DETERMINING THE LEGITIMACY OF SPANISH LAND GRANTS IN COLORADO: CONFLICTING VALUES, LEGAL PLURALISM, AND DEMYSTIFICATION OF THE SANGRE DE CRISTO/*RAEL* CASE†

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I. INTRODUCTION

Rarely is a court challenged by a case in which the applicable law spans centuries of legal development and where competing laws, cultures, and values collide. Indeed, few cases in American jurisprudence have sparked deep-seeded community polarization and dislocation, exploded into violence, and fueled an internationally supported political movement.[1]

Rael v. Taylor[2] is such a case.

In dispute for nearly thirty years, *Rael* involves a conflict over the validity of communal "usufructuary"[3] rights to private land originally granted under Mexican law. These usufructuary rights, which have been passed down through generations, have been challenged under United States law, which was imposed on

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Both authors wish to acknowledge Dr. Marianne L. Stoller for the historical background provided in her seminal unpublished manuscript, *Preliminary Manuscript on the History of the Sangre de Cristo Land Grant and the Claims of the People of the Culebra River Villages on the Lands. See infra* note 20.

1. *See* Calvin Trillin, *U.S. Journal: Costilla County, Colorado, A Little Cloud on the Title*, NEW YORKER MAG., Apr. 26, 1976, at 122.

2. 92 Colo. S. Ct. 74 (1994). The Colorado Land Rights Council has pursued this matter since the present case was filed in 1981. The authors would like to acknowledge them and their legal counsel for their input and guidance in producing this article.

3. Usufructuary rights are the rights to use or enjoy the property of another, and to draw from the same all the profit, utility, and advantage which it may produce. BLACK'S LAW DICTIONARY 1712 (4th ed. 1968).

territories ceded by Mexico to the United States under the Treaty of Guadalupe Hidalgo.[4]

The *Rael* case is unique because it highlights a fundamental conflict between competing value structures as reflected in the laws of two different nations. It pits Mexican law, with roots deeply embedded in a feudal economic system, against United States law, which is grounded in mercantilism and a market economy. However, because the values of the two cultures at conflict in *Rael* are not readily determinable, the issue of which of the two competing rights should be protected has remained unanswered throughout the history of the case. Indeed, without resorting to a third body of law and value system, there is little hope that a definitive answer can be reached to resolve the conflict in *Rael.*

This article analyzes the problems which arise when legal systems change, but the values and expectations of a particular community remain constant. It traces the history of a region of land that is located in what is now part of Colorado and examines the use and ownership rights originally granted to the settlers of this region. Furthermore, this article analyzes how the land rights of settlers in this region changed once this land became part of the United States, and subject to U.S. jurisprudence. Finally, this article proposes that in the *Rael* case, the usufructuary rights originally granted to the Sangre de Cristo settlers could be preserved by adopting cultural pluralism and tolerance, and shifting societal values toward the recognition of human rights.

II. HISTORICAL CONTEXT OF THE SANGRE DE CRISTO LAND GRANT

In what is now the Southwest of the United States, two types of Spanish/Mexican land grants existed prior to the Treaty of Guadalupe Hidalgo (the Treaty): communal grants and private grants.[5] Both types of grants incorporated a *vara* system — a system of land use and distribution adapted from Spanish law to take into account the unique geography of the Americas,[6] namely the arid conditions of what is now the Southwest part of the United States.

4. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 STAT. 922 [hereinafter Treaty].

5. *See* WHITE, KOCH, KELLEY AND MCCARTHY, ATTORNEYS AT LAW & THE NEW MEXICO STATE PLANNING OFFICE, LAND TITLE STUDY 83 (1971) [hereinafter WHITE, ET AL.].

6. It is worth noting that the Spanish land grant system was greatly influenced in the Americas by prevailing indigenous land tenure systems. *See* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985).

Varas are narrow strips of land that front upon a watercourse. These strips of land were typically divided among settlers in fee simple. Areas near the *vara* that were unsuitable for tilling or inaccessible to irrigation were either held in common by the settlers; or, under private land grants, were made available for use by the settlers for a variety of non-agricultural purposes.[7]

Throughout the conquest and colonization of the "New World," the Spanish Crown sought to settle and stabilize its newly acquired territory through a series of land grants. Chiefly driven by a feudal economic system which Spain maintained much longer than most other European countries,[8] the Spanish land grant system depended upon a hierarchical structure. Under the Spanish system of land distribution, the Lord, or *Patron*, was given authority by the Spanish Crown to award land located in the New World. In exchange for a land grant by a *Patron*, the crown expected each individual grantee to convert the area to productive use. Thereafter, the grantee would be obligated to make a tax payment to the *Patron* and also to the Spanish Crown.

Once awarded the land grant, the grantee (the Manorial Lord in old England) would recruit individuals (commoners) to live on the land and organize cooperative farming villages. The large estate holder would then divide his land into individual parcels and reserve a portion to be used in common (the commons in England). Thus, the whole system of Spanish land grants, like the old English estate system, was chiefly tied to agrarian and extractive modes of production.

Under a feudal structure, in which many individuals engaged in cultivation, usufructuary rights made good economic sense. This was because the individual parcels of land located in what is now the southwest United States did not usually produce all the resources necessary for commoners to sustain their livelihood. Thus, areas that were too mountainous, dry, wet, or densely wooded for cultivation would be set aside[9] as common lands. These lands would then be made available to commoners for hunting, harvesting timber, or grazing animals. In fact, usufructuary rights and common lands formed one of the two pillars of Castilian property law: "No individual had the right to appropri-

7. VICTOR WESTPHALL & MERCEDES REALES, HISPANIC LAND GRANTS OF THE UPPER RIO GRANDE REGION 194 (1983). Once all conditions of an *empresario* land grant had been complied with, the private land being used as a commons would be converted to community property and held in trust by the town. *See generally* HALL, *infra* note 18.

8. *See generally* JONATHAN KANDELL, LA CAPITAL: THE BIOGRAPHY OF MEXICO CITY, 188-90 (1988).

9. *See generally* Peter Cook, *Public Access to the Common*, 135 SOLIC. J. 228 (1991).

ate for himself and monopolize a part of the resources of nature that were produced without the intervention of man."[10] The second pillar, equally important, maintained that "possession of the land was dependent on the act of using it."[11]

Under Mexican law, which succeeded Spanish law in part of the Americas, land grants were gratuitously awarded to entrepreneurs.[12] Mexican land grants were, however, always conditioned upon some type of service.[13] In early Mexico or New Spain, grants were first awarded to settlers to establish stability in unsettled territories.[14] Thereafter, land grants were conditioned upon the Christianization of the indigenous population.[15] As the race for acquisition and settlement of land intensified, however, the conditions of a land grant became less important. This was because rapidly increasing encroachment on Mexican lands by United States settlers made the quick settlement of outlying Mexican territory a top priority.[16]

While Mexican land grants still maintained some of the feudal aspects of the Spanish land grant system, settlers enjoyed more advantages under Mexican land grant arrangements than commoners had enjoyed under traditional feudal systems.[17] For example, it would be inappropriate to characterize the relationship between a grantee and a settler as that of "lord" and "serf,"[18] respectively. Rather, the private Spanish/Mexican land grants in the 1830s and 1840s were characterized as grants to *empresarios* or businessmen, as opposed to a *patron* or Lord. Instead of collecting a tax payment, these *empresarios* were allowed to retain one-third of the land grant in fee. The remaining two-thirds of the grant had to be distributed to settlers within 20 years of the original grant.[19]

Due to the less stringent hierarchical structure of Mexican land distribution, many land grants made by the Mexican government in the 1830s and 1840s were simply made to groups of settlers. These group grants resulted in essentially self-sufficient

10. David E. Vassberg, *The Tierras Baldias: Community Property and Public Lands in the 16th Century Castile*, 48 AGRIC. HIST. 383 (1974).

11. *Id.* at 384.

12. GUILLERMO F. MARGADANT, AN INTRODUCTION TO THE HISTORY OF MEXICAN LAW 107 (1981).

13. *Id.*

14. *See* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039, 1043 (1985).

15. *Id.* at 1053-54.

16. *Id.* at 1065-66.

17. *Id.*

18. FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE 103-06 (1885).

19. *Id.*

agrarian village societies, which utilized a system of both private and communally held lands.[20]

There is some debate, however, as to whether Spain (and later Mexico) ever relinquished title to lands awarded through group land grants.[21] A close examination of Spanish colonial and Mexican law reveals that title passed from the Crown to the grantees and their heirs and assigns only when the conditions of the grant were met.[22] While Spanish and Mexican law may have, in theory, required royal confirmation to clear title to the lands being awarded, it appears that law and practice actually diverged on this point. As one author discovered, "In practice [royal confirmation] was often overlooked for reasons of economy and convenience."[23]

Apparently, grants were maintained by the original grantees upon substantial performance of the conditions or terms of the grant.[24] In Spain, the highest valued use of land was agricultural production.[25] Thus, under Spanish land grants, use and possession were important conditions for acquiring title to land. In the Mexico of the 1840's, use and possession — especially along Mexico's northern border — played an even greater role in the decision to award individuals title to land.[26] Consequently, paper title was of little importance to the Mexican government, and for that reason, was not an essential aspect of land ownership.[27]

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20. Marianne L. Stoller, Preliminary Manuscript on the History of the Sangre de Cristo Land Grant and the Claims of the People of the Culebra River Villages on the Lands, 4-5, 46-47 (1980) (unpublished manuscript, submitted as an affidavit to the District Court of Costilla County). *See also* WHITE, ET AL., *supra* note 5.

21. United States v. Sandoval, 167 U.S. 278 (1897), the leading Supreme Court case related to ownership of communal lands in a community grant, held that no title passed from the sovereign to the community for communal lands. The Court's holding in Sandoval was based upon a theory developed and advanced by the United States Attorney. *See* Brief for the Appellant, United States v. Sandoval, 167 U.S. 278 (1897) (Reel No. 467). However, the theory seems to have little support in fact or law. *See* discussion in GOMEZ, *supra* note 6, at 1076-78.

22. *See, e.g.*, Francis P. Burns, *The Spanish Land Laws of Louisiana*, 11 LA. HIST. Q. 557, 570-72 (1928) (citing Spanish colonial land law).

23. *See* MARGADANT, *supra* note 12.

24. This standard of substantial compliance was utilized by the United States Supreme Court in Fremont v. United States, 58 U.S. 542 (1854).

25. *See* Gomez, *supra* note 6.

26. *Id.*

27. In the Spanish-based system of property law, custom played an even more important role in the demarcation of property boundaries than did a paper deed. WHITE, ET AL., *supra* note 5, at 83. In fact, an informal system for legal land transfers, including those that were oral, thrived because each land owner in the system had intimate knowledge of the region and of each settler that made up part of the community. *See* JOHN R. VAN NESS & CHRISTINE VAN NESS, SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO (1980). Thus, when the property included in the land grants became U.S. territory under the Treaty of Guadalupe Hidalgo, problems arose because American property law is based on legal documents. The United States' frequent insistence on a document or deed to

Even today, Mexican law places great emphasis on the use of land in common. For example, Mexican property law holds the Mexican land grant, or *ejido* cooperative system, sacred. In fact, until 1992, the sale of either the individual or common lands in the *ejido* was constitutionally prohibited under Mexican law.[28] Only since the amendment of Article XXVII of the Mexican Constitution in 1992 have individual owners of common lands been permitted to sell their interest in the land.[29] Even so, the sale of common lands situated next to private land requires a vote of approval by the *ejido* town assembly. Thus, despite recent constitutional changes, recognition of usufructuary rights to common lands remains fundamental to Mexican property law.[30]

III. THE SANGRE DE CRISTO GRANT

The roots of the *Rael v. Taylor* case can be traced back to 1844, when the Mexican government awarded the Sangre de Cristo Land Grant (the Grant) to two entrepreneurs, Stephen Luis Lee and Narcisco Beaubien.[31] The Grant, as eventually confirmed by U.S. patent, was roughly 1,000,000 acres and included within its boundaries all of the land which today comprises Costilla County, Colorado.[32]

At the time the Grant was executed to Lee and Beaubien, Mexico had recently won its independence from Spain, and its government was still very unstable.[33] This instability, combined with Mexico's competition for territory with their neighbor to the north, created a situation rife with ambiguity regarding ownership of unsettled lands. But while the United States subscribed to the idea that property had to be clearly defined, measured and registered, Mexico considered ambiguities over boundaries of little concern. This is because under Mexican jurisprudence, use and custom were utilized to solve ambiguities related to property.[34]

When the territory now known as southern Colorado passed from Mexican possession to that of the United States, the change

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prove fee simple or use rights led to confusion and a multitude of court cases and land disputes.

28. MEX. CONST., art. XXVII (amended 1992).

29. *Id.*

30. *See generally* JOHN DE LA VEGA, MEXICAN REAL ESTATE (1976).

31. Stoller, *supra* note 20, at 26.

32. *Id.* at 11, 20.

33. *See generally* DAVID J. WEBER, THE MEXICAN FRONTIER, 1821-1846: THE AMERICAN SOUTHWEST UNDER MEXICO (1982).

34. The idea that in the Spanish legal tradition transfer was accomplished by mere delivery or possession had been recognized by United States jurisprudence well before the Treaty of Guadalupe Hidalgo, *e.g.*, in Missouri. *See* GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 57 (1980 replacement).

in sovereignty did not greatly impact the day-to-day life of the inhabitants of the Sangre de Cristo Grant. In fact, by 1860, the Sangre de Cristo grantees had recruited roughly 1,700 Mexican settlers to work the land.[35] In 1863, Carlos Beaubien, pursuant to Mexican land grant law and in compliance with the conditions of his grant and his contract with the Mexican government, executed and recorded a document setting forth the regulations, rights, and privileges of the Sangre de Cristo settlers.[36] In accordance with the law that *empresario* grants contain both private and communal lands, Beaubien declared that certain lands of the Rito Seco would:

> [r]emain uncultivated for the benefit of the community members . . . for pasturing cattle by the payment of a fee per head . . . . According to the corresponding rule all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another.[37]

In a poignant twist of history related to the unique geographical and geopolitical location of the Sangre de Cristo Grant, the original Mexican settlers and their descendants enjoyed, for over one hundred years, essentially uninterrupted communal use of this land for the purposes outlined in Beaubien's 1863 document.[38] Regarding this uninterrupted use, a leading anthropologist on the region states:

> The settlers' subsistence base was a mixed economy of irrigated river agriculture on the valley floors, pastoralism with seasonal migrations of flocks between the highland mountain meadows in the summer and valley-bottom pastures in the winter, augmented by hunting and fishing. Although effected by and gradually drawn into the technological and economic systems introduced by Anglo-Americans, starting within a few decades of their initial settlement, this subsistence base and general cultural pattern in relation to natural resources remained characteristic of the area until the 1960's when the economic base was restricted by the closing of the Mountain tract.[39]

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35. Stoller, *supra* note 20, at 33.

36. *Id.* at 31-32.

37. *See* Petitioner's Brief at 6, Rael v. Taylor, 92 Colo. 74, (No. 87-CA-0658) (1994).

38. In 1949 the San Luis Valley was described as follows:

> If possibl[y] more isolated and landlocked than the mountain villages of New Mexico, a folk culture has survived in the San Luis Valley, some phases of which stem directly from the Middle Ages . . . . In much the same way, the self-sufficient character of their economy made it possible for them to carry over into the present many elements of their Spanish culture.

CAREY MCWILLIAMS, NORTH FROM MEXICO, 95 (1968).

39. Stoller, *supra* note 20, at 76-77.

While the settlers obtained and exercised usufructuary rights over land outside of the plots they obtained in fee simple for cultivation, the title to this common land was apparently not transferred to the town, as conditioned by the Grant and Mexican law.[40] The location and ownership of this communal land area are the crucial questions underlying the *Rael v. Taylor* case. It is worth noting, however, that irrespective of this ambiguity, usufructuary rights were respected and exercised in this part of Colorado for over one hundred years.

Interest in the Grant and title to the land contained in the grant became increasingly confused over the years as transfers of individual plots multiplied.[41] Narcisco Beaubien's father, Carlos, had come into sole possession of the Grant following the death of the original grantees in the Taos Rebellion of 1847. As his minor son's heir, Carlos Beaubien inherited Narcisco's half interest in the grant. Carlos Beaubien then acquired Stephen Luis Lee's half interest in the grant for $100 as partial payment for Mr. Lee's debts. In 1853, Beaubien vested title to a one-sixth interest in Joseph Pley; a one-sixth interest in his daughter and son-in-law, Luz and Lucien B. Maxwell; and another sixth in attorney James H. Quinn. In 1860, Joseph Pley sold his one-sixth interest to Ceran St. Vrain for $1,000. St Vrain, in 1862, then sold his interest in the land to Colonel William Gilpin, first Territorial Governor of Colorado, for $20,000.[42]

Eventually, Gilpin acquired the entire grant for about four cents an acre.[43] Though Gilpin maintained the largest interest, he divided the property, and by 1868, there were five co-owners.[44] Many speculative ventures were attempted in the ensuing years, but no major land sale occurred until 1902, when the property was acquired by the Costilla Estates Development Company (the Company), a group of Colorado Springs investors. The Company held the property from 1902-60.[45]

While the Company did not deny the individual or usufructuary rights of the settlers, it did change the entire system of water distribution.[46] Although the change in water distribution

40. HALL, *supra* note 18, at 106.

41. Apparently title to the individual plots of land awarded to the Sangre de Cristo Grant settlers was eventually transferred in subsequent conveyances. That ownership of the individual plots was recognized was fortunate, given that most Mexican land grants were not confirmed in Colorado, New Mexico, or Arizona. Stoller, *supra* note 20, at 31-33; *see also* RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT (1990).

42. Stoller, *supra* note 20, at 33-35.

43. *Id.* at 35.

44. *Id.* at 35-38.

45. *Id.* at 38, 44, 47.

46. Charlie A. Vigil, History and Folklore of San Pedro and San Pablo, Colorado, 47-49 (1956) (unpublished Masters Thesis, on file with Adams State College).

allowed some acres which were previously not arable to bloom, the change, nevertheless had a negative impact on the settler's use of the land. This was because the redistribution of water also rendered previously fertile land barren, consequently reducing the overall size of the settler's tillable lands.[47] Yet despite these changes, the fabric of society still remained essentially the same.

The unencumbered exercise of usufructuary rights ended in 1960, when John T. (Jack) Taylor, Jr., a North Carolina investor, obtained title to the mountain property (Mountain tract) adjacent to the area used for cultivation by the descendants of the original settlers. Taylor obtained title through a Torrens[48] action, and paid the Company the modest price of seven dollars per acre for the land. Taylor's deed provides:

> All of the land hereby conveyed . . . also subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlement rights in, to and upon said land . . . .[49]

When word of the sale spread, many residents of the community organized to protest the sale. The *Asociacion de Derechos Civicos* was formed before Taylor even arrived in the San Luis Valley.[50] When Taylor set out to end public access to the property, disputes began almost immediately. In 1963, Taylor began to fence the entire boundary of the property, making known his opinion that in the future, he would consider whoever entered the enclosure a trespasser. Violence broke out a number of times between Taylor and community members who felt their rights were being violated. These violent episodes eventually resulted in the death of one Taylor ranch hand.[51] Subsequently, a number of court actions were filed. To this day, the case remains unresolved.

It should be noted that following Taylor's entry onto the scene, the residents of Costilla County experienced a significant economic downturn. By 1978, Costilla County had the highest percentage of Colorado residents receiving public assistance — about one out of every two persons.[52] The enclosure of the property, which many Costilla County residents perceived as blatantly disregarding their long-standing communal rights, diminished

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47. *Id.*

48. A name commonly applied to the system of government registration of titles to land, named after Sir Robert Torrens. *See* 16A Colo. Rev. Stat. §§ 38-36-101 to 198 (1982 & 1983 Supp.).

49. Petitioner's Brief at 6-7, Rael, et al. v. Taylor, 92 Colo. 74 (No. 87-CA-0658) (1994).

50. DENVER POST, August 24, 1960.

51. *See* Trillin, *supra* note 1.

52. Stoller, *supra* note 20, at 91.

the self-respect and pride that many residents had previously felt as self-sufficient citizens.[53]

IV. Legal History of the Sangre de Cristo Land Grant

The government of Mexico bestowed the Sangre de Cristo Grant to its original settlers in 1844.[54] By 1848, when control over the territory encompassed by the Grant was relinquished by Mexico and given to the United States under the Treaty of Guadalupe Hidalgo,[55] it was unclear how many settlers had arrived in the area. Although written records available are limited, it appears that when the Treaty went into effect, some settlers had already been granted fee simple title in *vara* strips — individual tracts of land for cultivation — and were enjoying use rights on surrounding areas.[56] Moreover, it appears that a number of additional settlers arrived after the signing of the Treaty, which was to later add another wrinkle to the case.

Unlike most of California and all of Arizona, New Mexico, and Texas, only a portion of Colorado was ever claimed as Spanish, and later, Mexican territory.[57] It was within that portion of Colorado, contiguous to New Mexico and physically separated by mountains from the rest of Colorado, that the area of the Grant was comprised. The fact that only a somewhat economically insignificant part of Colorado ever belonged to Mexico, may have contributed to the fact that land claims based upon the original Sangre de Cristo Grant were not quickly resolved.

Nevertheless, in 1844, when all of contemporary Costilla County was granted by the Mexican government to two "businessmen," free of charge, the only consideration the government received was a promise that the grantees would recruit settlers to live in the area encompassed by the grant.[58] If the grantees did not satisfy this condition, title to the land would not legally vest in the grantees.[59]

In 1844, the Mexican government desperately wanted settlers to occupy its outermost territory in order to legitimize its territorial claims.[60] Thus, an individual's use and occupation of the land was considered of crucial importance, and the Mexican government began awarding grants only upon a promise that

53. *Id.* at 89-91.
54. *Id.* at 6, 7, 26.
55. *See* Treaty, *supra* note 4.
56. Stoller, *supra* note 20, at 25-27.
57. *See* Griswold del Castillo, *supra* note 41.
58. Stoller, *supra* note 20, at 4-5, 25-28.
59. *Id.* at 4-5, 28.
60. *See* Gomez, *supra* note 6.

these two conditions would be fulfilled. Consequently, use and occupation were the only conditions attached to the award of the Sangre de Cristo Grant. Indeed, the Sangre de Cristo Grant was made at the eleventh hour,[61] in an attempt to recruit settlers to Mexico's northern territory. Despite the attempt to solidify Mexico's claim to this territory, by 1848, the United States military occupied the area. Just as the Mexican government had feared, it did not take long from the date of the Grant's execution for the entire area to fall under the sovereignty of the United States.[62]

While it is impossible to ascertain with any degree of certainty whether all of the conditions of the Sangre de Cristo Grant had been met by 1848, it is highly unlikely that they were. Nevertheless, even after 1848, the grantees continued to recruit settlers in an attempt to satisfy the conditions of the Grant.[63] The effort to fulfill these conditions even after the United States gained possession of the territory is not unusual, given that many Mexican laws and customs were enforced in Colorado after 1848. In fact, because the transition from Mexican to United States sovereignty was far from automatic, it is unclear whether even today, the transition has been "fully" completed.

By 1860, it appears that the grantees were well underway to fulfilling the conditions of the Grant. The fact that by 1860 a number of families had come to occupy lands in the Grant area suggests that the grantees were successful in recruiting settlers to the area.[64]

In addition to the fact that the original grantees substantially fulfilled the conditions of the Grant, the Treaty of Guadalupe Hidalgo reinforced the United States's obligation to respect the land use and possession rights of the settlers and their heirs. Established international legal principles hold that the ownership of lands recognized under a previous sovereign must also be recognized under the subsequent sovereign. Thus, in entering into the Treaty with Mexico, the United States bound itself to respect the ownership of lands that the Mexican government had previously recognized.[65]

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61. It should not be overlooked that even though the Mexican government provided this grant, the land was by no means "undiscovered" or "uninhabited." *See generally* ALFONSO ORTIZ, 10 HANDBOOK OF NORTH AMERICAN INDIANS (1983); ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC (1934); ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940).

62. *See* Treaty, *supra* note 4.

63. Stoller, *supra* note 20, at 26-30.

64. One account states over 1,700 people had settled there. Stoller, *supra* note 20, at 33.

65. United States v. Percheman, 32 U.S. 51, 88 (1833).

Consequently, in 1854, under the pretext of complying with the Treaty, the United States Congress established the Office of the Surveyor General of New Mexico.[66] The Surveyor, however, was not empowered to confirm or reject land claims, but only to determine, "the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico."[67]

In 1860, the Sangre de Cristo Grant was one of the first — indeed, one of the few — grants affirmed by the United States Congress.[68] Apparently realizing that the Mexican government never intended to provide a windfall property grant to Carlos Beaubien, the United States government confirmed the Grant, but only provided Beaubien with a quit claim deed. The confirmation expressly provided that the deed was subject to claims by third parties.[69] Thus, neither the private grants of land to the settlers, nor the usufructuary rights specified in the grant were terminated.[70] Nevertheless, the United State's grant confirmation process simply overlooked the fact that the original grant had been subdivided. In particular, it did not take into account the fact that individual title to certain tracts of property had already been provided to settlers and *ejido* lands already defined.

To some degree, Beaubien's actions indicate that even after the United States Congress confirmed the Sangre de Cristo Grant, he felt obligated to comply with the conditions of the original grant. The congressional confirmation of the grant did not change his relationship to the land, because he continued to encourage settlers to arrive and occupy the land. Even as late as 1863, Beaubien was executing documents defining both private and communal lands. Thus, any contentions that he believed he

66. Act of July 22, 1854, ch. 103, 10 STAT. 308 (appointment of office of Surveyor-General).

67. *Id.* at 309. *See also* Gomez, *supra* note 6 at 1068.

68. Act effective June 21, 1860, ch. 167, 12 STAT. 71-72 (1860) (certain private land claims in New Mexico confirmed). It is important to note that Congress confirmed the grant in successors to the original grantees, and specified that it was providing a quit claim deed. Stoller, *supra* note 20, at 10, 20.

69. In a congressional act, the United States government declared, "[T]he foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." Act effective June 21, 1860, ch. 167, 12 STAT. 71-72 (1860). The 1880 patent also recites this condition. The United States government may have realized that by granting only quit-claim deeds to the successors of the original grantees, the next "layers" of ownership would not be recognized. Hence, hundreds of additional legitimate claimants would not be eligible to have their claims affirmed.

70. *Id.* Usufructuary rights in property were recognized by Mexico, as were claims evidenced by deed or by custom. While usufructuary rights on private land grants were not specifically protected by the Treaty of Guadalupe Hidalgo in other than general language, there is likewise no indication in the Treaty that such rights would be terminated.

had come to hold the entire Grant in fee simple absolute subsequent to Congressional confirmation are belied by his own actions.[71]

Following confirmation of the Grant by the United States Congress, remarkably little changed in terms of land use in this area of Colorado for over one hundred years.[72] The settlers, and later, their descendants, continued their way of life, mostly unaware of, and unaffected by, the fact that various investors and speculators had supposedly purchased all of the property and property rights contained in the original Grant.[73] Even though in the 1870's, title to the entire Grant appears to have been "legally" vested in various companies, speculators, and investors, none of them were able to execute their plans for development. Thus, there were no fundamental changes in the use of the land at issue.[74]

Given the inaction of developers and the consistency of the settlers in making use of the land, the unique social fabric of the community within the region remained intact for decades. In 1960, however, the lifestyle of the residents was threatened when Jack T. Taylor obtained a *Torrens* deed to the property. When Taylor obtained the property that was originally part of the Sangre de Cristo Grant, he knew that the heirs to the original settlers believed they had usufructuary rights to the property. In fact, Taylor's deed parallels the conditions which appear in the first written document on file related to the property:

> It has been ordered that the lands of the Rito Seco remain uncultivated for the benefit of the people of the town of San Luis, San Pablo and Los Ballejos and other inhabitants of these towns, for the purpose of ingress and pasture, etc., and that the water of said creek shall be apportioned between the inhabitants of the said town of San Luis and those on the other side of the *vega* who have lands adjoining and close to said

71. *See* Petitioner's Brief, Rael v. Taylor, 92 Colo. 74 (No. 87-CA-0658) (1994). It may be best to conceptually view these land grants as contracts, with terms between the Mexican government and the grantees. Because the change in sovereignty made compliance with the terms of the "contract" more difficult, it is difficult to define "substantial compliance" in such a unique historical context. For example, control of the common lands was apparently never turned over to the town, suggesting that the grantees failed to comply with the terms of the contract. Nevertheless, because the residents of the town enjoyed usufructuary rights to this land, there is a strong indication that the grantees had substantially complied with the "contract" terms of the Grant.

72. *See* McWILLIAMS, *supra* note 38.

73. *See supra* note 41 and accompanying text. While details are sketchy, many people during this period appear to have had difficulty obtaining title to their private tracts of land. In fact, because some settlers were unable to produce a "valid [paper]" title, they were eventually forced off of their land. Stoller, *supra* note 20 at 38-42.

74. Stoller, *supra* note 20, at 38-42.

> *vega*, since said lands are not irrigated with waters of the Culebra river . . . .
>
> All the inhabitants shall have the right, with convenient arrangement, to enjoy the benefits of the grazing lands, water, wood and timber, always being careful not to be prejudicial with one another.[75]

Taylor eventually enclosed the entire tract, erected other barriers to entry,[76] and began a quiet title action in the United States District Court. Because the case was the first to deal with usufructuary rights in the context of a private or *empresario* land grant, the Sangre de Cristo Grant presented a number of intertwined legal issues. Additionally, the case's complexity was further enhanced by the fact that the actions taken with respect to the Grant lands occurred in two countries under two legal systems.

V. LEGAL CONTEXT OF *RAEL V. TAYLOR*: LAW AND VALUES IN CONFLICT

The basis for conflict in the *Rael v. Taylor* case can be traced directly to the transfer of sovereignty over the territory encompassed by the Sangre de Cristo Land Grant from Mexico to the United States. There appears little doubt that, if the land encompassed by the Grant had remained part of Mexico, the usufructuary rights therein would still be protected.

Usufructuary rights have been a fundamental part of property law, not only in Spain and Mexico, but throughout Europe. For instance, "[c]ommons and common rights, so far from being a luxury or a convenience, were really an integral and indispensable part of the system of agriculture, a linchpin, the removal of which brought the whole structure of village society tumbling down."[77]

The common law rights to use common lands in England, "were rights which the lord of the manor granted to his tenants to take certain profits from his wastelands. There were four kinds . . . . The word 'commons' is a general term for a profit a prendre."[78] Blackstone considered a commons an "incorporeal hereditament."[79] Importantly, "incorporeal hereditaments ap-

75. See Petitioner's Brief at 6, Rael v. Taylor, 92 Colo. 74 (No. 87-CA-0658) (1994) (citing Costilla County Record of May 11, 1863).

76. *See* Trillin, *supra* note 1.

77. RICHARD H. TAWNEY, THE AGRARIAN PROBLEM IN THE SIXTEENTH CENTURY (1912).

78. THOMPSON, *supra* note 34, at 106.

79. An incorporeal hereditament is a right which can be transferred and exercised in connection with a corporeal thing, but without any ownership, possession, control or power of disposition of the thing with which the power maybe exercised. 2 BLACKSTONE COMMENTARIES, Ch. 3.

pendant or appurtenant to corporeal hereditaments are regarded as so intimately and inseparably connected with the tangible property of the estate upon which they are created, that they will pass with a conveyance of such estate without the necessity of their being specially mentioned."[80]

By the time the English colonies of North America had united, mercantilism and the market economy had replaced feudalism in Northern Europe and England.[81] Thus, the commons system had fallen into disfavor, and rarely can one find a reference to commons or community owned property in the jurisprudence of the United States.[82] Nevertheless, leading scholars have stated, "It would seem that common pasture of 'appurtenant' and 'in gross,' being rights annexed to a dominant tenement or belonging to a person and his heirs, may exist in this country."[83]

Not surprisingly, the "development of land and natural resources at the beginning of the nineteenth century drew into question many legal doctrines formulated in an agrarian economy."[84] The agrarian system, which entitled an owner to undisturbed enjoyment of his property, became threatened by the maximization of income as the paramount value of property use.[85]

These competing values are played out in much of early United States property law. Eventually, the role of the individual as primary economic actor came to dominate American property law.[86] The bias toward fee simple absolute in property law is the embodiment of the value of the market economy and the role played by the individual in it.[87] In the United States, common land came to be viewed as an inefficient relic, for it was not

80. THOMPSON, *supra* note 34, at 108-09.

81. *See* TAWNEY, *supra* note 77.

82. Most frequently, when a reference to a "commons" is made, it is within that part of the United States that was previously claimed by Spain or France. For example, Congress, in 1812 and 1831 confirmed in the inhabitants of St. Louis their claims to a town commons. Les Bois v. Bramell, 45 U.S. (4 How) 449, 457 (1846). In addition, it is interesting to note that the first pilgrims to arrive to these former colonies utilized both individually and communally held lands. *See* David T. Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137, 151 (1974).

83. THOMPSON, *supra* note 34, at 474.

84. Morton Horwitz, *The Transformation in the Conception of Property in American Law 1780-1860*, 40 U. CHI. L. REV. 248 (1973).

85. *Id.*

86. BRUCE A. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975).

87. *Id.*

owned individually, and, therefore, no incentives existed to use resources efficiently, *i.e.*, maximization of dollar value.[88]

According to Richard Posner, a leading economic theorist, "If there is always an individual who can exclude all others from access to any given area, then individuals will endeavor by cultivation or other improvements to maximize the value of the land."[89] Therefore, individual ownership, exclusivity, and transferability of property were all seen as important to economic development, the predominant value recognized in the United States in the mid-1800s.[90] Thus, as the value of marketability became dominant, restrictions on transactions respecting collective usufructuary rights were disfavored.

At the same time that United States law began to favor individual ownership of land, nineteenth-century Mexican law continued to embody and protect usufructuary rights. Thus, while Mexican law valued collective and agrarian land use, the law of the United States embodied and protected capitalism and the market economy. These two competing views towards property were not easily reconciled, and it appears that very little effort was made by United States Courts to understand the underlying differences in social policy when cases implicating these differences arose: "Land grant litigation has ignored this history as well as the internationally accepted doctrine of acquired rights and American principles of due process and fairness."[91] Today, however, as equitable principles and international law continue to evolve, courts are more willing to consider the qualities of acquired rights, due process, and fairness.

VI. UNITED STATES LEGAL HISTORY REGARDING LAND GRANTS: RHETORICAL RECOGNITION OF THE TREATY OF GUADALUPE HIDALGO

In 1848, when sovereignty over the territory encompassed by the Sangre de Cristo Grant was ceded by Mexico to the United States in accordance with the Treaty of Guadalupe Hidalgo, international law regarding conquest was well established.[92] Contracts for the sale of land, as well as land grants valid under the previous legal order, were to be recognized and given full legal effect in accordance with the previous legal sys-

88. One of the most quoted articles of the conservative law and economics movement revolves around this theme. *See* Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

89. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 30 (3rd ed. 1986).

90. *See generally* Horwitz, *supra* note 84.

91. Gomez, *supra* note 6, at 1080.

92. *See* LOUIS B. SOHN AND T. BUERGENTHAL, EDS., BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

tem.[93] This international legal concept was integrated early into the jurisprudence of the United States:

> A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession.[94]

One of the main purposes of the Treaty was to guarantee that the spectrum of rights enjoyed by Mexican nationals who now would be living in United States territory would be respected.[95] The Treaty of Guadalupe Hidalgo specifically protected the property rights of Mexican citizens:

> Mexicans now established in territories previously belonging to Mexico . . . shall be free to continue to reside, or remove at any time to the Mexican republic, retaining the property which they possess in the said territories . . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected.[96]
>
> Mexicans who, in the territories aforesaid . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.[97]

Originally, this article read:

> In the meantime, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws . . . .[98]

While the change in article IX has received some academic attention,[99] the legal impact of this change is difficult to determine, given the understandings entered into by Mexico and the United States subsequent to the signing of the Treaty.[100] Even though the understandings may not have the force of law, they

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93. *See* Treaty, *supra* note 4.
94. United States v. Percheman, 32 U.S. 51, 87 (1833).
95. GRISWOLD DEL CASTILLO, *supra* note 41, at 172.
96. Treaty, *supra* note 4, art. VIII, 9 Stat. at 943.
97. *Id.* art. IX.
98. *Id.* art. IX (original). Changes to the original Treaty were added in Queretaro, Mexico subsequent to the signing of the original Treaty. *See* Protocol of Queretaro, *infra* note 102.
99. *See* GRISWOLD DEL CASTILLO, *supra* note 41.
100. *See* Palmer v. United States, 65 U.S. 125 (1857).

have often been consulted in cases where the Treaty is implicated:[101]

> The American government by suppressing the IXth article of the Treaty of Guadalupe and substituting the IIIrd article of the Treaty of Louisiana did not intend to diminish in any way what was agreed upon by the aforesaid article IX in favor of the inhabitants of the territories ceded by Mexico . . . .[102]

The original Treaty also contained a provision related to land grants, which was eliminated from the final version:

> All grants of land made by the Mexican Government or by the competent authorities, in the territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico . . . .[103]

The removal of the original article did not technically impact the substance of the Treaty, for the international law of conquest in force when the Treaty was signed called for such protection.[104] Moreover, the understanding entered into between Mexico and the United States following the Treaty could not be interpreted to change the essence of the Treaty, or violate international law.

It is also important to point out that the concept of 'title' for United States and Mexican negotiators diverged significantly. United States law treated title according to its documentation, while title under Mexican law was fundamentally defined by use and custom.[105] Despite the different notions of "title," the Treaty, nevertheless, provides that all types of property recognized by the Mexican government would be respected. Additionally, the Treaty also makes clear that a claim or right recognized by Mexico would also be respected by the United States.[106]

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101. *See* Armando B. Rendon, The Treaty of Guadalupe Hidalgo and Its Modern Implications for the Protection of the Human Rights of Mexican Americans, 7 (1982) (unpublished manuscript, on file with author). *See also* Palmer v. United States, 65 U.S. 125 (1857).

102. Protocol of Queretaro, U.S.-Mex., May 26, 1848, *reprinted in* Griswold del Castillo, *supra* note 41.

103. Treaty, *supra* note 4, art. X.

104. *See* SOHN AND BUERGENTHAL, *supra* note 92.

105. One confusing description of *title* states:

> Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May 1846, and in Texas up to the 2nd of March 1836.

Later it was held that the dates set out in this understanding were not limiting. *See* Palmer v. United States, 65 U.S. 125 (1857).

106. *See* Treaty, *supra* note 4.

VII. Pertinent Case Law

Following ratification of the Treaty, settlement of land claims in the Unites States moved quickly. A leading scholar on the Treaty states, "In the first half century after ratification of the Treaty of Guadalupe Hidalgo, hundreds of state, territorial, and federal legal bodies produced a complex tapestry of (more than 200) conflicting opinions and decisions."[107]

Given the pressures created by increased immigration to California following the signing of the Treaty, Congress acted quickly to establish the Commission on Spanish and Mexican Grants to settle land claims in California.[108] The first such case to reach the United States Supreme Court dealt with a California land grant.[109] In order to comply with The Treaty, the court realized that it must first ascertain and apply Mexican law:

> The Mexican system of colonization included the following principles: The grants were made on conditions equitably combining private and public utility. The system was modified according to circumstances, but always preserved the principle of grants on condition, the consideration of the grant being the performance of the conditions. The system of settling *pobladores* was applied in California.[110]

In another early case, the United States Supreme Court held that the Treaty of Guadalupe Hidalgo protected lands owned privately and by whole town communities.[111] The Court further recognized that town lands are held in trust by the town for its inhabitants.[112]

Pursuant to the Land Law of 1854, Congress created the office of Surveyor General of New Mexico. Under this mandate, the Surveyor General was to determine "the origin, nature, character, and extent of all claims to land under the laws, usages, and customs of Spain and Mexico . . . ."[113] This act was important, for it should have ended speculation that United States courts would only recognize titles valid under United States property law. In reality, however, the Surveyor's scope of work appears to have been limited to determining the size and legitimacy of original land grants, and did little to investigate how the grants had been subdivided under Mexican law, usage, or custom.[114]

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107. Griswold del Castillo, *supra* note 41, at 86.
108. Commission on Spanish and Mexican Land Grants, 9 Stat. 631 (1851).
109. Freemont v. United States, 58 U.S. 542 (1854).
110. *Id.*
111. Townsend v. Greeley, 72 (Wall 5) 336, (1866).
112. *Id.*
113. Act of July 22, 1854, ch. 103, 10 Stat. 308, 309. *See also supra* notes 65-67 and accompanying text.
114. Gomez, *supra* note 6, at 1068-1075. *See also supra* note 67 and accompanying text.

Racked by corruption and changes in the political climate, the Surveyor General registered only a fraction of the land claims presented to the Surveyor General's office.[115] In fact, the system was considered so corrupt and ineffectual that in 1891, Congress eliminated the body and created the Court of Private Land Claims to replace it.[116]

Applicable law in the area of land grant claims in the United States includes the Treaty of Guadalupe Hidalgo, as well as a substantial number of cases regarding land claims, and a multitude of applicable statutes. Thus, support for almost any proposition can be found in this area of jurisprudence. The following cases interpret various aspects of The Treaty that are relevant to the instant case, and shed favorable light for the plaintiffs of San Luis:

> In *Reynolds v. West*,[117] the California Supreme Court ruled that an inchoate title was protected by the treaty.
>
> In *Palmer v. United States*,[118] the United States Supreme Court held that the Protocols of Queretaro were not limiting, and that in New Mexico and California, legitimate titles might have been made by Mexican officials after May 13, 1846. In *United States v. Moreno*,[119] the Court also held that the Treaty protected land grants that were legitimate under Mexican law.
>
> In *Townsend v. Greeley*,[120] the United States Supreme Court held that both community and private grants were protected by the Treaty.
>
> In *City and County of San Francisco v. Scott*,[121] the Supreme Court held that the Treaty stipulations did not invalidate the powers of local officials, acting under Mexican law, to make legitimate land grants prior to the implementation of American laws.
>
> In *United States v. Green*,[122] the Treaty of Guadalupe Hidalgo, in Articles XIII-IX, was held to protect all types of property recognized by Mexican law: "No duty rests on this [U.S.] government to recognize the validity of a grant to any area of *greater* extent than was recognized by the government of Mexico." (*emphasis added*).
>
> In addition, in *Chadwick v. Campbell*,[123] "By the Treaty of Guadalupe Hidalgo . . . private rights of property within the

115. Gomez, *supra* note 6, at 1068-1075. *See also supra* note 67 and accompanying text.
116. Act of March 3, 1891, chs. 538, 539, 26 STAT. 854, sec. 1.
117. 1 Cal. 322 (1850).
118. 65 U.S. 125 (1860).
119. 68 U.S. 400 (1863).
120. 72 U.S. 326 (1866).
121. 111 U.S. 768 (1884).
122. 185 U.S. 256, 269 (1901).
123. 115 F.2d 401, 404 (10th Cir. 1940).

ceded territory were unaffected by the change in sovereignty . . . ."

The most problematic case for the Sangre de Cristo settlers and their descendants, is *United States v. Sandoval*.[124] This case grapples with the issue of who owns common lands when they were derived from a community grant.

In *Sandoval*, the Supreme Court declined, on two grounds, to confirm title to communal or community owned property in the individual petitioners. In resolving the dispute, the Court avoided the question of ownership of communal lands by stating that the Court of Private Claims was one of limited jurisdiction. Therefore, the Court reasoned, it was limited to cases where perfect paper title existed. Thus, the Court held that if no such title to the common lands in question existed, then the matter was an issue for the political branch, not the judiciary.[125]

Second, the Court declared that communal and community owned lands were not held in individual fee simple absolute. That is, the Court defined community held lands as *unassigned* lands, with title retained by the sovereign. Under this theory, the Court reasoned, title to all unassigned lands passed from Mexico to the United States with the signing of the Treaty of Guadalupe Hidalgo.[126]

This decision effectively terminated rights to community held property that were derived from Mexican or Spanish land grants, but which had not already been recognized by the United States. This decision set important precedent. Given the questionable legal basis for the decision, the desire to convert the property to what was perceived as a more "productive" use, must have played an important role in the Court's decision.

The first ground cited by the *Sandoval* court contradicts an earlier Supreme Court case that applied international law relative to conquest to hold that no implementing statute was needed for a court to deal with questions of property ownership.[127] In *United States v. Percheman*, the Court stated that titles of individuals would remain just as valid under the new government (the United States) as they were under the old (Mexico), and further held that those titles might be asserted in the courts of the United States.[128]

The second ground upon which the *Sandoval* Court made its decision — that is, treating the commons or community held

124. 167 U.S. 278 (1897).
125. *Id.* at 293.
126. *Id.* at 294-296.
127. United States v. Percheman, 32 U.S. 51, 87 (1833).
128. *Id.* at 87.

lands as unassigned lands — finds no support in English, Spanish, or Mexican law. Thus, the Supreme Court chose to further obscure the issue by asserting that community lands "[were] far from being an indefeasible estate such as is known to our laws."[129]

If the conditions of the *Sandoval* grant would have been correctly complied with, all the land would have been "assigned." In that case, unassigned land would exist only if the grant conditions had not been met. However, equating unassigned lands with the *ejido* or commons system negates the fact that grants could be given to private individuals (*empresarios*) or communities, and that both private and communal property existed in civil law societies. The concept of communal property was not an alien concept to American jurisprudence. Anglo-Saxon jurisprudence recognized both private and communal ownership, as the commons was an important part of the United States' legal history.[130] Thus, the *Sandoval* Court's refusal to recognize communal property was disingenuous at best.

Following the cession of a large portion of Northern Mexico to the United States in 1848, the majority of Spanish and Mexican settlers, other than those from California, not only lost their communal lands, but also their private lands.[131] It left many settlers embittered and highly suspicious of United States institutions.[132] Even though the Treaty of Guadalupe Hidalgo mandates that, "property of every kind, now belonging to Mexicans now established there, shall be inviolably respected,"[133] most claims to land were, in fact, not recognized. Thus, the claim that the justice system of the United States acts only to protect the interest of the powerful and wealthy resonates all too loudly within the valley that is modernly known as Costilla County.

VII. Correct Decision Demands Use of Legal Pluralism

The *Rael v. Taylor* case is more than just a simple quiet title case. In order to render a decision in the *Rael* case, the court must not only deal with conventional property and procedural law, but also Spanish and Mexican property law, contract law,

129. United States v. Sandoval, 167 U.S. 278, 297 (1897) (citing Grisar v. McDowell, 73 U.S. 363, 373 (1867)).

130. *See infra* notes 154-56 and accompanying text.

131. For an excellent history of this tragic part of U.S. legal history, see Gomez, *supra* note 6; *see also* Griswold del Castillo, *supra* note 41. Of the approximately 135 claims sent to Congress by the Surveyor General between 1854 and 1880, only 47 were confirmed. Gomez, *supra* note 6, at 1072.

132. Clark S. Knowlton, *Violence in New Mexico: A Sociological Perspective*, 58 Cal. L. Rev. 1054 (1970).

133. Treaty, *supra* note 4.

treaty law, and international human rights law. Thus, the *Rael* case provides a clear example of what legal scholars have described as "legal pluralism"[134] in that no exclusive, systematic, and unified hierarchical ordering of values can be easily deduced from the varying legal regimes implicated in this case.

Even without the complicating factors of Spanish and Mexican law, United States treaty law, and international human rights law, the case would remain one of legal pluralism because different social values exist within Anglo-American jurisprudence over time. The degree of respect that United States courts have afforded to usufructuary rights has varied according to the United States' social values, and presently the predominating social value with respect to land is not easily discernible. In the land grant area of jurisprudence, United States courts have struggled to choose between two different values: the desire to individualize all property to achieve the easily exchanged fee simple absolute,[135] and the desire to enhance the stability and credibility of its legal system by respecting the property rights of its citizens, even if such rights were derived hundreds of years ago.[136]

Recognition of usufructuary rights in Anglo-American jurisprudence traces back to the Statutes of Merton (1235) and Westminster 11 (1285). English legal development in the area of usufructuary rights is noteworthy because the same issues embedded in the English commons system surface in *Rael v. Taylor*. In England, the King would grant the Lord of the Manor property to divide. The property would then be distributed in small tracts to the commoners, and the property left over would be used in common. Thus, even though the Manorial Lord did not have fee simple title to the land, the commoners still enjoyed a use right in the land.[137]

Even more significantly, the commoner and his heir's right to use this "common" area could not be defeated by the passage

134. " 'Legal pluralism' refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields', which, it may be added, is in practice a dynamic condition." John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 38 (1986).

135. The bias toward fee simple absolute in property law is the embodiment of the value of the market economy and the role the individual plays in it. "If there is always an individual who can exclude all others from access to any given area then individuals will endeavor by cultivation or other improvements to maximize the value of the land." *See* POSNER, *supra* note 89.

136. Usufructuary rights made economic sense when the economy was based upon small farms. An area of land was needed where settlers could cut timber, hunt, or allow their animals to graze in order to supplement what they could produce on an individual tract of land. *See generally* Cook, *supra* note 9.

137. Potter v. Sir Henry North, — Eng. Rep — (1669), *reprinted in* Ventris' Kings Bench Reports, 383, 395-96 (1726).

of time nor the transfer of title of property from one person to another. According to *Domina Regina v. the Duchess of Bucklew*,[138] "No lord of the manor could, by selling manorial lands, deprive tenants of the manor of their rights of common over those lands, irrespective of whether they were part of the demesne lands or the waste (commons) of the manor."

Despite this historical precedent, English courts did occasionally stray from the principle articulated in *Duchess of Bucklew*. Most frequently, English courts overlooked the rights of tenants of the manor when economic development, defined as individual wealth maximization, was perceived as more important than the preservation of the commons in England.[139] Nevertheless, the only fully consistent principle in English law has been that if commoners abandoned their use right, then their use rights were defeated.

In the case of *Rael v. Taylor*, the Petitioners used the property in dispute for grazing, hunting and collecting timber until they were physically prevented from doing so in the 1960s. In fact, because of its unique geography and history, the Mountain tract at issue in the Sangre de Cristo Land Grant case is one of the few land grants wherein the usufructuary rights survived over a century of uncertain ownership brought about by conflicting regimes of property law. Thus, it is clear that the use rights to the Sangre de Cristo Land Grant were not in any sense abandoned by the heirs of the original grant.

Modern English jurisprudence heavily favors respecting the usufructuary rights of commoners if common land use has survived to the present. For example, Lord Denning, while acting in equity in *Corpus Christi College, Oxford v. Gloucestershire CC*,[140] expressed the importance that the state not put an unduly heavy burden of proof upon the commoners in regard to delineating and registering their usufructuary rights. Even more recently, the House of Lords, echoing the 1704 *Bucklew* decision, held that land would not cease to be common land merely due to the voluntary act (of sales) by the title holder.[141]

While usufructuary rights were not favored for a specific historical period in Anglo-American jurisprudence, they are rights which have a long history, and which recently have had their le-

138. 6 Mod. 150 (1704).

139. *See generally* Cook, *supra* note 9.

140. 1 Q.B. 360 (1983).

141. Hampshire v. Milburn 2 W.L.R. 1240 (1990). It is significant to note that on July 26, 1990, David Trippier, the British Minister of Environment and Countryside, commenting on those commons that had survived over time, said, "The great majority of commons are privately owned and their present status largely derives from their historical pattern of tenure, especially grazing rights."

gitimacy recognized. Even so, usufructuary rights are an oddity among traditional property rights. As leading scholars in the field have stated, "Unlike most property interests, common rights exist regardless of the property owner's intent."[142] Nevertheless, the fact that they are an oddity does not make them any less enforceable. This is especially true in light of the recognition contemporary English courts have given to the few commons that have survived. Thus, usufructuary rights in the United States are worth recognizing, given their unique cultural aspects and their continuing legal validity in modern jurisprudence.

Just as the English cases represent a full circle of legal development regarding legal recognition of the commons, United States courts have recently begun to recognize Native American usufructuary rights as well. Contemporary United States law holds that treaty-recognized usufructuary rights may not be abrogated by implication.[143] The decision to sustain usufructuary rights in *United States v. Michigan* followed the reasoning used by the Michigan Supreme Court when faced with the issue a few years earlier in *People v. LeBlanc*.[144] In *LeBlanc*, the Court held that usufructuary rights could be abrogated only by an extremely strong showing that such was the intent of Congress.[145]

The Seventh Circuit has also followed the Michigan Supreme Court's reasoning regarding usufructuary rights.[146] In *Lac Courte Oreilles Band v. Voigt*, the Seventh Circuit Court held that, "An act of Congress should . . . be construed as extinguishing usufructuary rights *only* if the legislation expressly stated that such was the intent of Congress or if the legislative history and surrounding circumstances made clear that abrogation of treaty-recognized rights was intended by Congress . . . ." (*emphasis added*).[147]

The renewed respect for Native American usufructuary rights accorded by the judiciary is due to a growing understanding of the importance of these rights to native cultures and their survival. Such respect is now demanded by United States treaty obligations related to international human rights law.

142. WILLIAM G. HOSKINS & LAURENCE D. STAMP, THE COMMON LANDS OF ENGLAND AND WALES 5-6 (1963).

143. United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

144. 248 N.W. 2d. 199 (1976).

145. *Id.* at 212.

146. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341 (7th Cir. 1983).

147. *Id.* at 358.

VIII. Implications of Human Rights Law

To date, no United States court has viewed the legal battle growing out of the Sangre de Cristo Grant — and others similar to it — as implicating human rights law. However, as a few scholars have observed, the developing acceptance of human rights law into the jurisprudence of the United States suggests that *Rael v. Taylor* deserves renewed consideration as a case involving international human rights obligations.

On April 2, 1992, the United States ratified the International Covenant on Civil and Political Rights (the Covenant).[148] This move officially consecrated the trend in the law of the United States to integrate human rights law into its jurisprudence. Article 27 of the Covenant guarantees, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[149] Furthermore, Article 1 of the Covenant states that "in no case may a people be deprived of its own means of subsistence."[150] While some commentators have debated the impact of the Covenant, all concur that the ratification will have a positive impact on respect for human rights in the United States.[151]

An example of the type of change mandated by ratification of the Covenant can be seen in events which occurred in New Zealand in the late 1970's. Prior to New Zealand's ratification of the Covenant in 1978, the political activity of foreign students in New Zealand could be prohibited by the government under its immigration policies. In fact, the purpose of allowing the New Zealand government to restrict the political activity of foreign students was to prevent African students from making anti-apartheid and anti-discrimination speeches while residing in New Zealand.

After New Zealand signed the Covenant, however, one foreign student from Zimbabwe challenged the government's prohibition of her political activities. Given that New Zealand had assumed the affirmative obligation to promote and protect human rights as found in Article 2 of the Covenant, the New Zealand government felt that they not only should allow students to protest apartheid and racial discrimination, but that the gov-

148. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16 at 165, U.N. Doc. A/6316 (1966).

149. *Id.* art. 27.

150. *Id.* art. 1, para. 2.

151. *See* Roundtable, *The United States Constitution and the Adoption of International Human Rights Instruments: Freeing the Political Logjam*, 20 GA J. Int'l & Comp. L. 253, 309 (1990).

ernment should, in fact, encourage such activities. Consequently, New Zealand's immigration policy was changed to conform to its new international legal obligations.[152]

Thus, when issues of international human rights are implicated in a particular case, United States courts must consider the overarching principles at stake. In the case of the Sangre de Cristo Land Grant, the Supreme Court should consider how to fashion a decision that ensures the respect of the petitioners' culture and means of subsistence as protected by Article 27 and Article 1 of the Covenant. Accordingly, the importance of the recent ratification of the Covenant to the disposition of the *Rael* case cannot be overstated.

Furthermore, in addition to the Covenant, the United Nations Charter[153] — which the United States also ratified — affirms that international human rights law is designed to allow all people to advance without compelling assimilation into Western culture. Thus, it is apparent that human rights law not only demands political pluralism, but legal pluralism as well.

It is important to also bear in mind that human rights protections embodied in United States federal and state constitutions are easier to implement than protections embodied in international agreements. Thus, most Americans would be inclined to turn to the former, and not the latter to preserve their rights. While this view may be correct in certain situations — such as the struggle for full participation in the existing system by women and minorities — it does not directly help the petitioners in the *Rael* case. Petitioners are not trying to achieve equal opportunity, but are struggling to maintain their own values and social system. These are rights-in-fact insufficiently protected by the United States' law enforcement of the Treaty of Guadalupe Hidalgo, but which are be bolstered by human rights obligations.

Furthermore, the United States constitutional order tends to concentrate on protecting the rights of the individual, while international human rights law protects both individual and group rights.[154] For example, Article 22 of the Charter of the Organization of African Unity (OAU), explicitly recognizes the "rights" of "peoples" to realize "economic, political and cultural development."[155] Thus, the petitioners in the Sangre de Cristo land dispute are more likely to find their interests specifically defined in

152. Jerome B. Eklind, *Application of the International Covenant on Civil and Political Rights in New Zealand*, 75 AM. J. INT'L L. 169 (1981).

153. U.N. CHARTER, U.N.T.S. No. 993 (1945).

154. *See* Roger Jones, *Legal Strategies for Cultural Survival and Human Rights*, 10 CULTURAL SURVIVAL Q. No. 1, at 69 (1986).

155. Charter of the Organization of African Unity, May 1963, art. 22.

international law, while they may never be articulated in United States law.

With respect to land rights, United States courts, in their commitment to promote economic growth, at times overzealously adhere to the values found in one set of laws, and blind themselves to the violations they are committing under another set of laws.[156] Thus, the United States may be overwhelming discrete groups within its social network, at a time when these groups are struggling to hold onto their own values and to achieve their personal goals. Consequently, United States courts should be cognizant of the numerous bodies of international law respecting human rights, and should consider these bodies of law before rendering any decisions touching the core of a discrete group's human rights.

The protection of property held in common by minority groups is embodied in a number of international accords. For example, Article 27 of the International Covenant on Civil and Political Rights protects the ownership of communal lands. In addition, Article 17 of the Universal Declaration of Human Rights states, "Everyone has the right to own property alone as well as in association with another."[157] This principle is further supported by article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination[158] as well as and Article 21 of the American Convention on Human Rights.[159]

Thus, the position of the Sangre de Cristo settlers in the *Rael* case finds support in a number of international accords. Specifically, the Declaration of Barbados II prohibits any form of physical domination of a people by stating, "Physical domination is reflected first and foremost in the plundering of our lands."[160] In addition, Article 2 of the relevant International Labor Organization Convention is more directly on point, stating that, "[t]he right to property, whether collective or individual, of the mem-

156. *See generally* RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 39 (1981).

157. Universal Declaration of Human Rights, G.A. res. 217 A(III), Dec. 10, 1948.

158. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature,* Mar. 7, 1966, art. 5, 660 U.N.T.S. 195, 220.

159. American Convention on Human Rights, Nov. 7-22, 1969, art. 21, 36 O.A.S. Treaty Series 7.

160. Declaration of Barbados II, cited in J.R. Coba Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations 237, E/MAN.4/Sub.2/1986/7.

bers of the population concerned over the lands which these populations traditionally have domain shall be recognized."[161]

From these international agreements, it is clear that denying the descendants of the original Sangre de Cristo settlers usufructuary rights to lands over which they traditionally had domain — and to which they continue to lay legitimate claim — may violate their human rights. International human rights are implicated in the *Rael* case because within international law, there is an understanding that land, culture, and the economic survival of many peoples are closely related. Consequently, international law recognizes that to deny a discrete group the land they depend upon would have devastating effects upon the viability of that group of people.

It is clear that in the *Rael* case, the livelihood of the Sangre de Cristo settlers is threatened. Until just recently, the communities encompassed in the original Sangre de Cristo grant were economically self-sufficient and deeply steeped in traditional Hispano culture.[162] After the dispute over communal lands escalated, one noted expert in the area observed that, "The people of Costilla County and especially in the Culebra River villages have been plunged into economic poverty, many forced to abandon the life and land they love so much, and forced to become a burden on the citizens of Colorado, losing in the process much of the self-respect and pride in controlling their lives and being productive citizens that they once enjoyed."[163] Thus, a permanent denial of the usufructuary rights of Costilla County residents to the Mountain tract would deliver a severe blow to the culture and life style of the descendants of the original settlers of the Sangre de Cristo Grant.

IX. CONCLUSION

Most of the basic tenets of the United States' property system, such as the assumption of property and the maximization of resources, argue against subjecting land to common rights. However, the private property system must fit into a proper legal perspective. Thus, United States courts should recognize that the public has important interests in land which may have existed *before*, and created after, the private ownership system fully developed in the United States. Indeed, as one noted legal scholar has stated, "Resolving the common rights issue will have legal

161. Convention of the International Labor Organization, Jun. 26, 1957, art. 11, 328 U.N.T.S. 247, 256.

162. *See* McWILLIAMS, *supra* note 38.

163. Stoller, *supra* note 20, at 95-96.

consequences that transcend a private landowner's immediate interests."[164]

Although many United States courts have previously viewed the *Rael* case, and other similar cases, as involving a simple property question, United States courts can no longer afford to do so. To deny usufructuary rights which have existed for centuries would undoubtedly result in the destruction of a unique culture and economy which developed in the San Luis Valley throughout an extraordinary set of historical circumstances. Therefore, to avoid irreparable harm to the development of a people and to their economic productivity and self-sufficiency, United States courts must seriously consider other legal principles which are implicated in the *Rael* case.

For this reason, a pluralistic approach to the dispute should be employed. Under a pluralistic approach, United States courts would apply a combination of English and Mexican law as well as contract, international, human rights, and United States law, and the Treaty of Guadalupe Hidalgo. The result of using a pluralistic approach to the Sangre de Cristo land dispute would undoubtedly support continued usufructuary rights to the Mountain tract for the *Rael* petitioners, a result that is more than a century overdue.

164. Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 845 (1982).