made the success of the plaintiffs in *Lobato v. Taylor* so marked.

## II. THE SURPRISING SUCCESS OF *LOBATO V. TAYLOR*

When *Lobato v. Taylor* was decided in the early 2000s, it was extremely unlikely that any court would uphold a claim to a community land grant. The legal system set up by *Tameling*, *Sandoval*, and *Botiller*, as well as the grant-confirmation process, had left very few community land grants unscathed—only twenty of the original one-hundred-and-fifty-four Mexican land grants remained intact.<sup>75</sup> The community land on the larger

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72. *Botiller v. Dominguez*, 130 U.S. 238, 246–50 (1889). In an earlier case, *United States v. Percheman*, the Court recognized that international law required the protection of private property regardless of changes in sovereignty. 32 U.S. 51, 86–87 (1833). The *Botiller* opinion directly contradicted this precedent but did not even mention *Percheman*.

73. *Botiller*, 130 U.S. at 247.

74. *Id.* at 250. For a discussion of the federal government's obligation to respect Mexican land grants, see *supra* Section I.B.

75. Benavides & Golten, *supra* note 6, at 892. The accounting of properly confirmed grants is much disputed. Benavides and Golten's article details why the Government Accounting Office, which issued a report claiming that over 68 percent of community land grants were properly confirmed, is vastly overestimating the number of proper confirmations. *Id.*

Sangre de Cristo Grant at issue in *Lobato v. Taylor* was bound by this precedent, like all other community land grants, and, therefore, seemed to have as slim a chance of ratification as its fellows when the case went to court. Due to the unique history of the Grant, however, the *Lobato* community land grant avoided the pitfalls that seized so many other grants and successfully retained its status as a true community land grant available to all residents. This Part first provides a brief history of the Grant and then addresses each of the cases brought within the over-arching litigation of communal land rights on the Grant.

A. *Major Events in the History of the Sangre de Cristo Land Grant*

From 1847 until 1863, the time period most relevant to the *Lobato* case, the Sangre de Cristo Land Grant was owned by a Canadian-turned-Mexican citizen named Charles Beaubien.<sup>76</sup> He was a successful merchant and politician and held a large amount of land in the New Mexico Territory.<sup>77</sup> Beaubien acquired the Grant in the midst of the Mexican-American War, immediately following a violent uprising in Taos.<sup>78</sup>

Despite the volatile nature of the New Mexico Territory at this time, Beaubien managed to find people to settle the Grant, which was a requirement to perfect his title under Mexican law.<sup>79</sup> The date of the first permanent settlement is disputed. A report by renowned historian Malcolm Ebright puts it in 1848, with the establishment of Costilla;<sup>80</sup> another report by the equally well-respected historian Marianne Stoller states that

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76. Stoller, *supra* note 9, at 4–12, 14; Malcolm Ebright, Charles Beaubien and Common Use-rights on the Sangre de Cristo Grant, at Exhibit A (1998) (unpublished manuscript) (on file with author). The Grant was originally made by the Mexican government to Beaubien's son, Narciso, and a close friend of Beaubien's named Stephen Luis Lee. After both original grantees were killed in 1847 in Taos, Beaubien inherited half the land from his son and purchased the rest from Lee's estate. Stoller, *supra* note 9, at 4–5.

77. *Id.* at 6–7.

78. *Id.* at 6.

79. *Id.* at 4–5; *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1155 (Colo. 2003); REYNOLDS, *supra* note 26, at 72.

80. Ebright, *supra* note 76, at Exhibit A. Malcolm Ebright is a prolific scholar of the American Southwest and has written much about Mexican land grants.

the first settlement was Garcia, formally created in 1849.<sup>81</sup> The Grant was settled extensively in the years that followed.<sup>82</sup>

The Mexican-American War began in 1846 and ended with the signing of the Treaty of Guadalupe-Hidalgo in 1848.<sup>83</sup> The territory of New Mexico, including the Sangre de Cristo Land Grant within it, was ceded to the United States as part of the Treaty.<sup>84</sup> Beaubien's land, thus, became part of United States, and Beaubien was required to get his land grant confirmed by the new government.<sup>85</sup> He did so with relative ease and speed.<sup>86</sup>

In 1863, Beaubien recorded a document laying out "the land and use rights of the settlers on the eastern side" of the Grant.<sup>87</sup> In this document, known as the Beaubien Concession of 1863 ("Concession"), Beaubien set aside a sizeable tract of land "for the benefit of the community members" from the surrounding towns.<sup>88</sup> The document specified that no one could "place any obstacle or obstruction to anyone in the enjoyment of his legitimate rights" and required the immediate removal of any existing obstructions.<sup>89</sup> The community members with rights to the land were obligated to care for the roads and not overuse the water, and were granted the "benefits of pastures, water, firewood and timber, always taking care that one does not injure another."<sup>90</sup> The Concession merely formalized the arrangement surrounding land use that was already in place on the Grant; land grants to communities were a mainstay of Mexican land-use law.<sup>91</sup> When Beaubien arranged for the sale of the Grant in the years before his death, he included a clause requiring the new owner,

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81. Stoller, *supra* note 9, at 7. Marianne Stoller was another expert on Southwestern land grants.

82. *Id.* at 7.

83. See Treaty of Guadalupe-Hidalgo, *supra* note 21.

84. *Id.* at art. V.

85. See Act effective July 22, 1854, ch. 103, 10 Stat. 308, 309 (1854).

86. "The only questions [raised during the grant-confirmation process] concerned Charles Beaubien's succession to title." Stoller, *supra* note 9, at 14. This concern was settled quickly, and the surveyor general recommended that Congress approve it as a "good and valid" grant. *Id.* at 15. Beaubien's ownership of the Grant was confirmed in 1860. Act of June 21, 1860, ch. 167, 12 Stat. 71.

87. Jenkins, *supra* note 9, at 2. The Concession is reproduced in relevant part in *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 946–47 (Colo. 2002).

88. Jenkins, *supra* note 9, at 3 (quoting the Concession).

89. *Id.* at 4 (quoting the Concession).

90. *Id.* (quoting the Concession). This report provides a detailed analysis of the location of the conceded land, the rights and uses granted, and process by which the Concession was recorded.

91. *Id.* at 5–6; Benavides & Golten, *supra* note 6, at 871–72; *Lobato I*, 71 P.3d at 949. See *supra* Section I.A for more on communal land rights.

William Gilpin, to respect the community-land rights laid out in the Concession.<sup>92</sup> For about a hundred years, every deed of every sale in the chain of title of this common land recognized the community land grant that Beaubien formally established in his 1863 Concession.<sup>93</sup> The community members to whom the land grant was made, as well as their successors in interest, made continuous use of their rights for that entire period.<sup>94</sup>

*B. A Half-Century Battle: History of Lobato v. Taylor*

The journey of the community land of the Sangre de Cristo Land Grant—from unchallenged communal land to the hottest land-rights case of the last few decades—was long and winding. *Lobato v. Taylor* was neither the first nor the last suit brought in the legal saga of the Sangre de Cristo Grant, but it was by far the most important. The first part of the saga began in the 1960s when the residents of the Grant lost their ability to access their community land grant.<sup>95</sup> Twenty years later, the community fired back with a lawsuit against the new owner of the land to void his title.<sup>96</sup> This suit bounced between courts until the Colorado Supreme Court finally reached the merits in 2002.<sup>97</sup> The residents of the Grant won back their rights to use their community land and then spent the next twenty years slugging it out in district court to determine who had actually received those rights.<sup>98</sup> In the fall of 2020, the half century of litigation surrounding access to the Grant came to a close.<sup>99</sup>

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92. Stoller, *supra* note 9, at 28–29.

93. *Lobato I*, 71 P.3d at 953.

94. *Id.*; Golten, *supra* note 1, at 462.

95. *See infra* notes 100–102 and accompanying text.

96. *Rael v. Taylor*, 876 P.2d 1210, 1216–17 (Colo. 1994).

97. *Lobato I*, 71 P.3d at 946.

98. *See Cielo Vista Ranch I, LLC v. Alire*, 2018 COA 160, ¶¶ 5–7, 433 P.3d 596, 601–02.

99. *See Order Confirming Immediate Access Rights for the Owners of Certain Parcels Within Stipulated Settled Areas in Costilla County as Identified in the June 29, 2020 Report of Formation Environmental*, *Lobato v. Taylor*, No. 1981CV100005 (D. Colo. Sept. 8, 2020) (on file with author). Legal action surrounding the Grant continues, but the issue of community access to the land was resolved with this order. Currently, the community of the Grant is petitioning for relief from the current Ranch owner's aggressive surveillance and harassment of landowners attempting to exercise their rights to access the Ranch. *See Mot. to Safeguard Landowners' Rights*, *Lobato v. Taylor*, No. 1981CV100005 (D. Colo. Apr. 30, 2021) (on file with author).

## 1. The Saga Begins: The Torrens Action

In 1960, a North Carolina man named Jack Taylor bought a large parcel of land on the Grant (“Taylor Ranch”) and fenced in the land.<sup>100</sup> Taylor did his best to keep the community of landowners from exercising their historic rights to the ranch he had bought, filing a Torrens action in federal court to clear his title.<sup>101</sup> His title was successfully registered in fee simple by the district court because the community of the Grant had no land rights under Treaty jurisprudence, a decision that was upheld on appeal.<sup>102</sup>

The community landowners responded in 1981 by bringing a class action suit against Taylor, arguing that Taylor’s title was void because he served notice of the 1960 Torrens action primarily via publication, in violation of due process.<sup>103</sup> The plaintiffs also requested that the court return their rights to access the Taylor Ranch under both the Treaty of Guadalupe-Hidalgo and the theory that the Beaubien Concession either expressly granted or implied those rights.<sup>104</sup> When the case reached the Colorado Supreme Court, a majority ruled that Taylor’s service of process via publication was suspect, and the case was remanded for further investigation on that subject.<sup>105</sup>

On remand, the trial court ruled that seven plaintiffs were not barred by res judicata from disputing the Torrens action, as these plaintiffs had not been properly served in Taylor’s original action.<sup>106</sup> The court then proceeded to the merits of the case and found that the plaintiff landowners had not proved any rights to access the Taylor Ranch, as they had not established adverse use

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100. Golten, *supra* note 1, at 462–63.

101. *Id.* at 462–63, 466. Taylor invoked diversity jurisdiction to file his Torrens action (a method of registering title “by settling all adverse claims in one proceeding”) in the federal district court in Denver, which is 240 miles away from the Sangre de Cristo Land Grant. *Id.* at 466 n.31.

102. Sanchez v. Taylor, 377 F.2d 733, 736–39 (10th Cir. 1967).

103. Rael v. Taylor, 876 P.2d 1210, 1216–17 (Colo. 1994); Golten, *supra* note 1, at 469 & n.45. The “title examiner listed all” property owners in the relevant area as “potential defendants in the Torrens action,” but Taylor’s application for title listed only three-hundred individuals specifically. Golten, *supra* note 1, at 469 n.45. The application provided publication notice to “[a]ll other persons similarly situated who claim certain settlement rights.” Rael, 876 P.2d at 1214–15.

104. Rael, 876 P.2d at 1217; Golten, *supra* note 1, at 469.

105. Rael, 876 P.2d at 1229. The Court of Appeals held that res judicata barred the plaintiffs from even bringing the suit. *Id.*

106. Lobato v. Taylor (*Lobato I*), 71 P.3d 938, 944 (Colo. 2002).

and therefore had no prescriptive rights.<sup>107</sup> The Beaubien Concession did not grant express rights, according to the court, because it did not specify who received the rights or where the rights were valid.<sup>108</sup> The court also dismissed the implied grant of rights that the plaintiffs claimed on the theory that Colorado law did not recognize those kinds of implied rights.<sup>109</sup>

## 2. The Colorado Supreme Court Steps In: *Lobato v. Taylor*

It was at this point that *Lobato v. Taylor* properly began. The appellate court affirmed the trial court's judgment in its entirety, and the *Lobato* plaintiffs petitioned for and were granted certiorari.<sup>110</sup> The Colorado Supreme Court then astonished the legal community<sup>111</sup> by reversing the lower court's decision, granting the plaintiffs rights to the Taylor Ranch under three easements: one by prescription, one by estoppel, and one by prior use.<sup>112</sup> The court relied on the Beaubien Concession and Gilpin's agreement to uphold the rights granted thereunder in constructing these easements. In doing so, it held that the unique facts of the case satisfied the requirements to create implied easements for access to pasture, firewood, and timber—only three of the numerous rights that traditionally accompanied a community land grant.<sup>113</sup> The court allowed in extrinsic evidence to interpret the Concession, and it determined not only that the Taylor Ranch was indeed part of the community land grant but also that Beaubien meant to grant permanent access rights to that land in his Concession.<sup>114</sup>

The Colorado Supreme Court issued a separate opinion to determine which landowners on the Grant could access the

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 944–45.

111. See *supra* notes 5–8 and accompanying text (discussing reactions to the case).

112. *Lobato I*, 71 P.3d at 946. See generally Golten, *supra* note 1 (providing a detailed and informative explanation of *Lobato*, the legal reasoning that went into it, and the historical precedent it set by consulting Mexican traditions of land ownership).

113. *Lobato I*, 71 P.3d at 953, 956. For more about the full suite of rights attached to community land grants, see *supra* Section II.A and *infra* Section III.B.1.

114. *Id.* at 947–49.

Taylor Ranch.<sup>115</sup> In this opinion, the court ruled that the only current landowners that had easement rights were those “who are successors in title to those persons who settled Costilla County by the time the Beaubien document was created.” Therefore, only landowners who could trace their title back to the period when Gilpin owned the Taylor Ranch were entitled to use the land.<sup>116</sup> Gilpin’s promise to Beaubien to protect the settlers’ rights to their communal land established a deadline: any title granted afterward was not included in the 1864 agreement to protect the community land grant.<sup>117</sup> In addition, landowners had to prove “that their predecessors in title *settled* their lands at the time” of the Beaubien Concession.<sup>118</sup> This limiting principle made sense, given the court’s decision, but demonstrated that the court did not really uphold a community land grant on the Taylor Ranch—at least not a community land grant as traditionally understood under Mexican law. As explained above, community land grants were owned by the community located upon them and were available to be used freely by all community members. Instead, the court granted individual land rights to each landowner who met the qualifications—rather than upholding the community land grant as Beaubien intended.

In this 2003 opinion, the court also ruled that the publication service was invalid and permitted the landowners served in this manner to pursue their rights.<sup>119</sup> However, the landowners personally named in the Torrens action were barred by res judicata and could not claim access rights to the Taylor Ranch.<sup>120</sup> While more landowners received easements to the Taylor Ranch than were barred by res judicata, this decision demonstrated that the court was not upholding the 1864 community land grant, but rather creating new, more restricted rights outside of the community-land system.

The case was remanded with instructions to the district court judge to determine which landowners met the requirements for accessing the Taylor Ranch.<sup>121</sup> Taylor petitioned to the United States Supreme Court but was denied certiorari.<sup>122</sup>

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115. *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1155 (Colo. 2003).

116. *Id.* at 1158.

117. *Id.*

118. *Id.* at 1158–59 (emphasis in original).

119. *Id.* at 1158, 1161.

120. *Id.* at 1158, 1165–67.

121. *Id.* at 1167–68.

122. *Lobato v. Taylor*, 540 U.S. 1073 (2003).

### 3. The Saga Ends: Rights Adjudication and *Cielo Vista Ranch v. Alire*

After the Colorado Supreme Court nailed down the contours of the access rights to the Taylor Ranch, the district court had to figure out which landowners should receive those rights. On remand, the district court in 2004 began an “opt-out” process designed to determine which landowners were entitled to access the Taylor Ranch.<sup>123</sup> Landowners were not required to assert their claims in order to receive their rights and were instead informed by the court that they could pursue those rights.<sup>124</sup> The district court ruled that *res judicata* applied to people, not titles to land, so successors in title to the barred landowners could gain access rights to the Taylor Ranch.<sup>125</sup>

After the court had adjudicated a majority of the potential claims, it began a new “opt-in” process in 2010.<sup>126</sup> Under this process, landowners were required to take affirmative action to assert their claims.<sup>127</sup> The new owners of the Taylor Ranch “moved to serve any unidentified or nonresponding claimants” via publication—the mechanism that landed Taylor in hot water back in 1960.<sup>128</sup> The district court denied the motion, and the case of *Cielo Vista Ranch I, LLC v. Alire* followed.

In *Cielo Vista Ranch*, the ranch owners fought both the opt-out and opt-in processes: they appealed the district court’s denial of their motion and also argued that the opt-out identification process violated the Colorado Supreme Court’s mandate to

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123. *Cielo Vista Ranch I, LLC v. Alire*, 2018 COA 160, ¶ 5, 433 P.3d 596, 601.

124. *Id.* at ¶¶ 5–8, 433 P.3d at 601–02. Under this “opt-out” process, all landowners with titles dating back to the Gilpin era were able to gain access to the Ranch without having to make themselves known to the court. *Id.* at ¶ 9, 433 P.3d at 602. If, for example, one landowner made herself known to the court but chose not to exercise her access rights, she or her heir in title could still decide to do so and could begin using those rights at any point down the road. The court’s ruling in the case provides a detailed explanation of this process. *Id.* at ¶¶ 31–39, 433 P.3d at 605–06.

125. *Id.* at ¶ 35, 433 P.3d at 606.

126. *Id.* at ¶ 6, 433 P.3d at 601.

127. *Id.* at ¶¶ 40–43, 433 P.3d at 607. Although it did not prevail, under this system, the hypothetical landowner in *Lobato II* would soon lose her access rights due to her inaction if she did not make herself known to the court within the opt-in window. *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1159 (Colo. 2003); *see supra* note 124 and accompanying text. Again, refer to the opinion in *Cielo Vista Ranch*, ¶ 43, 433 P.3d at 602, for an in-depth explanation.

128. *Cielo Vista Ranch*, ¶ 43, 433 P.3d at 607.

identify and adjudicate access claims to the Taylor Ranch.<sup>129</sup> The community landowners cross-appealed, claiming that the opt-in process violated the Colorado Supreme Court's mandate.<sup>130</sup> The appellate court in *Cielo Vista Ranch* determined that only the opt-out process comported with the Colorado Supreme Court's instructions.<sup>131</sup> The court also affirmed the district court's denial of the ranch owners' motion to end the identification process via service by publication.<sup>132</sup> The court remanded the case to either personally serve every landowner with potential access rights or to leave the case open, allowing landowners to claim rights at later dates.<sup>133</sup>

On September 8, 2020, the district court confirmed a final stipulation as to which landowners were entitled to access rights to the Taylor Ranch.<sup>134</sup> There are nearly six-thousand people with access rights as of July 2021.<sup>135</sup> It is still possible that a landowner will come along and assert access rights, so the case remains technically open. Now, after about sixty years of back-and-forth litigation, the rights of the Sangre de Cristo Land Grant community members to access their historic community land grant have finally been confirmed. While the Grant's community did not receive a full restoration of their historic rights, landowners around the Taylor Ranch have been able to resume their traditional lifestyle with a newfound sense of security.<sup>136</sup>

### *C. Removal of Lobato from the Sphere of Treaty Jurisprudence*

To achieve the highly unique outcome in *Lobato*, the Colorado Supreme Court had to find a way to avoid disturbing Treaty

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129. *Id.* at ¶ 45, 433 P.3d at 607.

130. *Id.* at ¶ 46, 433 P.3d at 608.

131. *Id.* at ¶¶ 59–60, 433 P.3d at 609–10; *id.* at ¶ 151, at 433 P.3d 626.

132. *Id.* at ¶¶ 95–99, 433 P.3d at 616–17.

133. *Id.* at ¶¶ 152–53, 433 P.3d at 626.

134. Order Confirming Immediate Access Rights for the Owners of Certain Parcels Within Stipulated Settled Areas in Costilla County as Identified in the June 29, 2020 Report of Formation Environmental, *Lobato v. Taylor*, No. 1981CV100005 (D. Colo. Sept. 8, 2020) (on file with author).

135. Mot. to Permit Disc. Concerning “Pls.” Mot. to Safeguard Landowners’ Rights, at 1 n.1, *Lobato v. Taylor*, No. 1981CV100005 (D. Colo. July 2, 2021).

136. Telephone interview with Bennett Cohen, Counsel, Polsinelli PC (Sept. 8, 2020). The landowners still face barriers to their access rights imposed by the Ranch owner. These barriers include arbitrary denials of legal access, drone surveillance of landowners both on and off the Ranch, and harassment by armed security forces. See Mot. to Safeguard Landowners’ Rights, *supra* note 99, at 5–8.

jurisprudence that had been settled for decades. It did so through the way it constructed easement rights, pulling the case out of the sphere of Treaty jurisprudence. It agreed with the appellate court “that the landowners cannot claim rights under Mexican law,” apparently deferring to the standard judicial understanding of the Treaty of Guadalupe-Hidalgo.<sup>137</sup> This seemingly placed *Lobato* under the precedent of *Tameling* and *Sandoval*. However, this would have required the court to find for Taylor for two reasons. First, the Sangre de Cristo Land Grant was confirmed by the surveyor-general process in Beaubien’s name alone, which would nullify any other claims to the land under *Tameling*.<sup>138</sup> Since Taylor could trace his title back to Beaubien’s, he would have the sole legitimate claim to the Taylor Ranch. Second, under *Sandoval*, any community-land-grant claim would be extinguished because all community land grants became public lands held by the United States after the Mexican-American War.<sup>139</sup> The appellate court ruled in this manner, holding that the Mexican law claim failed because any Treaty rights “were subsequently extinguished by Congress’s” act confirming land grants in 1860.<sup>140</sup>

The Colorado Supreme Court, surprisingly, held otherwise on the basis of the unique history of the Sange de Cristo Grant. The court held that the original settlers’ land-use rights “developed under United States law” because the original settlers did not settle on the Grant until after it was ceded to the United States.<sup>141</sup> The court referenced the founding of the Costilla and Garcia settlements in 1849, following the end of the Mexican-American War in 1848, as the first time permanent settlements were made on the Grant.<sup>142</sup> Because of this later date of settlement, Mexican land law and the restrictive interpretation of its legitimacy after the Treaty did not apply to the Grant at all.<sup>143</sup> With this detail-oriented view of history, the court removed the case from the Treaty’s sphere of influence and opened up the way to confirm the landowners’ use rights.

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137. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 946 (Colo. 2002).

138. See discussion of *Tameling*, *supra* Section I.C.1.

139. See discussion of *Sandoval*, *supra* Section I.C.2.

140. *Lobato I*, 71 P.3d at 946 (citing *Lobato v. Taylor*, 13 P.3d 821, 829 (Colo. App. 2000)).

141. *Id.* at 946.

142. *Id.* at 946 n.4.

143. *Id.* at 946.

III. ANALYSIS: THE IMPACT OF *LOBATO V. TAYLOR* ON  
COMMUNITY LAND GRANTS

The *Lobato* decision was a great victory for the landowners involved in the case; after forty years, they regained access to their community land grant, this time with a stronger legal backing than they had before the case was litigated. The continuing opportunity for future qualifying claimants to apply for access rights to the Taylor Ranch further affirmed this victory.<sup>144</sup> *Lobato* was the first case of its kind in that the ruling preserved a community land grant without a congressional patent.<sup>145</sup>

However, while the legal community may have taken *Lobato* as the first example of a new strategy for confirming community land grants,<sup>146</sup> the case in fact made it more difficult for such grants to achieve recognition. There are admittedly not many land grants left with open litigation that could use *Lobato* as precedent,<sup>147</sup> but the New Mexico state legislature has a committee on land grants that met during the fall of 2020 and discussed continuing litigation over at least one land grant.<sup>148</sup> This committee is devoting funds to acquiring additional land rights for other grants as well, which demonstrates that communities are still sorting out land rights and might need to prove those rights in order to obtain their land.<sup>149</sup>

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144. *Cielo Vista Ranch I, LLC v. Alire*, 2018 COA 160, ¶¶ 149–51, 433 P.3d 596, 626.

145. The author has found no cases or scholarly works to contradict this claim. It is possible that some earlier case resulted in the same ruling as *Lobato*, but no such case was referenced in the entire sixty-year process of the *Lobato* litigation. Had there been such a case, it would likely have been incorporated into *Lobato* as favorable precedent, so the lack of citations indicates that no such case exists. Research outside of the text of *Lobato* has resulted in the same conclusion.

146. Golten, *supra* note 1, at 458, 494.

147. Litigation surrounding the Tecolote Land Grant in New Mexico appears to still be open. The status of the land grant is difficult for the author to assess. The most recent decision in the case the author has found is *Tecolote Land Grant ex rel. Tecolote Board of Trustees v. Montoya*, 2014-NMCA-092, 335 P.3d 222, which remanded the case back to the district court for further proceedings. Other land grants, like those mentioned in the New Mexico governmental sources cited in *infra* notes 148 and 149, are using nonjudicial avenues to assert their rights—likely because the judicial system is bound by such terrible precedent.

148. N.M. LAND GRANT COMM., MINUTES OF THE SECOND MEETING OF THE LAND GRANT COMMITTEE 3–4 (2020), <https://nmlegis.gov/minutes/LGCminOct14.20.pdf> [<https://perma.cc/VEZ8-WM5S>] (discussing the Tierra Amarilla Grant).

149. N.M. LAND GRANT COMM., ICIP CAPITAL OUTLAY PRIORITIES FOR LAND GRANTS (2020), <https://nmlegis.gov/handouts/LGC%20112020%20Item%20%20>

The *Lobato* ruling is so specific to the facts of the case as to make any precedent functionally useless, and, given the *Lobato* court's legal construction, it is inapplicable to grants bound by the Treaty of Guadalupe-Hidalgo. The fact that a successful confirmation of a community land grant can limit, not expand, the chances of similar grants looking to achieve legal recognition points to a failure of the U.S. justice system. This failure is compounded by the United States' abrogation of the Treaty, the somewhat strained historical and legal constructions that the *Lobato* court relied on, and the dismantling of other community land grants by courts.<sup>150</sup> When properly understood, *Lobato* destroys more hope for community land grants than it provides. This Part first analyzes why prior scholarship surrounding *Lobato* is incorrectly optimistic, then explains why *Lobato* narrows, rather than expands, the path to recognition for community land grants. This Part concludes with a discussion of how the U.S. judicial system has failed the Sangre de Cristo Land Grant community as well as the community-land-grant system as a whole.

#### A. *The Misplaced Hopes of the Legal Community*

*Lobato* was greeted with much optimism from the admittedly small subsection of the legal community that pays attention to Mexican land grants in the American Southwest. While the scholarship that followed *Lobato* generally recognized that the case "did not turn squarely on treaty rights,"<sup>151</sup> authors have held onto the belief that *Lobato* "offers an important opportunity for those attempting to vindicate land and water rights" stemming from Mexican land grants.<sup>152</sup>

An article on *Lobato* by Ryan Golten recognizes the limitations and concerns resulting from the *Lobato* decision. "Is it worth deemphasizing Treaty claims," Golten asks, if land grant communities can vindicate their rights via the easement-based common law theory advanced in *Lobato*?<sup>153</sup> In the alternative, is

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%20ICIP%20Capital%20Outlay%20Priorities%20for%20Land%20Grants.pdf  
[<https://perma.cc/N5HP-KCB8>] (handout from the New Mexico Land Grand Committee meeting on November 20, 2020).

150. See *supra* Section I.C.

151. Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1913 (2012).

152. Golten, *supra* note 1, at 494.

153. *Id.* at 492.

it worth losing land grants in an attempt to hold the United States to its Treaty-based promises?<sup>154</sup> Golten does not resolve these questions and instead finds that the “real significance” of *Lobato* is the precedent it sets that “will undoubtedly prove useful to other courts and claimants.”<sup>155</sup> Golten’s optimism is understandable, as she published her article in 2005, soon after the case was decided. A similar article, both in content and in early publication date, views the *Lobato* court’s citation of Mexican law as a good sign as well. This article, authored by Peter L. Reich, posits that “tribunals addressing southwestern natural resource disputes may choose to rely to a greater extent on Hispanic law in the future.”<sup>156</sup>

The decade that followed saw no such reliance on Mexican land-grant law in cases considering the viability of historic land grants. Despite this, scholars remained optimistic. A 2012 article by Richard Delgado interprets *Lobato* as “suggest[ing] an avenue for litigating at least some Mexican land claims and possibly other rights.”<sup>157</sup> Delgado acknowledges that *Lobato* “did not turn squarely on treaty rights” but does not acknowledge the extent to which Treaty rights have been decimated by early cases such as *Tameling* and *Sandoval*.<sup>158</sup> Delgado does not address the fact that *Lobato*’s success was due entirely to the removal of the case from the context of Treaty rights and instead moves in the opposite, fruitless direction.

Similarly, a 2013 article addressing U.S.-Mexican water disputes portrayed *Lobato* as the first step in “integrating Mexican natural resources law into the U.S. doctrinal system.”<sup>159</sup> The article further referenced the Colorado Supreme Court’s citation of Mexican law, claiming that *Lobato* “successful[ly] incorporate[d] Mexican civil law into a U.S. state’s common law.”<sup>160</sup> Yet this claim is refuted within the text of *Lobato* itself: on the very same page to which this article cites, the *Lobato* court

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154. *Id.*

155. *Id.* at 493.

156. Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre De Cristo Land Grant Case*, 5 SCHOLAR 217, 223 (2003).

157. Delgado, *supra* note 151, at 1913.

158. *Id.*

159. Peter L. Reich, *The Historical, Comparative, and Convergence Trifecta in International Water Law: A Mexico-U.S. Example*, 43 ENV’T L. REP. NEWS & ANALYSIS 10509, 10513 (2013).

160. *Id.*

states that “Mexican law cannot be a source” of the rights at issue in the case.<sup>161</sup>

These positive views of *Lobato* and its significance are ultimately unfounded. No land grant case has relied on it in the nearly twenty years since its decision. These examples, while accurate in explaining Treaty law and acknowledging the victory in *Lobato*’s outcome, incorrectly evaluate the wider applicability of the case. Rather, the background of the case and the quirks of the court’s ruling make *Lobato* too specific and too narrow to serve as helpful precedent for anyone.

*B. How Lobato Narrowed the Path to Community-Land-Grant Recognition*

The novel and positive outcome of *Lobato* blinded members of the legal community to the true narrowness of the ruling.<sup>162</sup> *Lobato*’s favorable decision was built on the extremely specific historical circumstances of the case, and since those circumstances are nearly impossible to replicate, the result of *Lobato* is correspondingly out of reach.<sup>163</sup> Additionally, the *Lobato* court relied on this history to remove the case from the realm of Treaty legal tradition, and into American property law, before it ruled for the landowners.<sup>164</sup> This departure from Treaty law means that the results of *Lobato* can apply to only those community land grants not subject to the Treaty—and there are few, if any, cases of that nature that could also satisfy the subsequent American property law analysis. Because the *Lobato* method of granting community land rights through easements is so dependent on the nature of the case, other community land grants will find that it is more difficult to gain recognition through American easement law than it was before the case was decided.

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161. *Id.* at 10513 n.54; *Lobato v. Taylor (Lobato D)*, 71 P.3d 938, 946 (Colo. 2002).

162. Golten, *supra* note 1, at 465.

163. *Lobato I*, 71 P.3d at 943–44.

164. *Id.* at 946 (“While the Beaubien Document cannot support an express grant of rights, when coupled with the Gilpin agreement and other evidence, it supports a finding of a prescriptive easement, an easement by estoppel, and an easement from prior use.”).

1. Prohibitive Specificity of *Lobato*

The *Lobato* plaintiffs succeeded due to an extraordinary convergence of historical events, the actions of other parties, a favorable court, and luck. First, *Lobato*'s historical timeline stretches back to the 1848 signing of the Treaty, and the case was only viable because, according to the Colorado Supreme Court, the original settlers of the Sangre de Cristo Land Grant began their settlements after the Treaty was signed.<sup>165</sup> This post-Treaty settlement date is rarely, if at all, found in the history of other land grants. Out of forty-four grants analyzed by scholar J.J. Bowden, only the Sangre de Cristo Grant was first settled after 1848.<sup>166</sup> It is therefore unlikely that any other community land grant can get around the *Tameling* bar, as the vast majority of grants are subject to the Treaty and its caselaw due to their dates of settlement.

Even if a community-land-rights claim can survive this hurdle, it must then contend with the due process issue that allowed *Lobato* to move past the Torrens action.<sup>167</sup> Had Taylor not improperly served the successors in interest of the original Grant settlers via publication notice, all adverse claims to the Taylor Ranch would have been closed after the Torrens action under *res judicata*.<sup>168</sup> Overcoming this hurdle is not impossible, but it is unlikely. This due process concern has saved a communal land grant before in *Armijo v. Town of Atrisco*. In that case, the Supreme Court of New Mexico rejected a distribution plan for a community land grant because not all the heirs to the grant were represented in the proceedings.<sup>169</sup> However, in the post-*Lobato* case of *Tecolote Land Grant ex rel. Tecolote Board of Trustees v. Montoya*, the New Mexico Court of Appeals explicitly rejected

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165. *Id.* For more on the timeline of the Grant, see *supra* Section II.A.

166. See J.J. BOWDEN, PRIVATE LAND CLAIMS IN THE SOUTHWEST (1969), reprinted in N.M. LAND COUNCIL, SELECTIONS FROM J.J. BOWDEN'S "PRIVATE LAND CLAIMS IN THE SOUTHWEST" (2018), [https://lgc.unm.edu/sites/default/files/desktop/nmlgc\\_-\\_2018\\_bowden\\_print\\_-\\_complete\\_1.pdf](https://lgc.unm.edu/sites/default/files/desktop/nmlgc_-_2018_bowden_print_-_complete_1.pdf) [https://perma.cc/P3VS-4S7B]. Bowden's work on Mexican land grants is widely known and respected. This report contains the history of forty-four land grants described in Bowden's six-volume thesis, which provides the historical background for every southwestern land claim. Most of these forty-four grants do not have a date of settlement listed separately from the date of the land grant and are instead described as being settled by 1848. For an example of one such grant, see *id.* at 75.

167. *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1158, 1161 (Colo. 2003).

168. *Id.* at 1158, 1165–67.

169. *Armijo v. Town of Atrisco*, 1957-NMSC-045, 62 N.M. 440, 312 P.2d 91.

the Armijo due process argument when the Tecolote Land Grant raised it.<sup>170</sup> What's more, *Lobato* does not appear in the court's opinion at all.<sup>171</sup> Even if a community land grant can prove a due process violation like that in *Lobato*, it may still lose under *Tecolote*.

Next, a community land grant must find a court that will look kindly upon its case. The surprise that the legal community felt when the *Lobato* ruling came down was due to the fact that every other court, in both the string of *Lobato* litigation and in recent memory, had ruled in accordance with the *Tameling* jurisdictional limit.<sup>172</sup> The Colorado Supreme Court was presented with a number of opportunities to dismiss *Lobato* in accordance with Treaty jurisprudence. First, Beaubien's land was granted to him by the Mexican government. The Grant was then confirmed by Congress, which *Tameling* holds as the ultimate bar to litigation on Mexican land grants. The court also could have affirmed the lower courts' decision that Colorado law did not recognize implied rights of the sort the *Lobato* plaintiffs claimed.<sup>173</sup> The court might have required the *Lobato* plaintiffs to prove chain of title back to the original settling of the Grant in order to claim access rights to the Taylor Ranch instead of accepting the best available evidence of title from the Gilpin period.<sup>174</sup> Further, the appellate court in *Cielo Vista Ranch* could

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170. Tecolote Land Grant *ex rel.* Tecolote Bd. of Trustees v. Montoya, 2014-NMCA-092, ¶ 36, 335 P.3d 222, 231. This case is the product of litigation over the Tecolote Land Grant, which began in 1999. In this case, the court found that *Tameling* did not apply to the Tecolote Land Grant because the Tecolote Land Grant had recognized that the Montoya land was not part of the Grant. *Id.* ¶¶ 28–34, 335 P.3d at 228–29. The court further held that *Armijo* did not apply because of the procedural history in the case; the court did not address the substance of the *Armijo* holding. *Id.* ¶ 36, 335 P.3d at 231.

171. *See id.*

172. *See, e.g.,* *Lobato v. Taylor*, 13 P.3d 821, 829 (Colo. App. 2000); *Sanchez v. Taylor*, 377 F.2d 733, 737 (10th Cir. 1967).

173. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 944 (Colo. 2002).

174. *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1159 (Colo. 2003). Given that the New Mexico Territory was frontier land for both Mexico and the United States during the years surrounding the war, it is not surprising that deeds to land were not always recorded, as there was little formal government to codify such recording. *See, e.g., Lobato I*, 71 P.3d at 964 (Kourlis, J., dissenting) (“Under the common law, the grantor [of land] merely warranted that he was seized of, or possessed of, the title that he purported to convey. The obvious deficiencies of such a system led to the eventual enactment of recording acts and other statutory conveyancing requirements in every state.”). In allowing landowners on the Sangre de Cristo Grant to prove ownership of their land via the best available evidence from the Gilpin period

have allowed the “opt-in” process of access rights adjudication, which would have cut off the adjudication process and deprived landowners with unadjudicated claims of their rights.<sup>175</sup> Considering that the vast majority of courts have stuck to the *Tameling* doctrine, it is hard to believe that another court would deviate from the well-established legal standard of Treaty interpretation to the extent that the Colorado Supreme Court did.<sup>176</sup> Of course, a case hoping to replicate *Lobato* would not have the same procedural and factual quirks, but the sheer number of nontraditional decisions that *Lobato* required casts serious doubt on the possibility of replication.

## 2. Applicability of *Lobato*-Style Easements to Treaty-Based Cases

The *Lobato* court achieved the results it did by removing the case from the realm of the Treaty and resolving it under American easement law, which makes any precedent that *Lobato* set inapplicable to Treaty-based cases. As discussed above, very few, if any, land grants have the same historical circumstances that enabled the Colorado Supreme Court to escape from *Tameling*'s binding precedent.<sup>177</sup> The court did not mention *Tameling* at all in its opinion and avoided any discussion of the Grant's status as a private or community land grant by constructing implied easements that rendered such discussion unnecessary.<sup>178</sup> *Lobato* therefore has no real legal application to other land-grant

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(instead of deeds in an unbroken chain of title), the Colorado Supreme Court recognized and worked around what were otherwise fatal difficulties.

175. *Cielo Vista Ranch I, LLC v. Aire*, 2018 COA 160, ¶¶ 149–51, 433 P.3d 596, 626.

176. *See, e.g.*, *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569 (1891); *Maxwell Land-Grant Case*, 121 U.S. 325 (1887); *H.N.D. Land Co. v. Suazo*, 1940-NMSC-061, 44 N.M. 547, 105 P.2d 744; *Martinez v. Rivera*, 196 F.2d 192 (10th Cir. 1952) (reaffirming a congressionally approved land grant under *Tameling*); *Ysleta Del Sur Pueblo v. City of El Paso*, 433 F. Supp. 3d 1020 (W.D. Tex. 2020), *appeal dismissed*, No. 20-50313, 2020 WL 6054343 (5th Cir. July 31, 2020) (finding no jurisdiction to determine the validity of a land claim under *Tameling*).

177. *See supra* Section III.B.1.

178. *Lobato I*, 71 P.3d at 943, 945–46. The court cites *Tameling v. United States Freehold Land & Emigration Co.*, 2 Colo. 411 (1874), the Colorado Supreme Court case that confirmed the entirety of the Sangre de Cristo Land Grant in Beaubien's successors in interest. *Lobato I*, 71 P.3d at 956. *Tameling* was appealed to the U.S. Supreme Court, which granted certiorari and authored the famous opinion so integral to land grant litigation. *See Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1876).

cases, since all other community land grants are under the Treaty and are bound by *Tameling*.<sup>179</sup> So far, *Lobato* has served as useful precedent only for cases involving ancient documents like the Concession as extrinsic evidence, cases regarding court-ordered awards of costs, and cases litigating easement rights.<sup>180</sup> The idea that *Lobato* could serve as helpful precedent for land-grant cases is belied by the fact that no opinions in land-grant cases appear to have cited it in the nearly twenty years since it was decided.<sup>181</sup>

Despite *Lobato*'s specific historical background and its avoidance of Treaty law that binds other land grants, other Treaty-based community land grants might still hope to rely on it to win their case via easement rights. However, easement rights could actually function as an even bigger hurdle to community land grants hoping to achieve recognition because of the incongruency between American and Mexican law. *Lobato* was, again, unique in that the implied easements that secured recognition were based entirely in American law.<sup>182</sup> If a land grant from the Mexican government was settled after 1848, and thus not bound by the Treaty and the *Tameling* line of cases, the

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179. In her article, Golten states that *Lobato*'s "contextual approach is certainly applicable to other large private grants made during the end of Mexican rule over New Mexican territory." Golten, *supra* note 1, at 491. Golten does not specify which grants may benefit from the *Lobato* approach, and the author of this Note has not found any grants with historical backgrounds close enough to that of the Sangre de Cristo Grant to make *Lobato* even remotely applicable. Golten further argues that the "real significance of *Lobato* is . . . the way it succeeded in using the equitable tools of the common law in ways that will undoubtedly prove useful to other courts and claimants." *Id.* at 493. Golten's article was published two years after *Lobato* was decided and has since been proven wrong, as other courts have not utilized *Lobato*'s equitable approach in other land grant cases.

180. See, e.g., *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005) (citing *Lobato I* when discussing ancient documents as extrinsic evidence); *Landmark Towers Ass'n v. UMB Bank, N.A.*, 2016 COA 61, ¶ 33, 436 P.3d 1126, 1133 (citing *Lobato I* regarding the awarding of costs); *LR Smith Invs., LLC v. Butler*, 2014 COA 170, ¶ 18, 378 P.3d 743, 747 (citing *Lobato I* in reference to the ways to acquire easement rights). *Lobato II* has been cited almost exclusively regarding the doctrine of res judicata. See, e.g., *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 668 (Colo. 2011); *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005). The majority of cases that cite *Lobato I* and *Lobato II* are from courts within Colorado.

181. There may be land-grant cases that have referenced or relied upon *Lobato*, but the author has not found any. Parties to such cases may also have utilized *Lobato* in their briefs, but courts have apparently not found *Lobato* persuasive or relevant enough to merit discussion.

182. *Lobato I*, 71 P.3d at 952–53.

community land would still have to originate under American, not Mexican, law. Generally, community lands were acquired when an individual or small group of people petitioned the Mexican government for a community grant upon which to establish a settlement.<sup>183</sup> Therefore, regardless of settlement dates, community grants generally originated under Mexican law.

Justice Kourlis's dissent in *Lobato I* implied that the Sangre de Cristo community land grant also originated under Mexican law, rather than under American law. The dissent states that the Beaubien Concession attempted to create a Mexican community land grant at a time and under a legal system that did not recognize that sort of grant.<sup>184</sup> In truth, Justice Kourlis was probably correct; Beaubien lived under the Mexican property system for much of his life, obtained his land from the Mexican government, and drew settlers to that land via the traditional community land system he saw operating around him. Further, the Concession explicitly granted land "for the benefit of the community."<sup>185</sup> Under a strict view like Justice Kourlis's, Beaubien did not transfer any land to anyone via the Concession; it had no legal effect, because it attempted to grant a right that did not exist under American law.<sup>186</sup>

The *Lobato I* majority ruled otherwise, holding that this incongruity between legal systems created an ambiguity under which the court was able to admit extrinsic evidence to provide clarity on the issue.<sup>187</sup> The court admitted the Concession and constructed implied easements based on its understanding of Beaubien's intent in granting community lands.<sup>188</sup> While this was certainly a win for the *Lobato* plaintiffs, the necessity of American law as the foundation for easement rights bars most—if not all—other grants from obtaining easements themselves. These historical and legal bases for the easements granted in *Lobato* mean that the easement solution to community land grant recognition struggles is not widely applicable.

It is theoretically possible that another court could grant easement rights to a community under American law, even though that hypothetical community began using their land

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183. Benavides & Golten, *supra* note 6, at 873.

184. *Lobato I*, 71 P.3d at 962 (Kourlis, J., dissenting).

185. Jenkins, *supra* note 9, at 3 (quoting the Concession).

186. *Lobato I*, 71 P.3d at 963 (Kourlis, J., dissenting).

187. *Id.* at 947.

188. *Id.* at 947–49.

under Mexican law. However, the historical circumstances of both *Lobato* and the majority of other grants act as a barrier. The *Lobato* court grounded the easement rights in the case in prescription, estoppel, and prior use.<sup>189</sup> All three of these easements rely on the benefitting party having access to the burdened party's property for a substantial amount of time. The average prescriptive easement requires roughly twenty years of continuous and uninterrupted use to be valid.<sup>190</sup> Additionally, one element of easements by estoppel is that the owner of the servient estate "permit[s] another to use that land under circumstances in which it was reasonable to foresee that the user . . . believ[ed] that the permission would not be revoked."<sup>191</sup> Easements by prior use require just that—prior use. In *Lobato*, these requirements were not a problem, as the community of the grant spent a century using the land without opposition. In most other cases, however, the legal processes that removed communities from their land grants occurred over a century ago.

### C. *The Failure of the U.S. Judicial System*

In ruling as it did in *Lobato*, the Colorado Supreme Court achieved real, if somewhat limited, justice for the landowners of the Sangre de Cristo Land Grant. While nothing can make up for the forty years during which these landowners were shut out of their communal land on the Taylor Ranch, they may now rest secure in the knowledge that their access rights to the entirety of their community land grant are enshrined in law.<sup>192</sup> However, the fact remains that the only way the *Lobato* court was able to affirm these rights was by sidestepping more than a century of precedent in the face of the case's unique timeline. This demonstrates the failure of the U.S. judicial system to dispense, or even

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189. *Id.* at 946.

190. Alabama, Maryland, North Dakota, and South Carolina all require twenty years of use for prescriptive easements, but Pennsylvania and Ohio require twenty-one years, while Colorado requires eighteen. *See, e.g.*, *Apley v. Tagert*, 584 So. 2d 816 (Ala. 1991); *Turner v. Bouchard*, 32 A.3d 527 (Md. Ct. Spec. App. 2011); *Gajewski v. Taylor*, 536 N.W.2d 360 (N.D. 1995); *Bundy v. Shirley*, 772 S.E.2d 163 (S.C. 2015); *Lednak v. Swatsworth*, 1984 Pa. D. & C.3d 535 (1984); *Alpha Church of Nazarene v. Hoos*, No. 99CA0036, 1999 WL 980338, (Ohio Ct. App., Oct. 29, 1999); *LR Smith Invs., LLC v. Butler*, 2014 COA 170, 378 P.3d 743.

191. *Lobato I*, 71. P.3d at 950–51 (internal quotation marks omitted).

192. The Ranch owners' failure to close the access rights adjudication process in *Cielo Vista Ranch* demonstrates the security provided by the *Lobato* ruling. *Cielo Vista Ranch I, LLC v. Aire*, 2018 COA 160, ¶ 98, 433 P.3d 596, 616–17.

attempt to seek out, justice for the victims of the federal government's disregard of its Treaty obligations.<sup>193</sup> Further, the *Lobato* court did not actually affirm all of the rights guaranteed to the Grant's community by Beaubien.<sup>194</sup>

1. *Lobato* Failed the Community of the Sangre de Cristo Land Grant

The legitimacy of *Lobato* turns on the Colorado Supreme Court's removal of the case from Treaty precedent.<sup>195</sup> The court stated that the first permanent settlements on the Sangre de Cristo Land Grant were established in 1849 and that any claim the settlers' successors in interest had on the Taylor Ranch originated outside the context of the Treaty.<sup>196</sup> This clever legal construction certainly helped the *Lobato* plaintiffs, but it hints at a disquieting fact: only community land grants created after 1848 are permitted to seek justice in the face of attempted privatization under American law.<sup>197</sup>

However, the court's view of the history of the Grant is not the only legitimate one, which calls into question the timeline upon which the court based its legal analysis.<sup>198</sup> As discussed above, the first settlement on the Grant occurred in either 1848 or 1849.<sup>199</sup> If the first settlement on the Grant was in 1848, it may well have been before the Treaty was fully ratified, placing the settlers and their community land grant under Mexican law and under the jurisdictional limit of *Tameling*.<sup>200</sup> But Garcia's establishment in 1849 is relatively well documented, while the

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193. See *supra* Section I.B.4. For a discussion of a way forward, see *infra* Conclusion.

194. The court's failure to affirm all of the traditional rights associated with community land grants will be discussed later in *infra* Section III.C.1.

195. *Lobato I*, 71 P.3d at 946.

196. *Id.* at 946 n.4. Dr. Marianne Stoller, whose comprehensive report on the history of the Grant was a foundational document to both the *Lobato* plaintiffs and the court, dated the first permanent settlement, Garcia, to 1849. Stoller, *supra* note 9, at 7.

197. Other successful cases surrounding the confirmation of community land grants have been based around proper congressional patents of said grants. See Benavides & Golten, *supra* note 6, at 879 n.100, for a list of such cases and grants. These grants are therefore secure under *Tameling* and immune to privatization attempts like Taylor's 1960 Torrens action.

198. Ebright, *supra* note 76, at Exhibit A.

199. *Id.*; Stoller, *supra* note 9, at 7; see *supra* Section II.A.

200. Randall, *supra* note 36. The Treaty process lasted from February 1848 until July of that year.

1848 settlement date of Costilla is not so easy to prove.<sup>201</sup> This historical discrepancy is therefore not fatal to the reasoning of the case, but it demonstrates just how limiting the *Lobato* decision is. The subtraction of a few months to the Grant's settlement timeline would disqualify it from the list of grants able to seek lawful confirmation of community land rights. Given the international convention of respecting property rights discussed above and the United States' promise in the Protocol of Queretaro to acknowledge Mexico's land grants, this extraordinary time-based limitation on which land grants can achieve proper acknowledgement violates international law, the Treaty, and general principles of justice and fairness.<sup>202</sup>

Further, while *Lobato* affirmed the rights of community landowners on the Sangre de Cristo Land Grant to pasture, firewood, and timber, the court did not confirm all of the rights that traditionally accompanied community land grants which the landowners' predecessors had enjoyed.<sup>203</sup> The court ignored the traditional community land grant rights of hunting, fishing, gathering of fruits and nuts, threshing, and recreation.<sup>204</sup> On remand from *Rael v. Taylor*,<sup>205</sup> the lower court found that the landowners' predecessors in title had fished, hunted, and recreated on the community land grant, in addition to harvesting timber and grazing livestock, until Taylor fenced in the land in 1960.<sup>206</sup> Because only the grazing, timber, and firewood rights were explicitly mentioned in the Concession document, the court did not grant the other rights.<sup>207</sup>

On its face, the court's choice to grant only those rights laid out in the Concession seems logical. However, the court allowed in extrinsic evidence to interpret the Concession.<sup>208</sup> It is therefore less clear why the court did not consider all of the available

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201. See Stoller, *supra* note 9, at 7; Ebright, *supra* note 76, at Exhibit A.

202. See Randall, *supra* note 36; Luna, *supra* note 14, at 109–12 (discussing international law and its place in treaty interpretation).

203. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938, 956 (Colo. 2002).

204. *Id.* at 956, 958–59 (Martinez, J., dissenting in part). Justice Martinez quotes a report by Dr. Michael Meyer, professor emeritus at the University of Arizona, which details the full extent of usage rights exercised on community land grants. *Id.* at 958–59. Dr. Stoller testified to the same effect at trial. *Id.* at 960. Yet another expert, Dr. Maria Montoya, testified in support of this broader understanding of community-land-grant uses. *Id.*

205. *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994).

206. *Lobato I*, 71 P.3d at 958 (Martinez, J., dissenting in part).

207. *Id.* at 956.

208. *Id.* at 947.

extrinsic evidence, including expert reports, expert testimony, and accounts of historic use, which would have supported confirmation of all the traditional community-land-grant rights, including hunting, fishing, and recreation.<sup>209</sup> Counsel for the landowners in *Cielo Vista Ranch* has speculated that the court chose to limit the rights available to the landowners in order to prevent widespread sale of property to buyers solely interested in accessing the Taylor Ranch for these other uses.<sup>210</sup> While concerns over this possibility are legitimate, it does not excuse the court's decision to confirm only some of the rights tied to the community land grant in *Lobato*.

Not only did the court fail to confirm all the historic rights associated with the community land grant, but it also failed to confirm those rights for every qualifying landowner. In *Lobato II*, the court held that res judicata applied to the claims of the landowners who were personally served in the 1960 Torrens action.<sup>211</sup> The *Lobato* plaintiffs argued that those landowners should be allowed to gain access to the Taylor Ranch and their community-land-grant rights because (1) the federal court that ruled on the Torrens action misapplied the relevant Colorado law; (2) it would be manifestly unjust for those landowners to be excluded; and (3) res judicata in this situation would be contrary to public policy surrounding implied land rights.<sup>212</sup> The court rejected all three of these arguments, finding that the circumstances of the case were not extreme enough to outweigh the public policy interest in res judicata.<sup>213</sup> Most troubling was the court's determination that denying some landowners the rights available to their neighbors under res judicata would not create a manifest injustice.<sup>214</sup>

While it is true that there are weightier cases more deserving of exemptions from the res judicata doctrine—such as cases concerning foundational constitutional rights—the existence of

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209. *Id.* at 959, 961 (Martinez, J., dissenting in part) (citing the Meyer report for a complete list of traditional uses of community land grants and arguing extrinsic evidence must be used because the Concession document is neither perfect nor dispositive).

210. Telephone interview with Bennett Cohen, Counsel, Polsinelli PC (Nov. 24, 2020); see also Keith W. Lindner, *Geographies of Struggle in the San Luis Valley*, 102 GEOGRAPHICAL REV. 372, 378–80 (2012).

211. *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152, 1156 (Colo. 2003).

212. *Id.* at 1166; see *supra* note 101 and accompanying text (discussing Torrens actions).

213. *Lobato II*, 70 P.3d at 1156, 1166–67.

214. *Id.* at 1167.

other cases deserving of relief from *res judicata* does not somehow prevent the *Lobato* plaintiffs from deserving the same.<sup>215</sup> In light of the chronic denial of justice to community land grants—the federal and lower state courts’ incorrect constructions of Colorado law that denied the plaintiffs their rights, the limited grant of rights by the *Lobato* court, and the far-reaching impacts of the court’s legal construction of implied land right—there certainly seems to be reason enough to include all relevant landowners in the *Lobato* decision.<sup>216</sup>

Of course, having some rights confirmed to some landowners is better than losing all rights to the community land grant, but it is not a total victory. The fact that *Lobato* was touted as a big step forward for community land grants<sup>217</sup> demonstrates the sorry state of affairs of these grants under the Treaty of Guadalupe-Hidalgo: there is clearly some failure in the system when the construction of a few easement rights in lieu of a full confirmation of a community land grant is seen as an astounding success.

## 2. Two Centuries of Treaty Jurisprudence Have Failed All Community Land Grantees

Given the circumstances under which *Lobato* arose, the Colorado Supreme Court’s ruling in the case did an admirable job of dispensing justice to the community of the Sangre de Cristo Land Grant. The *Lobato* court was hemmed in by a century of debilitating legal precedent but managed to find a way to uphold community-land-grant rights despite those restrictions. It is easy to be critical of the case, given the way it limited the application of implied easement rights to community land grants, but it is important to remember the limits within which *Lobato* was forced to operate. The enduring lesson of *Lobato* is less about what it can or cannot do for other community land grants fighting for legal recognition than it is about the overall failure of the American justice system. This failure, which began with

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215. *Id.* (describing the proper application of *res judicata* in cases where the claim was unjustly forestalled by the doctrine but not powerful enough to overcome it).

216. *See supra* note 180 (noting that *Lobato I* has often been cited in Colorado cases regarding implied land rights).

217. *See supra* Section III.A.

*Tameling*<sup>218</sup> and continues to this day in *Tecolote v. Montoya*,<sup>219</sup> has stripped numerous community land grantees of their lands and left them with no judicial remedy due to the U.S. Supreme Court's decision not to enforce the Treaty of Guadalupe-Hidalgo.<sup>220</sup>

Since the courts have removed themselves from all processes designed to recognize community land grants, it appears that justice must be sought elsewhere. It is possible that Congress will rethink its historical treatment of community land grants and establish some sort of remedy for the massive loss of lands caused by the confirmation process. In 2000, Senate Bill 2022 was introduced to “provide for the development of remedies to resolve unmet community land grant claims in New Mexico.”<sup>221</sup> The bill died before receiving a vote, just as similar bills proposed in 1997 and 1998 did.<sup>222</sup> If Congress were to pass a bill like Senate Bill 2022, it would still have to determine what remedies would be suitable—and possible—to make up for land already lost. Given the United States' sacrosanct view of private property (in cases other than Mexican community land grants, that is), it seems unlikely that the community lands currently held as private will be returned.<sup>223</sup>

Alternatively, Congress could authorize financial compensation for the loss of land, but money can only do so much to substitute for lost land—especially when the land in question was used for the continued subsistence of an entire way of life.<sup>224</sup> Unfortunately, the comparatively small scope of community-land-grant loss in the grand scheme of federal budget concerns makes it unlikely that funds will be appropriated for this purpose. Congress, therefore, is unlikely to provide any meaningful reparation for its role in destroying community land grants.

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218. See *supra* Section I.C.1 (discussing *Tameling*).

219. See *supra* note 171 and accompanying text (discussing the *Tecolote* case).

220. See *supra* Section I.C.4 (analyzing the Court's abrogation of its responsibilities under the Treaty).

221. New Mexico Community Land Grant Review Act, S. 2022, 106th Cong. (2000).

222. See, e.g., Jon Michael Haynes, Comment, *What Is It About Saying We're Sorry? New Federal Legislation and the Forgotten Promises of the Treaty of Guadalupe Hidalgo*, 3 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 231, 233 (2001) (briefly discussing the 1997 and 1998 proposed bills).

223. Senate Bill 2022 contains a provision stating that “in no event shall” the recommended remedies to be developed under the act “include the divestiture of private property rights.” S. 2022 § 3.

224. Benavides & Golten, *supra* note 6, at 926.

## CONCLUSION: A DANGEROUS TREND AND A WAY FORWARD

The *Lobato* decision, while factually unique, fits into a wider trend of legal precedent surrounding land rights from grants to reservations: a court deigns to return some land rights to the historically marginalized community which owned that land, while leaving the system that stole that land in the first place completely untouched. This trend is visible in the recent Supreme Court case of *McGirt v. Oklahoma*, which restored tribal jurisdiction over a sizeable part of Oklahoma to the Creek Nation.<sup>225</sup> Justice Gorsuch, writing for the majority, determined that the “federal government promised the Creek a reservation in perpetuity,” and has “diminished that reservation” in the years following that promise.<sup>226</sup> The Court also acknowledged that the federal government has repeatedly exercised its “authority to breach its own promises and treaties”<sup>227</sup> and affirmed Congress’s ability to “withdraw its promises.”<sup>228</sup> The case concerned tribal jurisdiction, not land ownership, so it is somewhat understandable that the Court did not address the Creek Nation’s land rights in relation to the swath of eastern Oklahoma at issue in the case. The Court’s apparent comfort with the United States government’s repeated violations of its own laws, however, is much more difficult to comprehend.

Another example of this trend can be found in the 1980 case of *United States v. Sioux Nation of Indians*, in which the Supreme Court upheld a determination that the federal government had stolen Sioux land in the Black Hills of South Dakota.<sup>229</sup> The Court ruled that the United States violated its obligations under the Fort Laramie Treaty, which set that land aside for “the exclusive occupation of the Sioux.”<sup>230</sup> The Court’s remedy, however, was lacking: the Court concluded that the seizure of the Sioux land constituted a taking under the Fifth Amendment and ordered the “Government to make just compensation to the Sioux Nation” in the form of monetary payment, instead of by returning the land.<sup>231</sup> Additionally, in dicta, the

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225. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

226. *Id.* at 2482.

227. *Id.* at 2462.

228. *Id.* at 2482.

229. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

230. *Id.* at 424.

231. *Id.* The Sioux Nation has not touched the money—which now amounts to over a billion dollars due to interest—because that would essentially create a sale

Court reaffirmed its long-standing rule laid out in the earlier case of *Tee-Hit-Ton Indians v. United States*: “[T]he taking by the United States of ‘unrecognized’ or ‘aboriginal’ Indian title is not compensable under the Fifth Amendment.”<sup>232</sup> This rule demonstrates the same easy disregard for treaty obligations seen in land grant cases.

The U.S. justice system has successfully built up a façade of concern over indigenous and other minority<sup>233</sup> land rights, while simultaneously falling far short of delivering real justice in the form of returning that land. While courts have upheld some of these land rights here and there over the years, it is clear that the White imperialist U.S. government responsible for stealing indigenous and minority-owned land will not hold itself to the rule of law and respect non-White indigenous landownership guaranteed under treaty. Indigenous and other minority

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of the Black Hills to the United States. The tribe maintains, as it has for centuries, that it wants its land back. *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011, 3:57 PM), [https://www.pbs.org/newshour/arts/north\\_america-july-dec11-blackhills\\_08-23](https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23) [<https://perma.cc/3ZHZ-ZSBG>].

232. *Sioux Nation*, 448 U.S. at 415 n.29 (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955)).

233. The marginalized Latinx peoples living in the American Southwest, while not indigenous to the area, did predate White settlers of more direct European descent. The Mexican settlers were colonizers of indigenous lands who were then colonized by the United States. It is difficult to classify these marginalized peoples as purely settlers, because the majority of Mexicans are *mestizos*. *Mestizos* are defined as “[people] of mixed racial or ethnic ancestry, especially, in Latin America, of mixed American Indian and European descent.” *Mestizo*, DICTIONARY.COM, <https://www.dictionary.com/browse/mestizo> [<https://perma.cc/2ZBL-UJY6>]. The *mestizo* class was created through sometimes voluntary, sometimes violent sexual relations between European colonizers and indigenous peoples. See, e.g., Ian Stavans, *The United States of Mestizo*, 31 HUMANITIES MAG., Sept.–Oct. 2010, <https://www.neh.gov/humanities/2010/septemberoctober/feature/the-united-states-mestizo> [<https://perma.cc/7W9X-YFHG>]; Simon Romero, *Indian Slavery Once Thrived in New Mexico. Latinos Are Finding Family Ties to It*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/us/indian-slaves-genizaros.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/8S5U-HQUE>].

It is undisputed that Mexican settlers of the American Southwest set up shop on land already belonging to Native American tribes. For an example specific to *Lobato*, Beaubien’s early settlements were located on Ute land. These early settlements failed due to conflict with the Ute Bands. See Stoller, *supra* note 9, at 7–8. That said, the marginalization of Mexican and Latinx Americans by the United States, combined with the birth of the *mestizo* ethnic classification, complicates the status of descendants of early Mexican American land grant recipients. Only these marginalized minority and indigenous communities can work out the complexities of colonization and land ownership amongst themselves. However, it is clear that both indigenous Americans and Latinx Americans have been given the short end of the stick when it comes to otherwise sacred American property rights.

communities must therefore search for other approaches to regaining stolen land.

One approach is the “Land Back” movement, which pushes for the actual, physical returning of lands to indigenous tribes.<sup>234</sup> Examples of Land Back in action include the success of two Métis women living in modern-day Canada who received funds from an anonymous donor to purchase a large tract of land originally held by the Métis tribe.<sup>235</sup> They purchased the land in late 2020 and have put it in trust for future generations.<sup>236</sup> The Wiyot tribe reclaimed its native Duluwat Island, located off the northern coast of California, by raising over one-hundred-thousand dollars to buy acreage up for sale on the island. The city that owned the rest of the land on the island, Eureka, then transferred it back to the tribe—“perhaps the first time that a US municipality repatriated land to an indigenous tribe without strings attached.”<sup>237</sup> The Wyandotte Nation negotiated the return of some of its Ohio land from the United Methodist Church.<sup>238</sup> And the NDN Collective, a Land Back activist group, has joined the Lakota Nation in calling for the return of the Black Hills.<sup>239</sup> Other parts of the Land Back movement include generating funds for activist groups by selling indigenous art, participating

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234. The Land Back movement is described in part by the Landback organization as a process of “bringing our People with us as we move towards liberation and embodied sovereignty through an organizing, political and narrative framework.” *Land Back Manifesto*, LANDBACK.ORG, <https://landback.org/manifesto> [<https://perma.cc/8E74-WVYN>]. Journalist and Canada Council for the Arts chair Jesse Wentz commented that Land Back is “about the decision-making power. It’s about self-determination for our Peoples here that should include some access to the territories and resources in a more equitable fashion, and for us to have control over how that actually looks.” *What Is Land Back?*, DAVID SUZUKI FOUNDATION, <https://david-suzuki.org/what-you-can-do/what-is-land-back> [<https://perma.cc/SB6M-B6QT>]. While these two descriptions are by no means all-encompassing or exclusive, they provide a basic background for the movement and its goals.

235. Kyle Muzyka, *How 2 Alberta Métis Women Secured 65 Hectares of ‘Land Back’ in 3 Months*, CBC NEWS (Nov. 21, 2020, 4:00 AM), <https://www.cbc.ca/news/indigenous/chelsea-vowel-molly-swain-metis-land-back-1.5810779> [<https://perma.cc/7KBU-Y3CQ>].

236. *Id.*

237. Harmeet Kaur, *Indigenous People Across the US Want Their Land Back – and the Movement Is Gaining Momentum*, CNN (Nov. 26, 2020, 6:24 PM), <https://www.cnn.com/2020/11/25/us/indigenous-people-reclaiming-their-lands-trnd/index.html> [<https://perma.cc/HG24-DDJ2>].

238. *Id.*

239. See *Land Back Manifesto*, *supra* note 234.

in traditional ceremonies and land uses, and regaining a place in “keeping land alive and spiritually connected.”<sup>240</sup>

The applicability of the Land Back approach to community land grants, however, is debatable. The result of a successful Land Back movement in Southwest America would see land in the hands of the indigenous tribes—the Diné (Navajo), Apache, Ute, and many others—who originally lived there.<sup>241</sup> This might not be a favorable result for the majority of the early Mexican settlers of what is now the American Southwest, who are likely far removed from any tribal ancestry they may have had, in large part due to the atrocities committed by the Spanish during the colonization of Mexico. Despite this, the shared history of cultural and physical genocide, loss of land, and racist oppression at the hands of the U.S. government makes for a common cause between the descendants of land grant communities and tribes native to the area, making Land Back the most promising alternative source of recourse.

There are no easy answers to the problems discussed in this Comment, but that does not absolve the American community of our duty to continue searching. As a White descendant of Eastern-European Jewish immigrants, it is not this author’s place to advise the Mexican-American descendants of stolen community land grants of the best methods to vindicate their land rights. However, it is the responsibility of the White settler-colonizers who constitute the majority of the U.S. population to remember Mexican-Americans like the Sangre de Cristo community as this country navigates the long and winding road towards land justice.

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240. Nickita Longman et al., “*Land Back*” Is More than the Sum of Its Parts: Letter from the Land Back Editorial Collective, BRIARPATCH MAG. (Sept. 10, 2020), <https://briarpatchmagazine.com/articles/view/land-back-is-more-than-the-sum-of-its-parts> [<https://perma.cc/YHE3-6RYS>].

241. See *Land Back Manifesto*, *supra* note 234. For an interactive resource that enables users to input a specific location and see the tribes to which that land belongs, see NATIVE LAND DIGITAL, <https://native-land.ca/> [<https://perma.cc/23HG-LHPD>].