

MEMORY AND PLURALISM ON A PROPERTY LAW FRONTIER

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Introduction.

In northernmost New Mexico in early April 1903, members of the Defensive Association of the Land Settlers of the Rio de la Costilla gathered to bar the way to sheep ranchers intending to herd their animals onto land the ranchers had leased from the United States Freehold Land & Emigration Company. The men who confronted the Company's lessees were descendants of early Hispano settlers in the Costilla valley who migrated there in the years immediately following the Mexican War to establish home places on the Sangre de Cristo land grant at the invitation of its owner. They were subsistence farmers and sheep herders in the main, and they had organized to protect individual and communal land claims based on their settlement.¹ U.S. Freehold, for its part, had purchased the 1,000,000-acre grant in 1870, and since then had held title to most of the Costilla valley's land.² The lease of 8000 acres of its holdings as sheep range was meant to help reverse a history of failure in making the land pay and intended also to face down the continuing resistance by the valley's Hispano settlers to its presence. From U.S. Freehold's first arrival, those settlers had refused to accept the company's claims to own land the settlers regarded as their own, a confrontation not uncommon in territorial New Mexico, where established Hispano small holders often attempted to resist the ownership and the development plans of new owners of Mexican and Spanish grant lands.³

The settlers' specific grievance with the grazing lease was that it lay within the boundaries of a community grazing commons they claimed.⁴ The settlers argued that they had used the range for more than thirty years, and later, when it became clear that a claim of long occupancy would not prevail against the company's formal title, they argued on the basis of the settlement rights granted the first settlers, their parents and grandparents. Carlos Beaubien, who owned the Sangre de Cristo grant from 1847 to 1864, was said to have promised farmsteads and commons rights to induce settlement.⁵ In the settlers' view, U.S. Freehold did not own the land at all, or at the very least was obliged to honor Carlos Beaubien's commitments to the first settlers who had come to the Costilla valley because of the promise of land and perpetual commons rights.

A letter the settlers delivered to Frank Holman, one of U.S. Freehold's sheep range lessees, makes their position clear that the range was communally owned by the settlers. Awkwardly worded and punctuated, it was sent two weeks after the early April confrontation, as Mr. Holman and his partners were about to make a fresh attempt to drive their sheep to the disputed range:

Sir, if you want to avoid trouble with this corporation, you have to stay where you are, because the Deputy Sheriff will be ready and the corporation to stop you before you go to your lambing because the road to go to that place belongs to this people and not to the Company and it will be of no use to try to go to that place, as you choose if you think the law will give you that right we will be opposed not to let or permit you.

We will not allow you to make road for your sheep in our own property, all the road is occupied by the people, but if you could fly otherwise you will not

find your way through.⁶

The defiance, the invocation of legal formality, and the commitment to a collective strategy were to become hallmarks of the settlers' resistance. They were not sophisticated people, but they were committed to customary rights derived from an earlier legal order, and they determined to fight their fight on legal grounds, and collectively.⁷ They hired lawyers, having taken up a collection within the community, and through most of a very long fight were able to keep lawyers.⁸ The settlers delivered quit claim deeds to their properties to the Defensive Association on October 20, 1902 and again on April 21, 1903 so that the Association could act for them collectively, and then confronted the lessees who were preparing to drive sheep to the leased lands.⁹ The settlers drafted a constitution for their Association, asserting their rights of occupancy of private holdings and common lands.¹⁰ On March 2, 1903, before they went out to block the road to the Company's lessees, they filed an ejectment action in Taos County District Court against U.S. Freehold, alleging trespass on their community common lands.¹¹ The Costilla settlers' resistance, formally constructed and committed to an enduring legal fight, was unusual among small holder Hispano farmers in the New Mexico of that period.¹²

The settlers lost the lawsuit that followed. Styled *Meyer, et al. v. U.S. Freehold Land & Emigration Company*, the case was heard in New Mexico District Court at Santa Fe in November 1905.¹³ Referred to as the Santa Fe Case by the protagonists in the continuing conflict, *Meyer* proved to be the pivotal legal dispute between the Costilla settlers and U.S. Freehold and its successors. At trial, few of the settlers could produce

deeds to their farmsteads, and the documentary evidence of their claimed commons rights was scant.¹⁴ Judge John McFie confirmed the unqualified ownership of the Sangre de Cristo grant in U.S. Freehold and enjoined the settlers against further interference with the Company's occupancy.¹⁵ The court found that the quit claim deeds from the plaintiffs to the Defensive Association were void, representing titles without foundation.¹⁶

Yet, in the very moment of the settlers' defeat, Judge McFie felt compelled to soften the blow. The court was concerned that there would be no peace on the ground without some concession to the settlers' sense of right, and it advised the Company to offer an accommodation.¹⁷ The Company offered to lease to the settlers for a fixed term certain other grazing lands that the settlers viewed as part of their commons and to give deeds to the long term residents of the valley for their house lots and historically cultivated lands.¹⁸ The settlers would be allowed to keep their home places, but in accepting deeds from the company would concede the company's ownership and rights. The offered compromise seemed for a brief time to have been accepted, but it quickly unraveled. In the same way that the settlers' sense of right and of injury led them to sue the Company, a sense of right, and of threatened loss of land and security, made the settlers unwilling to accept the Company's offer.

The settlers' concerns were both practical and principled. Their communal rights to graze their livestock on the open lands of the grant, and also to gather fuel wood and building timbers, were essential to their understanding of their place on the land, and also to their economy.¹⁹ The loss of those commons rights threatened the end of economic security and placed their futures in the hands of the Company, which might or might not continue to grant them access to needed resources. To the Company it seemed that the

locals would not see sense: U.S. Freehold had won the lawsuit and, more essentially still, it could never concede to the settlers a continuing free access to the very resources it hoped to develop for profit. This impasse, defined by U.S. Freehold's legal victory and by the practical limits on what a court order can accomplish in an unwilling frontier community that refuses to accept its defeat, continued for decades, marked by rancor, ongoing litigation, and the stifling of economic development.

The conflict took its shape at the first meeting between the settlers and representatives of the Company in 1871.²⁰ From the beginning the Company unsuccessfully offered compromises to diminish settler opposition to its plans for development, and the settlers insisted on individual titles and commons rights which the Company would not acknowledge.²¹ The dispute flared periodically throughout the last decades of the 19th century and the first three decades of the twentieth century, bringing fresh collisions of established positions. In the end, almost seventy years after the first confrontations, the settlers' descendants were to win in 1940 an unexpected, though limited, victory, obtaining a loan from the New Deal's Farm Security Administration to purchase tax delinquent lands of the Company's successors, thereby re-establishing a community grazing commons.²² Until that late date, the unwillingness of either the settlers or the owners of the Sangre de Cristo grant to yield, and their common inability to win a decisive victory, carried the fight forward. The settlers were never able to persuade a court that their property claims were valid, and the Company and its successors were stymied by settler resistance.

My effort to understand the settlers' resistance and the impact that it had on the conduct of U.S. Freehold and on the response of the courts to settler claims is the reason

for this article. The article is concerned with the relationship between the legal order and a community of resistance. The community of resistance came into being not as a product of abstract opposition to the American legal system by Mexican frontier settlers, or through identity politics alone, but because of the threat to substantial rights. The land settlers argued for rights derived from a set of practices and expectations whose formal origins lay in the Mexican law for the creation of new settlements on Mexico's northern frontier,²³ but the settlers' commitment to that early order lay closer to the ground, in their insistence on protecting a physical and social landscape that defined their communities and their economy. The settler communities were communities defined by the expectation of access to commons rights, as a norm and as a matter of practical necessity. Rules of settlement with origins in Spanish and Mexican law had become so thoroughly absorbed by generations of practice and so routinely followed as necessary to the founding of settlements that the origins of the rules in law had become far less important than their near universal observation. The communities had become articulations of a particular strategy of settlement and of occupancy, grounded in the connection between individual holdings and commons access. The probability of the strong settler resistance may have been all the greater because of the nature of the Costilla settlements. These were organized settlements, typically created by people with previous ties to each other, and centered on farmsteads and irrigation systems established through hard work. The people had worked hard to situate themselves, and they would not be easily pushed out. Thus, in their first encounters with the Company, the settlers said their families had settled the Sangre de Cristo grant in conformity with well-established practices and expectations, and that a promise had been made by the grant's

owner, Carlos Beaubien, that the customary resource rights necessary for settlement would be theirs.²⁴ In the 1902 grazing lease dispute, the descendants of the Beaubien settlers would rely on long-established residency, claiming rights in the Sangre de Cristo grant by virtue of having been continuously in occupancy for two generations, “their fathers having been given their individual holdings, which included privileges in the surrounding grazing land.”²⁵

That sense of locality, and of vulnerability in the face of a changing property regime, framed the settlers’ response to the long string of legal defeats they suffered. To the settlers their defeats and the Company’s offered compromises proclaimed the need to stand fast. The settlers saw the losses and the offers of compromise as evidence that they must resist or lose land, community and security. The settlers also learned that defeats could produce positive results. Thus, an ongoing narrative of the meaning of legal defeat and of the meaning of the Company’s offered compromises came to define the community in a way that put at issue the justice of the established legal order and became the foundation for future efforts to oppose and to negotiate around the formal property rights declared by the courts. A particular local understanding of the source and content of rights became a defining element for a community of resistance. In the Costilla, legal defeats and offers of compromise by U.S. Freehold became rallying points and tools of further resistance.

Here memory and the transmission of the story of the dispute with U.S. Freehold within the community of settlers became important. The new limits on access to property and resource rights that would result from acceptance of the Company’s terms became, in a sense, monuments of resistance, fixed points of reference that declared what was at

stake to a people who worked the land and knew its contours and uses. The intensity of the settler resistance extracted from U.S. Freehold and its successors, and from the courts, a series of proffered compromises, which although unsatisfactory to the settlers, represented efforts by the victors and by the legal system to address the settlers' sense of injustice and to respond to a sense of right that the prevailing legal order would not formally acknowledge.

Why were the settlers allowed to resist in this way? Why were the responses of the law and of U.S. Freehold and its successors as soft as they proved to be? In other locales in territorial New Mexico, notably on the Maxwell Grant, trespass remedies against small holders without titles were vigorously, even harshly, enforced.²⁶ Law enforcement officers and private detectives removed resisting settlers and squatters. And yet on the Sangre de Cristo grant U.S. Freehold and its successors, having obtained injunctions barring settler interference and trespass, often chose not to press their rights. There were two principal reasons for their restraint.

First, the Company's freedom of action was limited in part because it needed peace with the settlers. Especially in the early years of its ownership, when it hoped to establish organized colonies of Northern European settlers on the Sangre de Cristo Grant, the company could not afford the active resistance of the valley's residents or the bad press their resistance would bring.²⁷ The physical isolation of the Costilla valley and a sense of vulnerability to an unappeased local population intensified the Company's wish for peace. Further, the Company hoped that the local Hispano people would provide a willing labor pool for its colonies and for development of the grant's mineral and timber resources.²⁸ Needing the cooperation of the legally vanquished, the Company thus

offered compromises that could not have been predicted from its legal victories. In the end, the settlers insisted on more than the Company would concede, and the Company and its successors struggled along, uncomfortable and opposed on the land they owned. As the years unfolded, the Company and its successors continued to hope for accommodation. The persistence of that hope in the face of continuing resistance suggests how awkward the company's position was and also its lack of other good alternatives for action.

The second factor was the settlers' pursuit of a law-based strategy of resistance during a period when New Mexico law and policy was highly ambivalent in its response to the handling of claims to resources by small holders on private land grants. The vulnerable position of small holders who lacked written title or documentary evidence of their claims had been recognized since the earliest days of New Mexico Territory,²⁹ even though law and policy did little effective to remedy the problem. And yet, official acknowledgement that the insecure titles of small holders was a problem had become a part of the land grant discourse, and gave the Costilla settlers a stronger sense of the justice of their claims.³⁰ The willingness of the law to protect small holders in some measure is plain in the 1911 decision of *Montoya v. Unknown Heirs of Vigil*, decided eight years after the Costilla settlers brought their suit against U.S. Freehold. In *Montoya* the court addressed the common practice of settlers who lacked written evidence of their own titles to nonetheless convey their land by deed or will.³¹ The practice was routine. Settlers on the land grants would freely give quitclaim and even warranty deeds to purchasers, or transfer their holdings through their wills, though they themselves lacked written proof or legal judgment of title. In making its ruling, the court applied a New

Mexico color-of-title statute that allowed successors in interest to land grant settlers to establish valid title through ten years' possession and a written document from their grantor, purporting to grant title.³² The New Mexico Court held that so long as a claimant under the statute could produce written evidence of their own title, they need not show that their predecessor also had documentary evidence of title. The court reasoned that because the first generations of grant settlers rarely received deeds or could offer documentary proof of their ownership, a requirement that persons claiming through them present such proof would undermine the remedial intent of the statute.³³

The significance of the *Montoya* decision is that it represented an effort to accommodate typical realities of land grant settlement and to offer some protection for the titles of small holders. This same impulse can be seen in the *Meyer* case, where the court on one hand rejected the individual and communal land claims of the settlers, and on the other insisted that U.S. Freehold offer the settlers a rough, if diluted, approximation of the private ownership and commons access rights the court denied. The court's resolution of the dispute in *Meyer* may be an instance of a larger phenomenon of necessary accommodation, not simply the result of one trial judge's desire to preserve the peace locally or to promote the effectiveness of court orders by making the consequences of those orders less offensive to the Costilla settlers. In other words, the pressures to protect small holder titles came not only from the settlers' themselves, but from awareness of the justice of the settler claims by public officials and the law. The law was certainly not staunch in the defense of those claims, but it was at times obliged to handle them circumspectly. Even though the Costilla settlers lost every legal encounter over many decades, they continued to turn to the courts in hopes that the law would vindicate

their claims. The commitment to a strategy of law-based resistance became an important factor constraining the Company. The settlers' resort to courts and law, and the protracted legal procedures of the times, delayed definitive resolution of the dispute and protected the settlers' struggle somewhat by keeping it within the embrace of formal legal procedures.

The narrative that follows offers an account of the decades-long dispute between the land settlers of the Rio de la Costilla and the U.S. Freehold Land & Emigration Company and its successors. The story has been reconstructed chiefly through court records and correspondence. These documents reveal intense struggle and high levels of mutual frustration between the settlers, on the one hand, and U.S. Freehold and its successors, on the other. Tension between local ideas of property rights and the rules of the external legal order can become an engine for an adaptive pluralism in which the dominant legal order absorbs and reflects some local norms and practices. In the Rio Costilla disputes, that process was imperfectly realized because the new owners had goals for the land that could not recognize the first settlers' occupancy or the rights the settlers claimed. That incompatibility had the effect of intensifying the settler community's connection to its challenged practices and also of strengthening its resistance. Part I describes the early phase of the confrontation between U.S. Freehold and the Costilla settlers in the years 1864-1887. Part II describes the confrontation between the Costilla settlers and U.S. Freehold in the years 1902-1919, a period of rancorous dispute that began with the *Meyer* litigation, and included continuing legal struggles over the land and water resources of the Rio Costilla valley. Part III offers a brief conclusion, and an

assessment of the Costilla disputes as an episode in the history of property in the United States.

Part I. *The Costilla settlements.*

The Costilla settlements were established at the invitation of Carlos Beaubien in the years following the Mexican War.³⁴ Beaubien, a leading citizen of Taos, New Mexico, owned the Sangre de Cristo grant from 1847 until his death in 1864, and in the early years he needed the settlers to bolster his ownership.³⁵ Although the grant had been fully confirmed by Mexican authorities in 1847,³⁶ in the volatile time of transition from Mexican to U.S. dominion, the lands were vulnerable to interlopers and to the risk that the grant might not be confirmed by United States authorities. The settlements, occupying the best, arable lands along the Rio Costilla, held the land against the onrush of trespassers and squatters in the years after the Mexican War.³⁷ The presence of permanent settlements on the land also demonstrated to United States authorities Beaubien's full compliance with the expectations of Mexican law and strengthened the case for confirmation of his grant.³⁸ In short, if the settlers benefited from Beaubien's offer of free land and permanent settlement rights, Beaubien also needed the settlers.

Documentation of Beaubien's arrangements with the Costilla settlers is suggestive rather than definitive. This became a major obstacle to the settlers' efforts to prove their rights. Unlike the case of Beaubien's settlements in the Culebra watershed immediately to the north, there seems to be no surviving record of the exact content of Beaubien's promises to the Rio Costilla settlers.³⁹ The petition for the grant recites the intention to bring settlers to the land,⁴⁰ but the specifics of the settlement terms must be inferred from

the general circumstances of settlements of this type and from a covenant exacted on behalf of the Costilla settlers when Beaubien's holdings were sold to William Gilpin in 1864.⁴¹ The covenant says that Gilpin and his successors will honor Beaubien's commitments to the Costilla settlers.⁴² Although no specific set of covenants or promises for the Costilla has survived, the rights insisted on by the Costilla settlers in fact conform to the rights Beaubien granted through more exact statement to the settlers of the Rio Culebra.⁴³ The rights claimed by the Costilla settlers also conformed with settlement rights on northern New Mexico grant lands typical of the period.⁴⁴ In all likelihood, Beaubien would have promised the Costilla settlers land for farmsteads, and communal rights of access to the waters of the Rio Costilla for irrigation and to the lands of the surrounding mesas and mountains for timber, grazing, hunting, and fuel wood.⁴⁵ For the settlers, the commons rights would have been an indispensable condition of successful settlement, providing essential resources that lay beyond the boundaries of their individual farmsteads.⁴⁶

Centered in the early years on defensible *plazas*, the Costilla communities consisted on groupings of house lots and allotments of arable lands arrayed along community irrigation ditches built by the settlers so that all would have access to water.⁴⁷ The farmsteads were granted as *vara* strips, prodigiously long strips of land, and in the coming conflict, a major question would be whether the *vara extensiones* would be confirmed in the Beaubien settlers, or lost to them.⁴⁸

Following the first fixed settlement in 1849, significant irrigation in the Costilla communities began in 1852, through the Acequia Madre, or mother ditch.⁴⁹ By 1860, 807 people were settled in and around the town of Costilla and its outlying

communities.⁵⁰ At that time, four plazas had been established, Plaza de Arriba, comprising the communities of Guadalupe del Cerro and Piña (later Amalia), Plaza de Media, corresponding to the town of Costilla, Plaza de los Manzanares, corresponding to the community of Garcia, and Plaza de Poleo, an outlier of Garcia.⁵¹ The census for 1860 suggests that settler families invested a good deal of effort in cultivating land, improving pastures and establishing irrigation.⁵² Very few of these early settlers seems to have received deeds to their properties, whether from Carlos Beaubien or from his immediate successors.⁵³

In addition to the original Beaubien settlers, many other Hispanos migrated to the Costilla lands in the years following first settlement.⁵⁴ It was altogether a typical feature of Hispano settlement in the upper Rio Grande region that relatives of first settlers as well as other residents of the settlers' communities of origin would come to the newly opened areas, and arrange themselves within the emerging structure of settlement along the acequias and close to earlier arrivals to whom they had ties.⁵⁵

William Gilpin and the other owners of the Sangre de Cristo grant who followed Carlos Beaubien would become very preoccupied with distinguishing between bona fide settlers who had received deeds from Beaubien, and the uninvited arrivals who had set up households among kin and former neighbors.⁵⁶ The insistence by Gilpin and his successors on proof of formal title was an understandable move to reduce the number and scale of claims against land which they had purchased from Beaubien. But there is a falsity in their repeated position that only those persons who could establish that they had been expressly invited by Beaubien to settle and who could show deeds from Beaubien should be viewed as legitimate settlers and land owners. In the period of Mexican

dominion, a grant holder interested in the people-ing of his grant might not have insisted that a settler family receive an express invitation, so long as they could fit themselves peaceably within the community of settlers. Indeed, although the grant owner would naturally want to protect his position as patron by preserving the power to grant or deny settlement rights, he might well have counted on the continual influx of family members and of people from the same localities as the original arrivals as a vehicle for settlement.⁵⁷ The large private land grant was intended as an instrument for distributing land broadly and for directing new settlement.⁵⁸ The private grant holder was understood to be obliged to direct the orderly settlement of the land. Persons who were not expressly invited, but who could situate themselves in the communities of invited settlers, might be regarded as participants in a process of land occupancy that was altogether consistent with the purposes of the grant. In this setting there would have been no meaningful distinction between invited settlers and uninvited householders who associated themselves with established settlements and who were accepted by their neighbors. All may have been welcome as persons needed to achieve the public purpose of effective and peaceable settlement.

Many squatters would also have found support for the legitimacy of their tenure in Mexican government policy. While Mexican law required measurement and demarcation even of small holdings in order to secure title, it was the case throughout Mexico, including in the relatively isolated lands of northern New Mexico, that a type of squatter sovereignty was accepted through local custom and common consent for the establishment of small holdings.⁵⁹ This was a result of a policy of encouraging the use and cultivation of unoccupied lands to secure frontier regions and of the practical absence

of a system for regulating the process of land occupancy on the frontier.⁶⁰ The government policy of promoting settlement seems to have contributed to toleration of informal processes of obtaining possession, so that small holders simply “took up” land with the expectation of securing rights not only to their houselots and farmsteads, but also rights of access to grazing and woodland tracts needed to supply the firewood, timber and forage critical to successful settlement, in common with their neighbors.⁶¹ The cultural divide over how uninvited settlers were to be viewed greatly troubled and complicated dealings between the Costilla Hispano communities and the successor owners of the Sangre de Cristo grant. There was a sense of common origin, common cause and shared fate among the invited Beaubien settlers and the uninvited squatters that held them together and frustrated the efforts of U.S. Freehold and its successors to divide them.

The effort to limit the claims of the earlier Mexican settlers began in earnest when the United States Freehold Land and Emigration Company was established in 1869 as the vehicle to attract and direct investment and to organize settlement in the southern half of the Sangre de Cristo grant, embracing the drainages of the Rio Culebra in Colorado and the Rio Costilla in New Mexico.⁶² At this early stage of its ownership, the Company had hopes of developing the Costilla Estate as a settlement colony, directing groups of organized settlers from Holland and England to arable lands and planned communities.⁶³ The company had borrowed substantial sums to organize its program of settlement, and its project depended on certain control of the lands most attractive to intending settlers.⁶⁴ Each good settlement locale, each useful quantity of irrigation water lost to a squatter would diminish the land that could be sold to others. The distinction between invitee and squatter became an important tool for challenging the claims of earlier settlers.⁶⁵ The

Hispano settlers were situated along the riparian lands of the valley's watercourses where they irrigated their lands with the snowmelt from the Sangre de Cristo range. These choice lands and the irrigation water were coveted by the Company because of the scarcity of readily irrigable and arable land and because of the scarcity of water.

Gilpin and his associates believed that the rights of the Costilla settlers needed to be addressed before they could proceed with development of the grant. On October 4, 1871, they met with members of a committee of the Costilla settlers to resolve the settlers' claims to land and water.⁶⁶ The only member of the settlers' committee who understood and spoke English well, Ferdinand Meyer, a local merchant, was absent from that meeting. The four remaining members of the committee signed an agreement fixing the boundaries of the holdings of the original settlers. The agreement confirmed the titles of persons who could demonstrate that they were Beaubien settlers and gave all owners and occupiers of lands the right to purchase unoccupied lands that they had been using for grazing purposes.⁶⁷ The agreement made no provision for the individual land claims of land occupiers who were not original settlers, though it offered to sell squatters the land that they occupied and farmed. The Company was insistent that it would not view squatters and original Beaubien settlers as on an equal footing, or grant either class of occupiers the commons rights they claimed to graze their livestock or to cut firewood and building timber on grant lands. The company meant to end the practice of general, free, access.⁶⁸

The October agreement did not hold. In December Ferdinand Meyer, the absent member of the committee, returned and rallied the people to repudiate the agreement because it forfeited the communities' rights in common lands and the *extensiones* of the

settlers *vara* strips.⁶⁹ At a later meeting that fall, the settlers' representatives rejected the Company's terms and insisted on their original settlement rights. Newell Squarey, the Company's agent, wrote, describing the collapse of the agreement and the settlers' return to their first position:

My interview with Meyer and the commissioners was very unsatisfactory. Everything is undone. They repudiate the original agreement made while your brother was down here and will agree to accept deeds and give up the Beaubien lines only on receiving a tract from 40 to 60 square miles taking in about half of the vega for the especial and sole use for pasturage for the Costilla people. . . . I am well nigh worn out and quite disgusted with the Mexicans and still more disgusted with [~~Meyer~~] [the fifth and until now absent commissioner] (sic). He has come out dead against us and made a speech which showed plainly that he wishes things to remain as they had been in years past, and unless sufficient influence can be used his power will be employed against us further.⁷⁰

Despite this failure, it remained imperative for the Company to resolve the land claims of the Hispano settlers, and in 1873, it made a fresh overture in a letter from its chairman, A. C. Rupe.⁷¹ The letter adopted a conciliatory and understanding tone, but its concrete proposals reveal the depth of the impasse between U.S. Freehold and the settlers. The letter explained that the Company could offer long-term settlers the lands they held under cultivation for nominal prices scaled to the length of their occupancy.⁷² Rupe wrote that the Company's commitments to its creditors and stockholders prevented it from offering more, and that its plans for development foreclosed the old regime of free

and open access. He noted that some in the company had been urging legal action to sweep away settler claims, but that he had resisted those urgings, wishing to arrive at an accommodation. The letter's discussion of water rights is intriguing. It asserts that the seniority of water rights for farms on the grant will correspond to the seniority of land conveyances from the Company. There is a clear, implied threat: settle quickly and accept the Company's deeds in compromise of land claims or run the risk that your water rights will be lost. Implied is the quite erroneous idea that the company's water rights are the only possible source of water rights, and that the established uses of the Costilla acequias have not established their own rights of priority.⁷³ That position would have been, and still is, utterly without foundation under New Mexico law.⁷⁴

The 1873 proposals did not differ significantly from the proposals offered by Gilpin and Squarey two years earlier. The heart of the matter for the settlers was their *vara*-strips and *extensiones*, assurance of their water rights, and access to grazing, fuel wood, and timber on the unsettled lands of the grant. On those points neither Gilpin, nor later Rupe, was able to offer what the settlers wanted. Throughout the long history of the dispute, the settlers were most anxious not to concede the principle that they could be made to pay for resources that had been theirs as a matter of right. Even though the company proposed a very modest rent for the grazing, the settlers could not have failed to recognize that once the duty to pay had been conceded, they would have lost their autonomy and would be in the company's hands. To lose free access to the grazing on plains and sierra and to lose timber and fuelwood would confine the settlers to their small plots and to whatever opportunities of employment the company's development of its lands might afford. Indeed, the Company's development plans had already begun to be

articulated, and it was plain that the Mexican settlers were viewed as very much in the way of those plans, except as a possible source of inexpensive labor.⁷⁵ Company minutes and memoranda reveal a program of mines, reservoirs and irrigation ditches to support larger scale farms and planned communities, all needing both the limitation of Hispano claims to land and water, and the availability of Hispano labor for the economy that was to come.⁷⁶ The underlying reason for the settler resistance was the threat of expropriation, and this they fought. The Rupe letter's combination of offered compromise and thinly veiled threat is characteristic of the Company's efforts to secure its position. The Company seems to have wanted sincerely to avoid litigation and to win the peaceable acceptance by the settlers of the Company's presence and of a limitation of their rights. The Rupe offer seems to have failed, although we must infer this from the fact that there is no evidence of a large scale issuance of company deeds to the settlers in the wake of the offer.⁷⁷

The Company's efforts to promote a coherent plan of development stalled.⁷⁸ Settler resistance made the Company's position uncertain and was a material factor in the Company's inability to proceed. The Company turned to lawsuits as a way of dealing with settler claims, but unsuccessfully. Although the Company brought a successful lawsuit in 1873 to eject trespassing settlers on the Sangre de Criso grant lands, and to quiet its own title, it did not follow up on its victory with active efforts to eject the many squatters in the Costilla and Culebra watersheds.⁷⁹ In 1887, it brought a case targeted at the Costilla settlers, *U.S. Freehold Land & Emigration Co. v. Arrellano*, naming 54 defendants in an ejectment proceeding, but the case languished for reasons that are now obscure.⁸⁰ The question of settler property interests remained open. In 1878 and again in

1879, the company was unable to pay its taxes on the Costilla Estate, and although the tax delinquencies were redeemed by the company's bankers, the prospects for development never revived. From 1880 to 1902, there were no land sales of consequence.

Part II. *The Meyer Litigation and its Aftermath.*

The next eruption of conflict between the Company and the Costilla settlers occurred in 1902, shortly before U.S. Freehold sold its Sangre de Cristo lands to the Costilla Land & Investment Company.⁸¹ The conflict was precipitated by U.S. Freehold's, and later Costilla Land & Investment's, effort to establish effective control over the Costilla lands in connection with the transfer of ownership from U.S. Freehold to Costilla L & I. By this time, U.S. Freehold had long since abandoned the idea of a colony settlement of the Sangre de Cristo lands and was instead seeking to exploit the grant's grazing, timber and mining resources and to win control over the principal water resources of the grant. The water rights would support mining, the sale of farmlands to be irrigated from company ditches and reservoirs, and the development of hydro-power resources.⁸² It was on the eve of the transfer to Costilla L & I that U.S. Freehold leased 8000 acres in the upper Costilla watershed as a sheep range to assert its control of the Costilla valley.⁸³ The effect was to galvanize anew the opposition of the Mexican settlers, provoking an active resistance that continued at least into the 1920s.⁸⁴ It led to the organization of The Defensive Association of the Land Settlers of the Rio de Costilla and triggered the confrontation and the lawsuit described in the opening paragraphs of this article.⁸⁵

The *Meyers* suit, or Santa Fe Case, was a defining moment in the Costilla conflict. Represented by Octaviano Larrazola and Charles Speiss of Las Vegas, New Mexico, the settlers directly challenged U.S. Freehold's ownership of the Sangre de Cristo grant and tried to prove their ownership of the grant's lands and natural resources.⁸⁶

The *Meyers* trial began on November 5, 1905, following a change of venue to the District Court for Santa Fe County.⁸⁷ In the run-up to trial, the Company hoped to negotiate a settlement, but was frustrated by the adamant position of the settlers. Company representatives wondered whether the resistance of the Costilla settlers might be part of a larger, regional movement.⁸⁸ They noted that squatters recently evicted from the Maxwell Land Grant to the east had relocated to the Costilla valley. They wondered whether their presence might mean trouble on a wider scale.⁸⁹

The united front presented by the settlers and their determination to press ahead seem to have troubled company officials, in spite of their confidence about the strength of their legal position. Edmond van Diest, U.S. Freehold's managing director, wrote the company's Denver counsel, voicing his frustration that the opposition of the settlers continued unrelenting, in spite of the injunction that had issued against them and in spite of the soundness of the company's title to the grant lands.⁹⁰ Van Diest enclosed with his letter a copy of the injunction the Company had won against the settlers and an item from the Taos newspaper describing the efforts of the settlers' Committee to raise money to contest the injunction and to press their trespass case against the company and its lessees. The letter continued by noting that until settler opposition was contained, the Company could not push forward with its development plan for the Costilla valley. Van Diest expressed regret that the Company had failed in its earlier attempts to persuade the

settlers to accept its deeds for their claims, and regret that the question of boundaries had not been resolved before this latest flare up of settler opposition.⁹¹ He proposed vigorous action on the ground, advising a strategy of pitting the settlers against each other by offering deeds to house lots at nominal prices to prominent Costilla residents and by granting grazing leases to some of the settlers in lands claimed as common lands, so as to undermine the notion of common ownership and to break down solidarity among the settlers.⁹²

Yet prospects seemed good for a ruling confirming the Company's ownership of the disputed grazing lands. The Company could prove clear title tracing back through Carlos Beaubien to the original grant by Mexican authorities. By contrast, most settlers had no written evidence other than Gilpin's covenant to prove their claimed individual and commons rights.⁹³ The Company concluded that it should not make further offers, deciding to see the legal action through to its conclusion.⁹⁴

The trial occurred over 12 days. On the first day of trial the court ruled that the Defensive Association lacked legal capacity to sue.⁹⁵ The reasons for the ruling do not appear in the record, but it is possible that the court thought that the purposes for which the Defensive Association had been organized were not lawful, or perhaps that the case involved only the property interests of the several members of the Association individually, so that there was no proper place for the Association and its alleged representation of communal rights.⁹⁶ In any event, the case was re-styled *Ferdinand Meyer Jr, et al. v. Thomas Keeley, et al.* and proceeded on that basis.

The presentation of evidence has not survived, but the thrust of the evidence can be inferred from the court's main rulings, confirming U.S. Freehold's unqualified

ownership of the Sangre de Cristo grant and rejecting completely the individual and community land claims maintained by the settlers. The rulings probably turned on the Company's offer of documentary evidence showing that its title to the Costilla Estate derived from valid conveyances traced to the original grantee, and on a corresponding inability of the settlers' to offer documentary evidence supporting their claims to community ownership of common lands or private ownership of lands. The only documentary evidence of community rights probably consisted of the Beaubien Document, prepared for the Culebra settlers rather than the Costilla settlers, and of Gilpin's agreement to Beaubien's executors to honor the unspecified settlement rights of Beaubien grantees in the Trinchera, Culebra, and Costilla settlements.⁹⁷ The court declared the Beaubien Document to be of no effect.⁹⁸ The court also rejected claims by adverse possession, noting that many other persons had used the claimed lands and that the plaintiffs had never excluded them or attempted to control the conditions of their use.⁹⁹ The court's findings confirmed that the Company owned the lands of the Sangre de Cristo grant, subject to no settler claims except those based on actual deeds from Beaubien or his successors.

The terms of the court-approved settlement nonetheless offered the settlers more than might have been expected. Prompted by Judge McFie, the Company offered a compromise agreement to the settlers.¹⁰⁰ To the Costilla residents in the suit it offered strips of land along the west bank of Costilla Creek, corresponding largely to the riparian lands that had been cultivated historically by the people of the town of Costilla.¹⁰¹ It offered 55 named parties residing outside the town of Costilla specific concessions of land aggregating 119 acres, corresponding to their home places, and left open a similar

offer to 40 settlers who had not been parties to the law suit.¹⁰² Those small lot concessions were made subject to the Company's option to purchase the land within two years at \$2.00 per acre and the value of any improvements.¹⁰³ The Company also offered to lease to individuals for fixed terms, access to grazing on the Company's lands.¹⁰⁴ The court-approved settlement was confirmed on November 17 following plaintiffs' waiver of jury trial.¹⁰⁵ In a letter to his brother-in-law William Meyer, a prominent merchant at Costilla, E.C. van Diest explained the Company's thinking in offering the compromise:

My Dear William,-:

[F]or your own information it is not intended to work an unnecessary hardship on any of them, but to let them all realize fully, that they must recognize the Co's rights and to it must be indebted for any favors. I felt this was a better plan than to place them on an entirely independent footing, the more as the judge told them and as their attorneys well knew, they would have lost the case entirely. Points of law were involved that would not have allowed the case to go to the jury, or would have compelled the judge to instruct the jury to find for us. As he did not want to be in that predicament from a political standpoint, and to promote good feeling I arranged the Compromise. . . .¹⁰⁶

The litigation had resulted in a complete formal repudiation of settlers' claims of individual and community title. It laid a foundation for a new structure of titles that might potentially come, derived from the Company and not the earlier asserted claims of right.

An essential element of the court's decree was provision for a land survey that would establish the new boundaries of the settlers' holdings, containing them and making clear what lands lay within the Company's power of disposition.¹⁰⁷ The survey was to be

administered by a body consisting of representatives of the Company and the settlers. The survey work did not begin well. Paul Albright, the local agent for Costilla L & I Co., wrote to van Diest to note that the settlers were resisting the terms of the settlement and refusing to proceed with the survey work. Van Diest replied, pointing out that the settlers had no choice but to accept the result of the court's ruling:

[T]he people and the Corporation seem to forget that this is not a compromise, but virtually a gift from the Co, and unless they take that they have nothing. It should be made clear to them, that they lost the suit, and the Co is only giving these things for the sake of harmony & because they have lived there so long . . .

Let them form or elect a committee, that all are agreed upon, and by whose actions they will abide without question and I will meet the Committee at any time, & take up the whole matter as to the claims included & not included in the settlement¹⁰⁸

The settlers appointed a committee of five to speak for them and to work with van Diest and the company in completing the survey.¹⁰⁹ But in a letter to van Diest, explaining their understanding of the survey work, the committee members said not only that they expected that the survey would assure them good title, but also that the right to free timber and fire wood for personal use would be guaranteed to all holders of the land and their successors.¹¹⁰ The insistence on commons rights to timber and fire wood represented a revival of commons claims excluded from the Santa Fe settlement. It was an early signal that the people had not abandoned their claim to commons rights in spite of the results of the lawsuit.

Things continued in that vein. The local men hired by the Company to do the work of holding stakes and stretching and measuring the survey chains demonstrated a persistent and annoying inability, or unwillingness, to do the work properly.¹¹¹ Their failure was compounded when each day a new crew of workers arrived to replace the previous day's crew, disrupting all continuity.¹¹² U.S. Freehold's agents blamed the incompetence of the local men and the community's determination to treat the survey not as a task to be completed but as an employment opportunity to be shared by all.¹¹³

The continual rotation of work crews and their seeming incompetence in performing basic tasks were instead a form of resistance to a survey that the settlers feared and did not want. The rotation of workers helped to delay the work and, not incidentally, would have served as a useful monitoring tool, allowing many members of the community to oversee the progress of the unwanted survey and its results. That resistance was a factor is indicated in a letter from community representatives complaining to the Company of the "cruelty" of the survey and its inconsistency with the community's sense of its rights.¹¹⁴ In response, Van Diest was moved again to remind the people that they had lost the lawsuit and that they now depended on the good will of the company for the recognition of any rights in the land. In February, he wrote to Tomas Rivera, president of the committee of settlers,

It seems to me that the people still do not understand that the agreement that we made in Santa Fe was entered into by the lawyers of both sides . . . and that their conclusions were confirmed by the Judge's order. If the people do not want to help in the survey, they will injure their own cause, not that of the Company, and if by chance they are entertaining the idea of reopening the question in court, they

will waste more money than the cost of buying the land from the company, and in the end they will lose the case. . . . If, instead of imposing obstacles, the people do all they can to complete the survey and comply with our arrangement, they will deserve the consideration of the Company, and will receive it. . . . I expect to hear without delay that things are proceeding as they ought¹¹⁵

The survey work for lands in and near the town of Costilla was completed in May.¹¹⁶ With the Costilla survey completed, the Company began to post notices throughout the valley to advise squatters on Company lands that they would be obliged either to lease or purchase their holdings from the Company or quit the land.¹¹⁷ That June, van Diest traveled to Costilla to meet individually with the owners of the 200 separate tracts in and around the town whose boundaries had been established by the survey to persuade the settlers to accept the new property lines.¹¹⁸

The response to van Diest's effort to win over the settlers to the terms of the Santa Fe decree was decidedly mixed. Some settlers accepted the proposed boundary lines, but in November, 1906, 38 persons, chiefly from the Amalia area, joined as plaintiffs in an action seeking to vacate the judgment in the Santa Fe case, arguing that neither the settlers' attorneys nor the Defensive Association had been properly authorized to compromise the settlers' land and resource claims.¹¹⁹

The settlers' resistance to the terms of the Santa Fe decree may have been sharpened because the threat to their land rights was accompanied by an attack on their water rights launched at this time and whose intent became clear in July 1908 when Ferdinand Meyer, a leader of the early opposition to U.S. Freehold,¹²⁰ initiated a lawsuit to establish his right to divert and to sell water from the Rio Costilla to the Costilla

Estates Development Company, an affiliate of Costilla Land & Investment Company.¹²¹

Over the years, Meyer had bought from his neighbors in the Costilla valley land irrigated from the *Acequia Madre*, the most senior ditch on the Rio Costilla, and he now wished to sell those water rights.¹²² His suit named 72 individual defendants, many of them defendants in the Santa Fe litigation.

The defense offered by the settlers was based on proof of the long-standing irrigation of their farms.¹²³ The difficulty was that these were the very farms that the court in the Santa Fe litigation concluded that the settlers did not own. The court in *Acequia Madre*, adopting the finding in *Meyers* that none but persons holding valid deeds from Carlos Beaubien or U.S. Freehold would be treated as title holders to Costilla lands, concluded that the defendant farmers did not own the land they cultivated and irrigated. Because it also concluded that water rights must be attached to land or to a place of use, it went on to rule that the *acequia* farmers could not own water rights.¹²⁴ Rather, the court concluded, their beneficial use of water on land they did not own had only had the effect of establishing the continuing right of the irrigated land to receive water for beneficial use. Thus, the land could continue to be irrigated, but the farmers would own neither land nor water except to the extent either was conveyed to them by the Costilla Estates Development Company.¹²⁵ The decision in *Acequia Madre* allowed Ferdinand Meyer to sell his very senior water rights to Costilla Estates Development Company. That sale and the Company's victory in the Santa Fe case established the company and its affiliates as owner of much of the land in the Costilla valley and gave the company control of the senior water rights in the Rio Costilla.¹²⁶

In a curious turn, the Company, having secured legal recognition of both its land rights and its commanding water rights, made a proposal in open court at the conclusion of *The Acequia Madre* case, that if the settlers who had lost their water rights would only accept the terms for resolving land claims that the Company had offered in the Santa Fe case, the Company would sell them the land they had irrigated in the past near the town of Costilla. It was a proposal that would save both the settlers' water rights and secure their land titles. The Company extended a parallel offer to the holdout settlers near Piña, proposing to sell them 400 acres of historically farmed land, "in proportion to their present occupancy of agricultural and now cultivated land."¹²⁷ The price and the payment terms for the additional land were modest, and the offer would secure the settlers in the ownership of their land and create a basis for valid water rights for them. The Company maintained that the offer was motivated by a desire to put an end to all disputes, to make the 1905 decree effective, and to make it possible for the settlers to retain their homes, but it is also plain that the Company was using the fear of loss of water to impose the terms of the Santa Fe decree.¹²⁸

The response of the settlers to the Company's offer is intriguing, given that the settlers now stood to lose their water, and might well be forced from the land by the loss of water rights. Twenty two settlers, who accounted for 802 of the total of 1000 acres the Company now offered, accepted the offer.¹²⁹ Of the total amount of land the accepting settlers would own, 259 acres was irrigated and cultivated, all with water rights affected by the *Aequia Madre* litigation.¹³⁰ Yet before their acceptance became definitive, other settlers persuaded those who had at first accepted to renege.¹³¹ Thus, an offer that plainly was attractive to settlers threatened with loss of land and water was rejected. Whether

simple cajoling and an appeal to solidarity were sufficient, or whether some combination of threats and harassment played a role in causing the willing settlers to change their minds, is impossible to say. The Company, although it at first met this new rejection with a fresh set of ejectment actions against the settlers, quickly backed off, saying that it continued to harbor hopes “that others might accept its offer and might cease their unlawful interference with the Company’s possession.”¹³² The Company obtained a writ against the still trespassing settlers but let its action “become dormant and quiescent,” choosing not to serve the writ upon any of the resisting settlers.¹³³

It is difficult to reconstruct the exact reasons for the settlers’ rejection of the chance to save their vital water or for the Company’s decision not to take advantage of *The Acequia Madre* decision to push the settlers from the land, but there are hints of an explanation in a second lawsuit from this same period. That lawsuit was *Costilla Land & Investment Company v. Allen*, brought in July 1906, seven months after the Santa Fe decree. The case was brought against 35 defendants in the Amalia area to enjoin their trespasses on company lands and to end their circulation of rumors that the company had no title to its land.¹³⁴ The complaint shows that the settlers had neither accepted the Company’s ownership nor ceased to occupy lands confirmed to the Company by the Santa Fe decree:

. . . defendant and each of them have wrongfully and unlawfully slandered the title of your plaintiff and have by false rumors alleged that said plaintiff has no title to said land . . . [they] threaten to take possession of certain portions of the land, water, pasture, woods and right of plaintiff . . . within the valley of the

Costilla river. . . , and are trying to induce others to take possession of said lands.¹³⁵

Many of the defendants had taken up lands along the bottoms of upper Costilla Creek and its tributaries around the town of Piña (Amalia), well within the exterior lines of the Sangre de Cristo grant as established by government survey.

Trial testimony in *Allen* reveals not only that many of the defendants in the case were recent arrivals in the upper Costilla valley, but suggests that new migration into the valley was likely.¹³⁶ These new arrivals had begun to arrive in the upper Costilla watershed around 1905, having been pressed from the Maxwell Grant's lands immediately to the east as the owners of that grant pursued a policy of evicting squatters to develop its lands or offer them for sale.¹³⁷ The evicted Maxwell Grant squatters had migrated westward over the Sangre de Cristo divide and into the Costilla Creek drainage.¹³⁸ They settled among older residents who had in recent years taken up and fenced new land for stock grazing and market farming in the area around Piña.¹³⁹

When *Allen* finally came to trial in December 1909, the pivotal question was whether the contested lands lay within the boundaries of the grant or in a supposed area of public domain in a gore of country between the eastern boundary of the Sangre de Cristo grant and the western boundary of the Maxwell grant.¹⁴⁰ The focus of the litigation was whether the Company could prove the exterior lines of the grant and therefore resist the defendants' argument that they had settled on the public domain. This influx of newcomers suggests an explanation for the Company's offer of land in *Acequia Madre* to protect the water rights of established Costilla valley settlers by confirming their land titles. The Company's offer in *Acequia Madre* was likely intended

to secure the possession of older settlers as a bulwark of sorts against the new migrations into the valley by squatters encouraged by rumors of public lands available for settlement. The evidence in *Allen* indicates that the new arrivals had brought considerable instability in their wake, and the Company may have supposed that by arriving at an accommodation with older settlers, the squatters might be discouraged or contained. This seems not too fanciful a conjecture. The *Allen* case made plain the risks to the Company created by a fluid population prepared to challenge the Company's claims. The lessons of *Allen* could easily have prompted the Company to make the *Acequia Madre* offer to stabilize its ownership and to bring recalcitrant older settlers into its fold.¹⁴¹

The Company's concern with the new arrivals may also have been a reason why the established settlers declined the Company's offer to accept land from the company's hand. The settlers may have believed that they would be able to hold onto their land and water in any case. The very pressures that led the Company to make the offer to them may have convinced the settlers that the Company would continue to tolerate them in preference to risking the instability that would result from driving them from the land or denying them water.

In the years after the *Meyer*, *Allen* and *Acequia Madre* cases, the Company continued as before in its effort to contain settler land holdings in the Costilla valley. As late as November 1915, the Company was obliged to sue 70 of the defendants named in the Santa Fe case, alleging their continuing trespass on Company lands and their refusal to comply with the 1905 decree.¹⁴² Eventually, it acted to evict some thirty families residing in the upper Costilla valley in 1919 and 1920.¹⁴³ They seem to have been the

new arrivals whose coming in the years after 1905 had triggered the *Allen* lawsuit, and not the longer term residents.¹⁴⁴ The completion of the Costilla canyon dam and the Cerro ditch in 1922 improved the Company's ability to supply water to its lands and provided a new reason to limit settler ownership of valley lands.¹⁴⁵ In early 1912, a fresh suit was filed to enforce the terms of the Santa Fe decree against 70 named defendants who continued to resist the Company's efforts to resolve land claims.¹⁴⁶ Some of the defendants were people living near the town of Costilla, but most were settlers in and around the community of Piña (present-day Amalia), six miles to the east.¹⁴⁷ These Piña settlers maintained that they had never participated in the agreement authorizing the lawyers to enter into the Santa Fe decree and that they were not bound by it. An incomplete and unavailable trial record made it quite unclear whether the Piña settlers were subject to the Santa Fe decree.¹⁴⁸

Hoping to avoid the uncertainties of a fresh trial of its rights, the Company worked instead to push the settlers towards settlement. Among its main efforts was a direct appeal to Bishop Pitivale of the Archdiocese of Santa Fe to control the parish priest at Piña, Father Emile Barrat, who had become a leader in the settler resistance and an officer in the Defensive Association.¹⁴⁹ The Company's lawyers visited the Archbishop and followed up with an exhaustive letter presenting the Company's side of things, complaining of Father Barrat's involvement with the settlers and suggesting that he was misleading his parishioners. The letter went on to present a full account of the history of the Company's acquisition of the Sangre de Cristo grant and to describe the legal proceedings in which its title has been repeatedly confirmed. It then turned to the Company's continuing efforts to persuade the Piña settlers to accept the terms of the

Santa Fe decree and concluded with an appeal to the Archbishop to intervene.¹⁵⁰ The Archbishop seems not to have intervened, and it is quite clear that Father Barrat did not desist in his efforts on behalf of the settlers.¹⁵¹

Nor was the Company able to persuade the settlers to cease their resistance. The dispute dragged on, and as late as December 1915, the correspondence between the lawyers for the Company and for the settlers still focused on finding a basis for settlement.¹⁵² In June 1916, the settlement efforts collapsed, and the Company again appeared to have resigned itself to the need to press ahead with lawsuits against the trespassing settlers.¹⁵³ Following sporadic communication within the Company and with the settlers' attorneys over many months, the parties finally agreed that the cases would be struck from the court's docket, with each party having the option of resetting the cases for trial at some future time.¹⁵⁴ A.B. Renehan, writing to the Company's board three years later to describe his approach to the litigation, said, "The dangers of the case . . . led to a strategy of playing the case along as best I could."¹⁵⁵ Renehan went on to recall that no more than 15 or 16 of the settler cases was either successfully compromised or dismissed. Renehan reminded the board that a majority of the Piña settlers continued to hold out and expressed his pessimism about achieving a resolution satisfactory to the company.¹⁵⁶

Thus ended another period of active effort by the company to address the settler problem. The case was stricken from the court's docket. The settlers believed that it was their refusal to vacate their farmsteads, and the unwillingness of the Company to chance what a trial might bring, that forced the Company's retreat and its acceptance of the fact that the people would remain on the land.¹⁵⁷

Thereafter, the ejectment cases lay dormant until the summer of 1921, when the Company again tried to test its title against the Piña settlers.¹⁵⁸ This time the renewal of activity coincided with completion of the Company's Costilla reservoir and Cerro ditch and may have been triggered by the Company's desire to control land that it could now irrigate.¹⁵⁹ The company's effort, as with past efforts, was oddly irresolute and badly coordinated. The correspondence of this period reflects genuine disarray and an awareness of the growing impatience of the court with the company's failure to press any of its challenges to settler claims.¹⁶⁰ The problem, again, was whether the Piña settlers could be made subject to the Santa Fe decree or whether a fresh case would be required, exposing the company to the risk that the Piña settlers might be able to prove their titles.¹⁶¹ The 1921 case began with a request for the appointment of a special examiner to review the claims and foundations of title by the parties, as a prelude to a final resolution.¹⁶² The work of the referee was never properly begun, however, as Company officials and lawyers delayed, unwilling to risk the possibility of adverse findings by the examiner and doubtful about how to proceed.¹⁶³

The Company continued with its strategy of avoiding a direct test of settler rights, striving for settlements instead. Its manager, C.A. Robinson, wrote to its litigation counsel, "It is important that nothing be done which would establish any record title for the defendants in their respective lands. As long as they have no record title there is always the possibility of our making some settlement with them."¹⁶⁴ By the summer of 1922, the Company seems to have abandoned the thought of immediate action.

Here the record of active proceedings falls away. Correspondence between Company officials and the lawyers wanes. A final letter from the Company's general

manager C.A. Robinson to its lawyer A.B. Renehan before the record falls silent captures the sense of frustration at being unable to proceed more decisively. Robinson writes, “The question that bothers me more than any other is whether we could dismiss these cases and leave us just where we would have been, had they never been started.”¹⁶⁵ The risk of facing a possibly hostile trial jury, the risk that the settlers might have unexpectedly documentary evidence of their titles, and the costs likely to be incurred in a full blown trial, lay behind this questioning and forced abandonment of the cases.¹⁶⁶ The renewed militancy of the settlers and their sense of the Company’s vulnerability had also killed the hope of an advantageous negotiated settlement.¹⁶⁷

The Company again chose to accept the long standing impasse with the settlers as the price of avoiding a decisive loss. Perhaps at this stage it viewed a victory over the settlers as less important than it once might have been. The successful completion of the Costilla dam and reservoir on the upper Costilla in 1920, and the completion in 1922 of the Cerro Canal to supply water from the reservoir allowed the Company to turn its attention from the sharply contested question of ownership of lands in the upper watershed to development of less contested properties elsewhere in the Costilla valley, and to abandon the struggle with the Amalia and Costilla settlers.¹⁶⁸

That is how things ended -- indefinitely. Indeed, a survey of the state of land titles among the residents of the Costilla and Amalia areas conducted in 1940 by the federal Farm Security Administration offers a portrait of ownership that might have been made in 1900.¹⁶⁹ It found that of 176 families engaged in commercial or subsistence agriculture or stock raising of some kind, 150 families claimed ownership of the land they worked but could show no title. Of the 134 families surveyed who claimed the

ownership of a house and house lot but not of agricultural or grazing land, most claimed ownership through the gift of their parents and could show no other foundation than the bare gift. The survey notes that “the people now buy land from one and another, and warranty deeds are given in the exchange, but there are no records of title to back them.”¹⁷⁰

The long fight with U.S. Freehold, Costilla Land & Investment and the Costilla Estates Development Company ended with the settlers holding on to their home places, though the formal land titles of many of the descendants of the Costilla and Amalia settlers could be proved only through application of the color-of-title statute interpreted in *Montoya*, a step rarely taken.¹⁷¹ The fight, as an expression of communalism and of commitment to place, though, helped the Costilla settlers prove to the federal Farm Security Administration the genuineness of their desire to re-establish their grazing commons and to operate a community grazing cooperative. But even though the descendants of the early Costilla settlers were able to hang on in a long fight, to frustrate the companies, and to win back their pasturage, the loss of their *vara strip extensions* in *Meyer*, and more importantly the contraction of their water rights in *Acequia Madre*, were defeats as significant as any of the settlers’ victories. It was the water of the Rio Costilla, first made available to the Costilla settlements through the communal labor of building *acequias*, that alone made possible the communities of small scale farmers of the Costilla valley. To this day much of that water is used on other lands, severed from the agricultural and social landscape that it originally created and defined. And yet the development project of U.S. Freehold and its successors, so dependent on capturing the commons of water, grazing and timber that constituted the foundations of the Costilla

valley settlements, never thrived. The companies' actions reduced and fragmented the historic commons of the Costilla settlers in some measure, but insufficient capital and resolve, the limits of the very land and water resources the companies hoped to develop, and the resistance of the settlers, prevented genuine success.

Part III. Conclusion.

The history of American property institutions offers a number of important narratives of popular resistance to formal property rights claims. R.W. Taylor's "A Kind of Warr" describes the 18th century dispute between formal title holders and the untitled occupiers of land in Maine. The striking feature of that contest was the reliance on natural rights theory by possessors without formal legal title to argue that their possession should be confirmed by the law.¹⁷² So persuasive was the idea that labor was a valid foundation of title that even persons holding seemingly valid formal deeds nonetheless felt that their titles required the support of acts of "improving possession" to be altogether safe before the law. Similarly, James Willard Hurst's famous narrative of the settlers of Pike Creek, Wisconsin emphasizes the sense of right that led squatters on public lands to draft a constitution for themselves and to organize a Claimants' Union to press their case for legal recognition of ownership established through settlement and cultivation of unoccupied lands.¹⁷³ Relying on a political and legal culture amenable to natural rights arguments, they insisted, successfully, that the law confirm their titles.

The history of the Costilla is another American story of an accommodation by the law of a variant understanding of property in land, though the accommodation was more awkwardly and less fully achieved than those in the narratives offered by Taylor and

Hurst. Full recognition of the claims of commons rights urged by the Costilla settlers would have required more of a stretch for the legal system, a more emphatic effort than the embrace of a little more of the natural rights principles that were already a mainstay of political and legal discourse in the social landscapes described by Taylor and Hurst.¹⁷⁴ Even though the United States in the Treaty of Guadalupe-Hidalgo had committed itself to the protection of rights grounded in the Mexican regimes of land and resource distribution, that protection was never fully achieved.¹⁷⁵ In the Costilla, as elsewhere in New Mexico, the legal system was asked both to protect rights grounded in an earlier legal order and to vindicate the boundaries of new owners who insisted that their titles be unimpeded by the undocumented claims of the settler communities. In the case of the long fight between the Costilla settlers and the commercial interests who had bought the Sangre de Cristo land grant, the impasse was unresolved, and two competing visions of landscape remained in suspension. To paraphrase John Locke's observation that the American frontier lay at the murky intersection of the social compact and the state of nature, it might be said of the legal and cultural borderland defining the Costilla disputes that it lay at the intersection of two warring conceptions of the foundations of ownership and the uses of land.¹⁷⁶ The outcome of the Costilla dispute was that two distinct cultures of property and landscape remained in a state of tension. The emergent American legal order overlay the older Mexican framework, containing it and supplanting it as the source of property rights, but without eliminating the sense of right or the capacity for effective resistance of the Mexican settlers. Two distinct frameworks of colonization and development, each a product of history and of an understanding of the building of place,

engaged each other.¹⁷⁷ The interaction of the two allowed the persistence not only of the community of settlers but also of more archaic forms of land occupancy.

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¹ DEFENSIVE ASSOCIATION OF THE LAND SETTLERS OF RIO DE COSTILLA, CONST. (Mar. 22, 1902). Filed on April 19, 1902 with the State of New Mexico Corporation Bureau upon organization of the Defensive Association as a New Mexico Nonprofit Corporation (SCC No. 0030809).

² Conveyance to U.S. Freehold of the Costilla Estate of the Sangre de Cristo Land Grant, by deeds dated July 14, 1870 and October 13, 1871, is recorded in Taos County Deed Book 1, Pages 411 and 476. There is an excellent account of the acquisition of the Sangre de Cristo grant by the investors group who organized the U.S. Freehold Land & Emigration Company in HERBERT O. BRAYER, WILLIAM BLACKMORE: THE SPANISH-MEXICAN LAND GRANTS OF NEW MEXICO AND COLORADO 1863-1878 (1949).

³ See e.g. for treatments of the phenomenon of conflict between established Hispano settlers and new, largely Anglo, arrivals., MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO (1994); ROBERT J. ROSENBAUM, MEXICANO RESISTANCE IN THE SOUTHWEST (1981); CAROLYN ZELENY, RELATIONS BETWEEN THE SPANISH-AMERICANS AND ANGLO-AMERICANS IN NEW MEXICO (1974); BRAYER, at 11-19, 107-114.

⁴ The settlers' argument for their ownership was to vary during the dispute. The Constitution of the Defensive Association in 1902 went so far as to deny the validity of the Sangre de Cristo land grant. It declared the grant to be "null and void," patented "under deceit and false representation." DEFENSIVE ASSOCIATION OF THE LAND SETTLERS OF RIO DE COSTILLA, CONST., art. I, § 3 (Mar. 22, 1902). The Constitution maintained that the settlers' rights were based on "more than thirty years of quiet and peaceful possession, residing thereon with their families, cultivating the lands, constructing dams and ditches, or irrigation purposes, building houses, raising animals, of the various domestic kinds, and in this manner occupying said lands, with its woods, pastures, water rights, in common benefit." *Id.* at § 2.

⁵ Later, at trial, the settlers introduced evidence meant to show that their titles and commons rights indeed derived from settlement rights accorded them or their ancestors by Carlos Beaubien as owner of the Sangre de Cristo grant. The settlers' effort to rely on the Beaubien grant and not simply on their occupancy of the land is plain from the Decree entered in *Meyer*, where the court repudiated the validity of grants from Beaubien as foundations for settler title. See, *infra* note 98. Perhaps the settlers' earlier denial of the validity of the Sangre de Cristo grant, and their effort to establish their ownership through possession and improvement, were based on a mistaken understanding of the requirements of adverse possession in New Mexico. Territorial law of the period is clear that titles claimed by adverse possession must be supported by written evidence of title, color of title. Laws of 1899, Ch. 63, section 2; Laws of 1905, Ch. 76, section 1.

The settlers may have resorted to Beaubien's settlement agreements as the foundation of their rights once it became clear that they could not prevail on a theory of possession unless they could also produce deeds or other written evidence establishing their claims. In any case, the same requirement of color of title applied to proof of possession of land properly granted by Mexico, so that the failure to produce adequate written evidence of title was as fatal to their efforts to establish rights through Beaubien as it had been to their efforts to establish adverse possession. Laws of 1899, Ch. 63, section 1. *See generally*, VERLE R. SEED, ADVERSE POSSESSION IN NEW MEXICO, PART TWO, 5 NAT. RESOURCES J. 96, 104, 105 (1965), on the need to satisfy color of title requirements. *See also* Armijo v. Trujillo, 4 N.M. (Gild.) 57, 63, 13 P. 92, 94 (1887). Note that because the Costilla settlements were established after the Treaty of Guadalupe Hidalgo, the New Mexico statute allowing title to land within Mexican or Spanish land grants to be based on ten years or more of peaceable possession begun no later than the beginning of U.S. dominion, was unavailable as a foundation for the settlers' titles. Civil Laws 1897, section 2143.

⁶ Letter from Thomas Rivera, President of the Defensive Association, to Sam Holman (Apr. 23, 1903) (on file with the U.S. Territorial and New Mexico District Courts for Taos County, Civil Case No. 685, Collection No. 1776-014, Folder 728, New Mexico State Records Center and Archives, Santa Fe, N.M.).

⁷ For discussions of the strategies and manifestations of Hispano resistance, *see, e.g.* EBRIGHT, *supra* note 3; ROSENBAUM, *supra* note 3; ZELNY, *supra* note 3.

⁸ The settlers' primary legal counsel were O.A. Larrazola and Charles Speiss, of Las Vegas New Mexico. U.S. Freehold and its successors the Costilla Land & Investment Company and the Costilla Estates Development Company tried to gauge the size of the settlers' "war chest" and the commitment of their lawyers, even managing to discover the amount of money in the settlers' account in an Alamosa, Colorado bank. Letter from E.C. van Diest, Managing Director, U.S. Freehold Land & Emigration Co., to Albert Smith, Esq. (Oct. 14, 1905) (on file in the van Diest Collection, at the Tutt Memorial Library, The Colorado College, Colorado Springs, Colo.) (hereinafter "Tutt Memorial Library"). When, for a short time, lawyers for Costilla Land & Investment Company mistakenly believed at a later stage of the litigation they could prove that the settlers' lawyers may have double-billed their clients, they were triumphant at the prospect of creating a rift between lawyer and client. Letter from A.B. Renehan to C.A. Robinson, General Manager of Costilla Estaes Devel. Co. (Jun. 11, 1917; Letter of A.B. Renehan to Paul Albright (Jun. 16, 1917, Renehan-Gilbert Papers, Box 15, Folder 95, New Mexico State Records Center and Archives.

⁹ Quit Claim Deeds of Juan R. Santistevan, *et al.*, recorded in Taos County Deed Book A-16, pp. 407-414 and dated April 21, 1903. The quit claims deeds represented conveyances to the directors of The Defensive Association of the Land Settlers of the Rio de Costilla by one hundred twenty nine settlers. Taos County Deed Records, Book A-16, pp. 288-293, 407-414. One hundred fifty deeds were delivered in the first set of conveyances. The second set of conveyances seems to have occurred in order to amend inadequate legal descriptions in the delivered deeds. The second set of conveyances involved 129 deeds, the granting parties all having delivered an earlier deed in the first round of conveyances. *See supra* note 31, and *see* letter from E.C. van Diest, Managing Director, U.S. Freehold Land & Emigration Co., to Albert Smith (Oct. 27, 1905) (on file in the van Diest Collection, Box 76, Copybook B, p. 108, at the Tutt Memorial Library). There were ___ heads of household in the communities of Costilla and La Piña reported as landowners in the 1900 United States census (final count pending).

The question whether the settlers threatened violence to the grazing lessees was contested. The Defensive Association plainly warned the Company's lessees to stay off the common lands, and within days of the confrontation described in the introduction, U.S. Freehold obtained an injunction against interference by members of the Defensive Association with the grazing lessees of the Company in the area. *See* Complaint, *supra* note 79, Answer of the Defendant Defensive Assoc. of the Land Settlers of the Rio de Costilla, Affidavit of Sandford Holman, and Writ of Injunction, in United States Freehold Land & Emigration Co. v. The Defensive Assoc. of the Land Settlers of the Rio de Costilla, Civ. Cas. No. 685, Taos Co.Ct. (April 22, 1903), Record of Taos Co. Dist. Ct. Folder No. 728, New Mexico State Records Center and Archives, Santa Fe, N.M.

The Defensive Association insisted on its good faith,

[T]hese defendants admit that it was and that it is their intention to prevent plaintiffs and any other outsiders from trespassing upon their aforesaid premises and real estate, but they say that they have never thought of accomplishing this end otherwise than by lawful and peaceable means; they admit by reason of the character of the country it would be easy for them to injure the property and the persons of the plaintiffs, and they say that it would also be easy to do so from the fact that about one hundred and fifty persons are members of the defendant association, and are now suffering the consequences of the trespasses of plaintiffs upon their lands aforesaid, but these defendants say and show to the Court that they and each one of them are peaceable and law abiding citizens, that the plaintiffs never had any good reason to expect any personal violence to themselves, nor injury to their flocks, as is evidenced from the fact that notwithstanding the ability of defendants to so injure them, the plaintiffs cannot name one single instance of personal violence or injury to their property, suffered by them at the hands of these defendants.

Defendant's Answer

¹⁰ The Constitution of The Defensive Association, filed with its Articles of Incorporation, describes the aspirations and goals of the Defensive Association:

The purpose of this Association will be the united defence, and mutual protection, of those associated therein, of their homes, rights, property and domain, which the settlers herein have acquired in the lands of the Rio de Costilla . . . by more than thirty years of quiet, and peaceful possession, residing thereon, with their families, cultivating the lands, constructing dams and ditches for irrigation purposes, building houses, raising animals, . . . and in this manner occupying said lands, with its woods. Pastures, wter rights, in common benefit.

That when these lands, now actually claimed by foreign, corporations, they, to us pretending, that they are the owners of the land under a pretended Land Grant given in 1843 to Luis Lee and Narciso Beaubien, commonly known as the "Sangre de Cristo Grant" have come to disturb our rights, and our possession, and said companies and corporations wishing to deprive us, of our first right and privileges, we have organized ourselves, under the laws of New Mexico, in an Incorporated Body Politic, in order to mutually protect ourselves in our proper and legitimate rights . . .

DEFENSIVE ASSOCIATION OF THE LAND SETTLERS OF RIO DE COSTILLA, CONST. art. I, ¶¶ 2,3 (Mar. 22, 1902), filed with Certificate of Incorporation of the Defensive Association of the Land Settlers of the Rio de Costilla, April 12, 1902 (# 0030809) New Mexico Public Regulation Commission, Santa Fe, N.M.

The language in the Constitution tracks very closely the language of the New Mexico color-of-title statute/cases for the proof of titles without documentation, and thus suggests that the advice of legal counsel may have informed the drafting of the Constitution. *See supra* note 1.

¹¹ *Defensive Ass'n of the Settlers of the Rio de Costilla v. U.S. Freehold Land & Emigration Co.*, Civil Case No. 681, New Mexico District Court (Taos County), Civil Docket No. 1, p. 45. Complaint in *Defensive Association of the Land Settlers of the Rio de Costilla v. Thomas Keely, et al.*, Docket No. 681, New Mexico District Court (Taos County), Mar. 2, 1903.

¹² *See* sources cited, *supra* note 3.

¹³ Order in *Meyer, et al. v. Keeley, et al.*, Docket No. 4741 District Court for Santa Fe County November 17, 1905. New Mexico State Records Center and Archives serial no. 14835, Santa Fe District Court civil docket J.

¹⁴ *See* Order, *supra* note 13. The settlers were thus unable to take advantage of a New Mexico statute of the period that allowed long-established settlers on recognized Mexican or Spanish land grants to obtain valid title against the world if they could produce documents adequate to establish color-of-title to the lands they claimed. *See infra* text accompanying notes 28-30.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; and *see* letter from E.C. van Diest, Managing Director, U.S. Freehold Land & Emigration Co., to William Meyer of Costilla, New Mexico (Dec. 6, 1905) (on file in the van Diest Collection, Box 76, Copybook B, p. 108, at the Tutt Memorial Library), in which van Diest claims credit for originating the offer of accommodation, in part to be able to go forward amicably with the settlers and in part to relieve the judge from the political predicament created by a ruling that vindicated the company's claims and rejected the settlers' claims.

¹⁸ *See* Order, *supra* note 13.

¹⁹ *See* CONST., *supra* note 1. For treatments of the patterns of settlement and habitation in the Upper Rio Grande valley, and especially for discussions of the importance of access to upland natural resources and irrigation water, *see, e.g.*, Alvar Ward Carlson, *Rural Settlement Patterns in the San Luis Valley: A Comparative Study*, 44 THE COLORADO MAGAZINE 111, 113, 116-119 (1967); Richard L. Nostrand, *The Century of Hispano Expansion*, 62 N.M. HIST. REV. 361, 361-367 (187); John R. Van Ness, *Hispanic Land Grants, Ecology and Subsistence in the Uplands of Northern New Mexico and Southern Colorado*, in LAND, WATER, CULTURE: NEW PERSPECTIVES IN HISPANIC LAND GRANTS 141 (Charles L. Briggs & John R. Van Ness eds., 1987).

²⁰ BRAYER, *supra* note 2, at 104-12; *see also* text accompanying note 64 *infra*.

²¹ *Id.*

²² Preliminary Proposal for a Loan to the People of Costilla and Amalia to Acquire Title to the Sangre de Cristo Grant, and associated papers (1940). Governor John E. Miles Papers, Special Reports and Issues, Sangre de Cristo Grant, Folder 267, ser. No. 13224, loc. 69-I-5, New Mexico State Records Center and Archives, Santa Fe NM.

²³ *See* VICTOR WESTPHALL MERCEDES REALES: HISPANIC LAND GRANTS OF THE UPPER RIO GRANDE REGION 3-25, 33-37 (1983).

²⁴ They did not make explicit reference to Mexican law nor did they argue that United States law was bound to recognize their rights because of treaty obligations under the treaty of Guadalupe-Hidalgo.

²⁵ *See* Complaint in Defensive Assoc. v. U.S. Freehold, *supra* note 11

²⁶ *See* MARIA E. MONTOYA, TRANSLATING PROPERTY, THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900 38f., 129f., 195f. (2002); JIM BERRY PEARSON, THE MAXWELL LAND GRANT 61-66, 112-43 (1961).

²⁷ *See* BRAYER *supra* note 2, at 107-114; *see also* THOMAS L. KARNES, WILLIAM GILPIN, WESTERN NATIONALIST 321-324 (1970).

²⁸ The hope that the local Hispano people would prove to be a tractable labor force was continually expressed by U.S. Freehold's management and agents. *See, e.g.*, WILLIAM BLACKMORE, SOUTHERN COLORADO AND ITS RESOURCES, A NEW FIELD FOR ENGLISH EMIGRANTS 3 (1868) where Ferdinand V. Hayden's endorsement of the Sangre de Cristo grant is quoted, "Its fertile soil, its extensive pasturage, its abundant water-power, and inexhaustible mineral resources, its wonderful vegetable production, its industrious and quiet Mexican-American people, rendering labour cheap, make it the most inviting district west of the Missouri." William Blackmore Land Records, Box 10798, File Folder # 0130, New Mexico State Records Center and Archives, Santa Fe, N.M. To similar effect were the letters and promotional

materials prepared by a Brown University academic, Nathaniel P. Hill, commissioned by William Gilpin to endorse the grant's potential. See, e.g., the letters of Nathaniel P. Hill in *Nathaniel P. Hill Inspects Colorado*, 33 THE COLORADO MAGAZINE 241 (1956). Hill's work for Gilpin is more generally described in KARNES, *supra* note 27, at 306-309. The mention of the advantages of cheap and tractable Mexican labor is fascinating, occurring as it does after the uproar in Costilla in the fall of 1871. See text accompanying notes 66-70, *infra*.

²⁹ See Report of Edward Hobart, September 13, 1890, in ANNUAL REPORTS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE OF THE UNITED STATES, 1854-1891, report for 1890 at 434; ANNUAL REPORT OF THE SURVEYOR GENERAL OF NEW MEXICO TERRITORY, July 19, 1890, 53rd Cong., 1 Sess., House Exec. Doc. No. 1 27, 29; ANNUAL REPORT OF THE SURVEYOR GENERAL OF NEW MEXICO TERR., H. Exec. Doc. No. 1 537 (2468), 49th Cong., 1st Sess, 1886 (Report of George W. Julian, Surveyor General); REPORT OF THE GOVERNOR OF NEW MEXICO, H. Exec. Doc. No. 1, 51st Cong., 2nd Sess., 1890; WESTPHALL *supra* note 23, at 193-94, 208-10.

³⁰ See Complaint in Defensive Association, *supra* note 11.

³¹ 16 N.M. 349, 120 P. 676, *aff'd*, *Montoya v. Gonzales*, 232 U.S. 375 (1914).

³² New Mexico L. 1857-1858, p. 64

³³ 120 P. at 686-687, analyzing the operation of Section 2937, Compiled Laws of 1897, the substantially identical successor to the 1858 statute. For a comprehensive treatment of the proof of title under New Mexico's color-of-title statutes, especially as applied to proofs of title grounded in Mexican and Spanish grants, see VERLE R. SEED, ADVERSE POSSESSION IN NEW MEXICO, PART ONE, 4 NAT. RESOURCES J. 559, 562 (1965) and PART TWO, *supra* note 5, at 104-05.

³⁴ BRAYER, *supra* note 2, at 64; OLIBAMA LOPEZ-TUSHAR, THE PEOPLE OF EL VALLE, A HISTORY OF THE SPANISH COLONIALS IN THE SAN LUIS VALLEY 32 (1997); VIRGINIA MCCONNELL SIMMONS, THE SAN LUIS VALLEY, LAND OF THE SIX-ARMED CROSS 83-84, 280 (1999).

³⁵ The history of Beaubien's acquisition, settlement and sale of the lands of the Sangre de Cristo grant is well chronicled. See BRAYER, *supra* note 2, at 59-67; KARNES, *supra* note 27 at 303-06; Marianne L. Stoller, *Grants of Desperation, Lands of Speculation: Mexican Period Land Grants in Colorado*, in Van Ness, *supra* note 19, at 22-39; WESTPHALL, *supra* note 23, at 147-52. A brief sketch of the life of Charles (Carlos) Beaubien appears in 6 THE MOUNTAIN MEN AND THE FUR TRADE OF THE FAR WEST 23-35 (Leroy Hafen ed.) (1968).

³⁶ A recitation of the history of the application for and confirmation of the Stangre de Cristo Grant appears in *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 647, *aff'g* 2 Colo. 411, 416 (1874). The original grantees and, after their deaths in 1847, their successor Carlos Beaubien, sought to fulfill the obligation to settle the grant lands in conformity with the expectations of Mexican law. See KARNES, *supra* note 27, at 302, and Stoller, *supra* note 35, at 31, 34. See especially the petition filed with United States authorities, noting that settlement of the grant has occurred, and noting conformity with Mexican law, submitted to support the recommendation of Surveyor General William Pelham on Dec. 30, 1856 that the grant be confirmed by U.S. authorities. Land Grant Collection, Sangre de Cristo Land Grant, Roll 12, frames 696-697, State Records Center and Archives of New Mexico, Santa Fe, N.M.

³⁷ See Stoller, *supra* note 35, at 26-27. In the year before organization of the Costilla settlements, there had already been an episode of an unauthorized attempt at settlement of the Beaubien lands. One George Gold attempted to establish a settlement on the Costilla in 1848. Beaubien responded with a successful ejectment action,, but his hold on his lands remained vulnerable to fresh invasions in an unstable period. See LOPEZ-TUSHAR, and SIMMONS, *supra* note 34, and Stoller, *supra* note 35.

³⁸ See Stoller, *supra* note 35; WESTPHALL, *supra* note 23, at 22, 25-27.

³⁹ Shortly before his death in 1864 Beaubien had met with the Culebra settlers in the town of San Luis to confirm their rights to individual farmsteads, to water, and to the grazing, timber, fuel wood, and hunting resources of the grant lands. The San Luis meeting seems to have occurred as part of the transfer of ownership, and to have been intended to assure the settlers of the continuation of their rights. See KARNES, *supra* note 27, at 304-05. It produced the so-called Beaubien Document which describes the commons rights of the Culebra settlements. See Costilla County Deeds, Book I, page 256. English translations of the Beaubien Document are to be found in the Myra Ellen Jenkins Collection, Series 4,8, Box 49, Folder 6, Fort Lyons College, Durango, Colo. A translation also appears in Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387, 428-429, n. 129. It is unknown whether such a meeting also occurred in the Costilla settlements, or whether a document corresponding to the Beaubien Document was produced for the Costilla settlements, though some arrangement with the Costilla settlers may be inferred from the terms of the Beaubien Document and from the circumstances of the Costilla settlement.

⁴⁰ Land Grant Collection (1959-133), Folder 95, "Sangre de Cristo: Land Petition. State Records Center and Archives of New Mexico, Santa Fe, N.M.

⁴¹ Covenant of William Gilpin to Frederick Muller and Jesus Abreu, Executors of Charles Beaubien, deceased, of Taos County, April 7, 1864, Book 1, p. 241 Taos County Deeds. The covenant recites that part of the consideration for the sale of the conveyance of the deed to Charles Beaubien's interests in the Sange de Cristo land grant is Gilpin's covenant that "certain settlement rights before then conceded by said Charles Beaubien to residents of the settlements of Costilla, Culebra, and Trinchera, within said Tract included, shall be confirmed by said William Gilpin as made by him," and that "This agreement and obligation . . . is made to secure the specific performance of the obligations and liabilities of said Charles Beaubien, on the part of said William Gilpin, and to perfect the rights of said parties entitled as aforesaid in accordance with the conditions by the said Charles Beaubien entered into and all of which are hereby by said William Gilpin recognized and confirmed."

⁴² *Id.*

⁴³ The document reciting the settlement rights of the Culebra settlements is commonly known as "The Beaubien Document." It appears at Deed Record Book 1, Costilla County, Colorado, pp. 256-57, but is there so faint as to scarcely be legible. Transcription from the original Spanish and English translation in the possession of author.

⁴⁴ For accounts of communal and commons rights in the settings of community and private land grants, *see, e.g.*, JOSE A. RIVERA, *ACEQUIA CULTURE, WATER, LAND & COMMUNITY IN THE SOUTHWEST* 1-12 (1998); Van Ness, *supra* note 19, at 159-61, 178-81; WESTPHALL, *supra* note 23, at 123-45.

⁴⁵ See The Beaubien Document, *supra* note 39.

⁴⁶ See sources cited *supra* at note 40.

⁴⁷ See BRAYER, *supra* note 2, at 64-65; Nostrand, *supra* note 19, at 372; SIMMONS, *supra* note 34, at 83-85, for general accounts of settlement of the Costilla communities. The dates of establishment of the various community irrigation ditches can be gleaned from Rio Costilla water rights adjudications and water litigation.

⁴⁸ See *infra* text accompanying note 75.

⁴⁹ See sources cited *infra* note 122, and Edmond C. van Diest, *Early History of Costilla County*, 5 THE COLORADO MAGAZINE 140, 141 (1928); Testimony of Ferdinand Meyer in the case of Ferdinand Meyer v.

Acequia Madre (New Mexico Dist. Ct. No. 1 (Taos Co.) No. 841) (available in the District Court Records for Taos County at the New Mexico State Records Center and Archives Center) Meyer's testimony in *Acequia Madre* in July 1910 offers dates of 1852-1853 for the construction of the principal Costilla acequias.

⁵⁰ Eighth Census of the United States, Taos County, New Mexico (1860). M653, Roll 715 National Archives of the United States.

⁵¹ The founding dates of the Costilla communities appears in SIMMONS, *supra* note 34, at 85.

⁵² Eighth Census of the United States *supra* note 50.

⁵³ The question of the number of deeds issued by Beaubien and the executors of his estate to Costilla valley settlers is a vexed one. No recorded Beaubien deeds appear in deed books or grantor-grantee indices from Taos County, New Mexico in the years preceding the conveyance by Beaubien's executors to Gilpin in 1864. The records of the newly created Costilla County, Colorado Territory, where the town of Costilla lay until it was restored to New Mexico by a redrawing of the boundary line between New Mexico and Colorado in 1867, show only 12 conveyances from Beaubien to Costilla settlers, all made between August 1 and August 20 of 1863. Deed Book I, Costilla County, Colorado. The available deed records for Taos County, New Mexico do show 46 deed conveyances from Beaubien or his immediate successors to settlers in the Costilla area, but none of those deeds was recorded until Ferdinand Meyer of Costilla began purchasing the lands from their original grantors some years after the Beaubien conveyances. With the exception of a larger parcel of 350 yards width along Costilla Creek to Jesus Maria Sanchez and 220 varas to Thomas Tobens [Tobin], the other grants range from 50- to 150- varas in width, typical of the pattern of householder grants of the time and place. The Meyer Testimony, *supra* note 49, reports a total of 56 Beaubien conveyances to Costilla area settlers. Indeed there does exist a list of exactly 56 donations made below the mouth of Costilla Canyon, but its date and provenance is uncertain. See "Lista de las tierras que donado en la Costilla del Cañon por abajo." It may have been prepared to accompany the minutes of the 1871 Costilla meeting between Gilpin and the settlers. Myra Ellen Jenkins Collection, Series 4,8, Box 49, Folder 9, Fort Lewis College, Durango, Colorado. It is possible that some of the Beaubien deeds were recorded in Taos County Deed Book A-3 (1873-1876) already missing from the Taos County Court House at the time of transfer of the county's Territorial Records to the New Mexico State Archives in September 1970. See Taos County Deed Books, and Meyer Testimony, *supra* note 49. In any case, there is a substantial discrepancy between recorded deeds and the number and settlers with land claims in the Costilla valley. Histories of the community emphasize the infrequency of deed conveyances, and even Meyer, buying land in the area to increase his holdings in the years 1867-1890, frequently accepted quitclaim deeds from persons he describes as squatters. See Meyer Testimony, *supra* note 49, Preliminary Proposal, *supra* note 22 at 5 "History of Community." For information on the resurvey of the Colorado-New Mexico boundary, see SIMMONS, *supra* note 34, at 14.

⁵⁴ *Id.*, and see David W. Lantis, *Early Spanish Settlement in the San Luis Valley*, 20 SAN LUIS VALLEY HISTORIAN 5, 17-21 (1988); Nostrand, *supra* note 19, at 361f.; WESTPHALL, *supra* note 23, at 193-94.

⁵⁵ See Nostrand, *id.*

⁵⁶ See letter from L.H. Meyer, Director of U.S. Freehold and U.S. representative of the Dutch bondholders, to C.A. Lambard, Director of U.S. Freehold Land & Emigration Co. (Nov. 21, 1871) (on file in the William Blackmore Land Records, Box 130, Folder 0396, at the New Mexico State Records Center and Archives, Collection 1959-019, Santa Fe N.M.) (hereinafter "William Blackmore Land Records"), and Minutes of Meeting between Settlers and U.S. Freehold Land & Emigration Co., (Oct. 4, 1871) (on file in the William Blackmore Land Records, Box 130, Folder 0375). See BRAYER, *supra* note 2, at 104-10.

⁵⁷ See Nostrand, *supra* note 19 *passim*; Van Ness, *supra* note 19, at 159-161, 166, 177-180.

⁵⁸ See WESTPHALL, *supra* note 23, at 25-27 ; Stoller, *supra* note 35.

⁵⁹ WESTPHALL, *supra* note 23, at 13, 15, 35-36, 194.

⁶⁰ WESTPHALL, *supra* note 23, at 124-25, 194. WESTPHALL at 9-10 notes the continuity of these policies and practices with policies and practices existing in penninsular Spain in the years following the reconquest.

⁶¹ See Van Ness, *supra* note 19, on the agro-pastoral economy of Northern New Mexico and Southern Colorado.

⁶² BRAYER, *supra* note 2, at 86-95. KARNES, *supra* note 27, at 233-323, offers a nice clear account of U.S. Freehold's capitalization. The lands were mortgaged to trustees in a mortgage dated July 15, 1870, to secure the payment of bonds to be issued by U.S. Freehold in the amount of \$2,500,000, mainly to Dutch investors. The U.S. Freehold Land and Emigration Company to Ambrose E. Burnside, et al., Trustees, Mortgage Indenture, dated July 15th 1870. (William Blackmore Land Records, Folder 111); letter from William Blackmore to Morton Coates Fisher, President of U.S. Freehold Land & Emigration Co. (Oct. 7, 1871) (on file in the William Blackmore Land Records, Folder 376), expressing confidence that the land and resources of the Costilla Estate would, when developed, pay a return adequate to "pay off the Bonds and to give handsome returns to the Stockholders."

⁶³ The minutes of the first meeting of U.S. Freehold's directors, held in Amsterdam on January 20, 1871, indicate plainly the concern and the expectation of the bond holders that the organization of settlement of the Costilla Estate be highly organized, and calculated to overcome any possible anxiety by intending settlers that the land and its resources not be misrepresented and that every obstacle to successful settlement be removed. The United State Freehold Land and Emigration Company, An Informal Meeting of a Majority of the Directors, January 20, 1871 (William Blackmore Land Records, Folder 155). See also the English prospectus directed to intending English settlers. BLACKMORE, *supra* note 28 (William Blackmore Land Records, Folder 130. Hayden's effusive report on the Costilla Estate, attached as an exhibit to the Prospectus for the First Issue of United States Freehold bonds in 1869, refers to the Mexican inhabitants only to suggest that the great abundance of crops they have produced using crude cultivation methods proves the fertility of the country. See *Report of Professor F. V. Hayden, of the University of Pennsylvania, Unite States, Geologist in the Territories of Wyoming and Colorado*, attachment to THE UNITED STATES FREEHOLD LAND AND EMIGRATION COMPANY, FIRST ISSUE OF LAND MORTGAGE GOLD BONDS, SECURED ON THE COSTILLA ESTATE, COLORADO. (William Blackmore Land Records, Folder 132).

⁶⁴ See *supra* note 56.

⁶⁵ BRAYER, *supra* note 2, at 109 has one take on this issue. After the Beaubien estate sold Beaubien's interest in the grant to William Gilpin, Gilpin assembled a group of investors to develop the mineral potential of the land and to recruit settlers from the States and from Europe. U.S. Freehold would own the Costilla Estate until 1902, when, upon its bankruptcy, it conveyed the property to a corporate successor, the Costilla Land and Investment Company, which in its turn failed in 1908 and transferred the property to yet another successor, the Costilla Development Company. BRAYER, *supra* note 2, at 64-65; KARNES, *supra* note 27 at 301-06. BRAYER, *supra* note 2 offers an excellent brief overview of the history of the creation and confirmation of the Sangre de Cristo land grant. The validity of the grant was put at issue, and decided in favor of Beaubien and his successors in interest in *Tameling v. U.S. Freehold L & E Co.* in 1877. 93 U.S. 644 (1877). BRAYER, *supra* note 2, at 62-63, 70-71, and *passim* through 81 on the hope of attracting settlers from the East and from abroad. See BRAYER, *supra* note 2 at 65; KARNES, *supra* note 27 at 301-31 for accounts of Gilpin's acquisition (301-06) and promotion (309-13, 317, 320-22) of the Sangre de Cristo Grant.

⁶⁶ Minutes of Meeting, *supra* note 56; letter from William Blackmore to Morton Coates Fisher, (Oct. 7, 1871) (on file in the William Blackmore Land Records, Folder 376), Blackmore wrote, “Squarey has had many difficulties to contend with, . . . the principle one that with the Mexicans has been fortunately settled whilst I was at Costilla and San Louis and all will I trust go on smoothly in the future.” A summary account of this meeting appears in BRAYER, *supra* note 2 at 109-110 and KARNES, *supra* note 27, at 323-24.

⁶⁷ Minutes of Meeting, *supra* note 56.

⁶⁸ BRAYER, *supra* note 2, at 107-109; KARNES, *supra* note 27, at 323-24.

⁶⁹ See BRAYER, *supra* note 2 at 110.

⁷⁰ Letter from Newell Squarey, U.S. Freehold Land & Emigration Co.’s local agent, to William Blackmore (1871) (on file with the William Blackmore Land Records, Folder 424).

⁷¹ Letter from Albert C. Rupe, Chairman of U.S. Freehold Land & Emigration Co., to Ferdinand Meyer, Pedro Rafael Trujillo and Jesus Bernal, Commissioners (Oct. 15, 1873) (on file in the Myra Ellen Jenkins Collection, Series 4,8, Box 49, Folder 9, Fort Lewis College, Durango, Colo.).

⁷² *Id.*

⁷³ *Id.* U.S. Freehold was to urge a similar argument in its water rights dispute with Culebra watershed acequias in Colorado, maintaining, without success, that it controlled all water rights on the Colorado portion of the Sangre de Cristo land grant by virtue of the riparian status of its lands. See Complaint of United States Freehold Land & Emigration Company, U.S. Freehold Land & Emigration Co. v. Gallegos (D. Colo. June 19, 1890), discussed in Hicks & Peña, *supra* note 39, at 431.

⁷⁴ See, e.g., Albuquerque Land & Irrigation Co. v. Gutierrez, 61 P. 357, 360-361 (N.M. 1900), and see JOHN O. BAXTER, DIVIDING NEW MEXICO’S WATERS, 1700-1912 (1997); IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 42-43 (1987).

⁷⁵ See *supra*, sources cited at note 28.

⁷⁶ See Minutes, *supra* note 56, and Hayden, *supra* note 64.

⁷⁷ See Taos County Deed Records and observations in note 53 *supra* on the difficulties of confirming whether or not deeds were issued. Malcolm Ebright in his study of the Las Trampas grant notes that one sharp practice used to destroy land and resource rights of land grant settlers was conveyance to them of non-recordable deeds in compromise of their claims. The use of that practice in the case of the Las Trampas grant raises the possibility that it may have been used elsewhere, suggesting another possible reason why the public record of deeds to the Costilla settlers is so scant. See EBRIGHT, *supra* note 3, at 160-62.

⁷⁸ BRAYER, *supra* note 2, at 114-15.

⁷⁹ Taming, *supra* note 36.

⁸⁰ U.S. Freehold Land & Emigration Co. v. Arrellano, Taos County Dist Court No. 350 (November Term 1887), Collection 1976-014, Records of the United States Territorial and New Mexico District Courts for Taos County, File No. 430, New Mexico State Records Center and Archives, Santa Fe, N.M. Records of proceedings in the case appear sporadically on the Taos County District Court Docket and in the Record of the District Court until December 4, 1899. There seem never to have been substantive proceedings in the case. One intriguing reason for the inaction is suggested by the coincidence that the lawsuit was filed shortly after E.C. van Diest took up his duties as manager of the Costilla Estate of the Sangre de Cristo land grant. In August 1887 van Diest had worked on a survey for the Dutch owners of the Maxwell land grant,

and while traveling over the grant had been followed by sixteen masked Mexicanos who prevented him from laying out an irrigation ditch. ROSENBAUM, *supra* note 7, at 85. Might that experience have led him and the other managers of the Costilla Estate do adopt a less confrontational policy? There is no evidence other than van Diest's and the Costilla Estate's owners' general approach to the Mexican settlers to support the possibility that the decision not to push forward with the *Arrellano* case may have been based on van Diest's experiences on the Maxwell Grant. *See also infra* note 118, describing van Diest's approach to dealing with the mexicano settlers of the Sangre de Cristo grant.

⁸¹ U.S. Freehold first sold its interest in the Costilla Estate to U.S. Freehold Land & Investment Company for one dollar in cash and \$1,036,000 in bonds, followed by transfer to a newly formed company, the Costilla Land & Investment Company. BRAYER, *supra* note 2, at 123; FACTS RELATIVE TO SALE OF SANGRE DE CRISTO GRANT TAX DEED 102 and 103, TAOS COUNTY (Sept. 1941). Governor John E. Miles Papers, Special Reports and Issues, Sangre de Cristo Grant, Folder 267, SN 13224, Loc. 69-I-5, New Mexico State Records Center and Archives, Santa Fe, N.M. The record after that date was one of tax delinquency and tax sale.

⁸² The shift in development objectives after the failure of the colony project is especially evident in the periodic reports on the timber, water, and mining resources of the grant prepared by E.C. van Diest, manager of the Costilla Estate of the Sangre de Cristo land grant from 1886-1903. *See, e.g.*, Report on the Irrigation of the Costilla Estate (1890), Report on the Appraisal of the Costilla Estate Made by E.H. Kellogg and William H. Meyer (Mar. 25, 1889), and Report on Irrigation of Part of the Costilla Prairie (July 27, 1888), all available in the van Diest Collection at Tutt Memorial Library of The Colorado College, Box 74, Copybook 2, pp. 135-42, 69-76 and 11-29. *See also* Statement Regarding the Timber Area of the Costilla Estate (Jan. 26, 1905), Box 76, Copybook A, pp. 148-51 van Diest Collection. The Articles of Incorporation and Bylaws of the San Luis Power and Water Company, established in 1910, also offer a window into the hopes of U.S. Freehold's successors to redeem the development potential of the grant through control of water and water power capacity. Box 25, Folder 127, van Diest Collection. The securing of substantial water rights in the Rio Costilla occurred through purchases in the years after 1910, rights that were confirmed in through formal adjudication in 1920. *See infra* notes 121-126.

⁸³ *See* Complaint, United States Freehold Land & Emigration Co. v. The Defensive Assoc. of the Land Settlers of the Rio de Costilla, Civ. Cas. No. 685, Taos Co.Ct. (Apr. 22, 1903), Record of Taos Co. Dist. Ct. Folder No. 728, New Mexico State Records Center and Archives, Santa Fe, N.M.

⁸⁴ *See, infra*, text accompanying notes 152-171.

⁸⁵ THE DEFENSIVE ASSOCIATION OF THE LAND SETTLERS OF THE RIO DE COSTILLA, State Corporation Certificate No. 0030809, incorporation date April 12, 1902.

⁸⁶ Larrazola would later become the first Hispano governor of New Mexico and its first Hispano U.S. Senator. Speiss was the law partner of Thomas Catron. Biographical Note, Governor Octaviano A. Larrazolo Papers, New Mexico State Records Center and Archives, Santa Fe, N.M.

⁸⁷ New Mexico District Court for Taos County, Civil Docket No. 1, p. 451 (No. 681). The chronology here is reconstructed from entries for The Defensive Association of the Land Settlers of the Rio de la Costilla vs. Thomas Keeley, et al. (No. 4741) in the Santa Fe County New Mexico District Court Record Vol. J, pp. 49-62 and the Santa Fe County Civil Docket Vol. 6, p. 155, and from the following correspondence of E.C. van Diest. Letter from E.C. van Diest, Managing Director of U.S. Freehold Land & Emigration Co., to E.C. Abbott, U.S. Freehold's lawyer in Santa Fe (Sept. 16, 1905) (Box 76, Copybook 76, page 9); letter from E.C. van Diest to General William Palmer (undated) (Box 76, Copybook B, pp. 20-21); letter from E.C. van Diest to William F. Meyer (Oct. 15, 1905) (Box 76, Copybook B, p. 78); letter from E.C. van Diest to Albert Smith, U.S. Freehold's lawyer in Denver (Oct. 17, 1905) (Box 76, Copybook B, p. 83), all available in the van Diest Collection, Tutt Memorial Library, The Colorado College, Colorado Springs, Colo.

⁸⁸ See letter from E.C. van Diest to Albert Smith (Oct. 27, 1905) (on file in the van Diest Collection, Box 76, Copybook B., p. 78, at the Tutt Memorial Library), and replying to Smith's concern that particular troublemakers among the squatters evicted by the Maxwell Company might have arrived in the upper Costilla valley, settled, and joined the law suit against Costilla Land & Investment Co. Van Diest wrote, "As to the squatters evicted by the Maxwell Company, none of these you name are mentioned as squatters in our suit with the defensive association. A few of these are squatters in the Costilla Valley, but are not included in the list covered by the Santa Fe suit."

⁸⁹ *Id.* With respect to the question whether recently arrived settlers in the upper Costilla included evicted squatters from the Maxwell Grant, the testimony of Mr. Harry W. Adams, a Colfax County rancher, in Costilla County Land and Investment Co. v. Allen, is most interesting. The Allen case involved an effort to establish definitively the boundaries of the Sangre de Cristo grant with respect to the Maxwell Grant. Mr. Allen had bought 35,000 acres for a ranch from the Maxwell Company, and his testimony in the Taos County District Court proceedings in Allen offers valuable insight into the patterns of settlement, movement, and resource use of the Hispano squatters on the eastern and western slopes of the Sangre de Cristo range. It demonstrates quite clearly how people moved continually from one watershed to another and from one landscape to another to cobble together livelihoods. See Allen Transcript 114-132, Civil Case No. 1329, New Mexico Supreme Court Records, available at the New Mexico State Records Center and Archives, Santa Fe N.M.

⁹⁰ The text of this paragraph is based on the Letter from E.C. van Diest to Albert Smith of Colorado Springs (Jan. 8, 1905) (on file in the van Diest Collection, Box 76, Copybook A, p. 349, at the Tutt Memorial Library).

⁹¹ The issue of the *extensiones* was critical for the Company, and offers a concentrated demonstration of the irreconcilability between the Hispano model of settlement and the Company's plans for development of the lands. A September 1905 letter from van Diest, concerned with the issue of *extensiones* in the Culebra watershed, offers insight into the depth of the impasse. "[T]he Beaubien deeds themselves were given to cover all these items [the *extensiones*], in as much as they extended from a creek North or South to the half distance to the next creek, thereby including all the bottom land adjoining the creek, from which a claim starts, upland beyond for pasture, and still further on a portion of the pinion hills for wood. If any of these rights extend to any now, they would be absolutely without control, and for one little right given them they would ask a dozen and trespass in most objectionable manner. The Company would seriously impair the value of its property by conceding either of these things. I would say, without the slightest question, sue rather than give them anything." Letter from E.C. van Diest to Albert Smith of Colorado Springs (Sept. 16, 1905) (on file in the van Diest Collection, Box 76, Copybook B, pp. 6-8, at the Tutt Memorial Library).

⁹² See letter from E.C. van Diest to Albert Smith, lawyer for and a director of Costilla Land & Investment Co. (Jan. 8, 1905) (on file in the van Diest Collection, Box 76, Book A, p.349, at the Tutt Memorial Library). Van Diest was quite candid: "The grazing leases I advised would to some extent pit these people against one another, from with the Company must benefit, but consent has not yet been received. Permit me to suggest that you could not sell the Estate in its present state to anyone who would [come] there to look over the ground, . . . I would again ask to have the deeds made soon, and [likewise] for the grazing leases."

A letter from Albert Smith, the company's lawyer to E.C. van Diest, quoted in a separate letter, is quite explicit in stating the Company's goals in offering deeds: "We would not want to make the proposition and have it refused. Could Mr. Wm. F. Meyer suggest to some of them that they could probably have title for such occupied tract in the town of Costilla immediately adjoining their houses, not extending to any material acreage however, and be entirely out of the matter, for the sum of \$1.00 each . . .? I have been informed from several sources that they have weakened considerably in their contention, and I think the deeds so given to a few of them would start a number of them occupying." Letter from E.C. van Diest to William F. Meyer (Oct. 14, 1905) (on file in the van Diest Collection, Box 76, Copybook B, p. 78, at the Tutt Memorial Library).

⁹³ See *supra* note 53, for discussion of the question of settler deeds. The Company's clean paper title would justifiably have caused the Company to suppose that the courts would view the United States' government's confirmation of the Sangre de Cristo grant in its predecessors in interest as effective in eradicating any undocumented commons or individual claims purported to be based on Mexican law or legal principles. See, e.g., *Catron v. Laughlin*, 72 P. 26 (N.M. 1903) and *H.N.D. Land Co. v. Suazo*, 105 P.2d 744 (N.M. 1940) (discussing the doctrine of "perfect grant").

⁹⁴ See letter from E.C. van Diest to William Meyer, and letter from E.C. van Diest to Albert Smith, *supra* note 87.

⁹⁵ *Meyer v. Keeley*, Santa Fe Co. Dist Court Docket No. 4741, Order of Court, November 3, 1905, Civil Record J, page 5, New Mexico Records Center and Archives, Santa Fe, N.M., Collection No. 1972-011.

⁹⁶ See, *supra* note 10.

⁹⁷ See *supra* note 39.

⁹⁸ Decree in the District Court in *Fernando Meyer, Jr. et al. v. Thomas Keely, et al.* at page ____ (No. 4741, Nov. 17, 1905). The record is silent as to what specific document the Costilla settlers introduced to establish their commons rights. Charles Beaubien had prepared a document dated May 11, 1863 and recorded October 5, 1864 in Costilla County Colorado Deed Book 1, p. 256, conceding to the land settlers of the Culebra watershed "enjoyment of the benefits of pasture, water, firewood and timber." Beaubien Document, *supra* note 43. There is no corresponding document for the Costilla settlements recorded either in the deed books or in the grantor-grantee indices for Taos County New Mexico or for Costilla County, Colo. The likely existence and content of such a document may be inferred, however, from an agreement between William Gilpin and the Executors of Charles Beaubien, entered into on April 7, 1864. In that agreement, Gilpin, for himself and for his heirs and successors, acknowledged that the sale to him of the Sangre de Cristo grant was conditioned upon his promise to perform Beaubien's promises to the settlers of the grant: "[S]aid tract was bargained to him by said Charles Beaubien during his lifetime but on the express condition that certain settlement rights before then conceded by said Charles Beaubien to residents of the settlements of *Costilla*, *Culebra* and *Trinchera*, within said Tract included, shall be confirmed by said William Gilpin as made by him, the said Charles Beaubien during his occupancy of said tract and as understood and agreed by and between him and said settlers and sale and conveyance and title be made to the parties lawfully entitled thereto on compliance on their part with the terms by them entered into, of which parties so entitled a list marked A accompanying this agreement, and is annexed and made a part hereof. (emphasis added). The agreement continued, binding Gilpin and his successors to performance of the Beaubien promises: "Now therefore this agreement and obligation . . . is made to secure the specific performance of the obligations and liabilities of the said Charles Beaubien, on the part of said William Gilpin, and to perfect the rights of said parties entitled as foresaid in accordance with the conditions by the said Charles Beaubien entered into and all of which are hereby by said William Gilpin recognized and confirmed." Book 1, p. 241 Deed Books of Costilla County, Colo. Neither Annex A nor the text of any agreement between Beaubien and the settlers of the Costilla, the Culebra and the Trinchera have yet been discovered. The Costilla settlers in the Santa Fe litigation may have had nothing more than the Beaubien Document for the *Culebra* settlements and the reference to the Costilla settlements in Gilpin's agreement with Beaubien's executors as evidence of their settlement rights. The absence, in particular, of Annex A may have been fatal to the settlers' effort to prove individual land titles or common title to grazing and woodland resources.

⁹⁹ Decree, *supra* note 98, at 60.

¹⁰⁰ Stipulation in Cause No. 4741 in the District Court, County of Santa Fe (Nov. 17, 1905) Arrellano Family Papers, courtesy of Estevan Rael-Galvez, State Historian, New Mexico State Records Center and Archives, Santa Fe, N.M.), and see *infra* notes 105 and 107.

¹⁰¹ Stipulation, *supra* note 100, at 1.

¹⁰² Stipulation, *supra* note 100, at 1,4.

¹⁰³ Stipulation, *supra* note 100 at 4; letter from E.C. van Diest to William Meyer (Dec. 6, 1905) (on file in the van Diest Collection, Copybook B, pp. 177-78, at the Tutt Memorial Library).

¹⁰⁴ Stipulation, *supra* note 100 at 2.

¹⁰⁵ Decree, *supra* note 98, at 62. The court found that Costilla Land & Investment Co., successor to U.S. Freehold Land & Emigration Co., was the exclusive owner of the New Mexico portions of the Sangre de Cristo Land Grant and that plaintiffs had no title or rights of possession, with the exception of limited deeded tracts. Plaintiffs claims were dismissed with prejudice.

¹⁰⁶ Letter from E.C. van Diest to William Meyer, *supra* note 103.

¹⁰⁷ Stipulation, *supra* note 100 at 2.

¹⁰⁸ Letter from E. C. van Diest to Paul Albright (Jan. 18, 1906) (on file in the van Diest Collection, Copybook B, Box 76, pp. 251-52, at the Tutt Memorial Library).

¹⁰⁹ The committee set out its charge and its expectations in a document signed by all of them (Miguel Trujillo, Roman Santistivan, Pedro Martines, Jose R. Martines, Juan R. Santistevan) under the seal of The Defensive Association. Preambulo y Resoluciones, January 7, 1906, van Diest Collection, Box 76, Copybook B, p. 274, Tutt Memorial Library, The Colorado College. A contemporary translation from the original Spanish into English appears at page 277.

¹¹⁰ There is some ambiguity as to whether the right to firewood and timber was to be limited to the members of the committee, or to extend to all those persons whose land title was established through the process of survey and grant of titles. The more coherent reading is that the right extended to the latter, and larger, group.

¹¹¹ Letter from E.C. van Diest to Charles A. Speiss (Feb. 14, 1906) (on file in the van Diest Collection, Box 76, Copybook B, pp. 304-05, at the Tutt Memorial Library).

¹¹² *Id.* van Diest wrote to Charles Spiess, lawyer for the settlers, "Mr. Albright is having considerable difficulty in securing the aid needed to do the work . . . The people desire to supply him with different men every day in order to have all of tem work out a portion of the time. Inasmuch as none of these men know anything about surveying or [are] even capable of reading a tape, it makes it difficult for Mr. Albright to keep track of the situation with such assistance."

¹¹³ Letter, *supra* note 111.

¹¹⁴ The sense of Tomas Rivera's letter is plain from the reply sent him by van Diest. Letter from E.C. van Diest to Tomas Rivera (Feb. 23, 1906) (on file in the van Diest Collection, Box 76, Copybook B, p. 315, at the Tutt Memorial Library).

¹¹⁵ Letter from E.C. van Diest to Tomas Rivera (Feb. 27, 1906) (on file in the van Diest Collection, Box 76, Copybook B, pp. 325-326, at the Tutt Memorial Library). Translation is by author.

¹¹⁶ Letter from E.C. van Diest to Albert Smith (May 24, 1906) (on file in the van Diest Collection, Box 76, Copybook B, p. 466, at the Tutt Memorial Library).

¹¹⁷ *Id.*

¹¹⁸ Letter from E.C. van Diest to Albert Smith (June 1, 1906) (on file in the van Diest Collection, Box 76, Copybook B, p. 476, at the Tutt Memorial Library). Throughout the dispute about the survey, Mr. van Diest represented himself to his correspondents as adept in handling negotiations with the Hispano settlers. Now counseling patience and peaceable tactics to Albright, now offering his understandings of the temperament of the people, now showing the people a mixture of firmness and inclination to treat them decently, now noting that in delicate negotiations the settlers would have to be persuaded individually, and that that delicate task fell to him, now noting that the ordinary people are being misled and ill-served by the Defensive Association, and may be becoming disenchanted with their leaders, while corresponding with them in their native tongue, van Diest seems to embody a model of colonial administration that may be attributable to his understanding of the “Dutch way.” For accounts of the Dutch model of colonial administration, see FRANCES GOUDA, *DUTCH CULTURE OVERSEAS: COLONIAL PRACTICE IN THE NETHERLANDS INDIES, 1900-1942* (1995); see also MONTROYA, *supra* note 26, at 126-27, for a discussion of its application in the American west and southwest. For relevant biographical information on E.C. van Diest, the son of a Dutch colonial administrator, see Hicks & Peña, *supra* note 39, at 436.

¹¹⁹ Meyer v. Keely No. 4741, Motion to Vacate, November 16, 1906. Record of Proceedings, First Judicial Dist. Court, Santa Fe County. 6 Civil Docket 155, Santa Fe Dist Court Records, New Mexico State Records Center and Archives, Santa Fe, N.M. The text of the motion appears among the documentation filed by Costilla Land & Investment Co. and the Costilla Estates Development Co. in 1915 in support of a writ to enforce the decree entered in the Santa Fe case. Application for Pluries Writ of Assistance 20, Santa Fe County Dist, Court No. 4741, November 2, 1915, Renehan-Gilbert Papers, Box 15, Folder 95, New Mexico State Records Center and Archives, Santa Fe, N.M.

120 See, *supra*, text accompanying notes 69-70.

¹²¹ Meyer et al. v. The Acequia Madre et al., (Taos County District Court Civil Case No. 841) (July 27, 1908), Taos County District Court Records, New Mexico State Records Center and Archives, Santa Fe, N.M.

¹²² Meyer alleged that his water rights in La Acequia Madre (1853) and in the other most senior ditches of the Rio Costilla, the Acequia de la Cordillera (1853), the Acequia de la Mesa (1854), fully absorbed most of the available flow of the Rio Costilla. Over the years, he had acquired over 2000 acres of land irrigated from those senior acequias, and he argued that no diversions by others should be permitted until his right to divert 40 cfs continual flow during the irrigation season was satisfied. Complaint in Taos Co. Dist. Ct. Civil Case No. 841, paragraphs 3, 8, and 30, Folder 1 of 2, on file at the New Mexico State Records Center and Archives. Later that year, while the action was still pending, Meyer entered into an agreement with Costilla Estates Development Company to sell for \$36,000 30 of the 40 cfs he claimed in the as yet unadjudicated waters of the Costilla. (Agreement of September 26, 1908 and Agreement of December 30, 1908, Exhibits A and B to the Amended Complaint in Taos Co. Dist. Ct. Civil Case No. 841). Trial of the case began on September 12, 1911 and the court entered its Final Decree on December 2, 1911, sustaining Meyer’s water rights and enabling him to sell those rights to Costilla Estates Development Company.

The law suit represented a curious turn of events. Ten years earlier Meyer had lost a lawsuit brought in a Colorado federal court by U.S. Freehold in which the Company had challenged the right of the Acequia Madre to divert water from Costilla Creek for agricultural use in Colorado. U.S. Freehold won what must be viewed as a surprising victory, in light of the Colorado and New Mexico water law, when it persuaded the United States Circuit Court of Appeals to reverse decisions of the lower courts in favor of the senior-most water rights of the Acequia Madre irrigators and to enjoin Meyer and the other acequia rights holders from diverting Costilla Creek through the Acequia Madre. This earlier defeat, and particularly the injunction against water diversions, may have triggered Meyer’s lawsuit against his neighbors and former allies as he sought to establish the seniority of his water rights vis a vis his neighbors. For a treatment of water rights disputes in the Costilla watershed and a description of U.S. Freehold’s strategy of attacking senior acequia water rights, see Kenneth W. Knox, *The Costilla Creek Compact*, 6 WATER L. REV. 453, 458 (2002), and cited sources. See also Duane D. Helton, *Garcia Water Problems*, (Colorado Water Conservation Board September 26, 1974) (copy on file with author). U.S. Freehold’s attacks against Rio

Costilla acequia water rights duplicated methods used to diminish acequia water rights in the Rio Culebra watershed in Colorado. *See* Hicks & Peña, *supra* note 39, at 425-44.

¹²³ Answer in Meyer v. The Acequia Madre at ¶ 3 (No. 841) (Feb. 26, 1909).

¹²⁴ Order in Meyer et al. v. The Acequia Madre, et al., (Dec. 2, 1911), reproduced in Pluries Writ, *supra* note 119, at 68-72.

¹²⁵ *Id.*

¹²⁶ A major contested issue in the case was whether Meyer's water rights could properly be said to be superior to those of his neighbors. As the owner of most of the land served by the senior-most acequias, his claim to senior, and therefore superior, rights was consistent with the emerging law of prior appropriation in New Mexico. It was at odds, however, with established acequia norms, which followed a principle that scarcity was to be shared, and also that temporal priority was one of only several considerations relevant to an equitable sharing of water from a common source. *See*, Hicks & Pena, *supra* note 39 at 410-415 for discussion of acequia water rights in New Mexico under the Mexican and Territorial regimes. The court's decision confirmed not only that senior use would prevail, but held that because other senior acequia irrigators did not own the land they had irrigated, their water rights were forfeit. Meyer's rights thus came to absorb much of the flow of the Rio Costilla, and those rights were transferred to Costilla Estates Development Company, resulting in the loss of a large portion of the Rio Costilla's available water to the traditional band of acequia-irrigated riparian lands. For an interesting study of the marginalization of traditional water allocation regimes in New Mexico during the territorial period, *see*, G. Emlen Hall, "Tularosa and the Dismantling of New Mexico Community Ditches," 75 NEW MEXICO HIST. REV. 77-106 (2000).

The loss of senior acequia water rights in the Rio Costilla has never ceased to be a sore point. The impact of the *Acequia Madre* in effecting an adjudication of water rights in the Rio Costilla was not understood at the time by the local people. There were periodic calls that the circumstances of the water loss be investigated. *See* "Sangre de Cristo: Diversion of Water from Costilla River," Land Grant Collection Folder 94, New Mexico State Records Center and Archives, Santa Fe NM where there appear petitions and letters to then governor O.A. Larrazola, complaining of the Costilla Estates Company's newly constructed reservoir in the Costilla canyon and the use of its impounded waters in Colorado. Governor Larrazola, recalling his past ties as attorney for the people of Costilla and Amalia, asked the New Mexico Attorney General to look into the claims of the Rio Costilla people. Letter from O.A. Larrazola to O.O. Askren (July 12, 1919), *op. cit.* *See also* Helton and Knox, *supra* note 126, for other accounts of the continuing confusion and bad feeling following the loss of water to the acequias as a result of *Acequia Madre*. The completion of the Costilla reservoir and in 1922 of the Cerro ditch made it possible for the water rights acquired by the Costilla Estates Development Co. from William Meyer to be effectively applied on lands far removed from the historically irrigated riparian lands of the Rio Costilla, both in New Mexico and Colorado. From that time, the hurtful impact of Meyer's sale of his water rights, and the impact of the ruling in *Acequia Madre*, became quite plain. The mechanisms of the loss remained obscure to most people. Meyer's contracts of sale of his rights appear as exhibits to his August 9, 1911 amended complaint in *Acequia Madre*.

¹²⁷ Pluries Writ of Assistance, *supra* note 119, at 72.

¹²⁸ *Id.* at 73.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 74.

¹³³ *Id.*

¹³⁴ Complaint, paragraph. V, *Allen*, *supra* note 89.

¹³⁵ *Id.*

¹³⁶ *See supra* discussion in note 89.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Testimony of Paul W. Albright, manger of the Costilla Estate, Trial transcript, pp. 85-86, 88, 90, 99, *Allen*, *supra* note 89.

¹⁴⁰ The bona fides of the trespassers are suggested in a letter sent by their attorney A.C. Voorhees on August 7, 1906 to the Commissioner of Public Lands, requesting a survey to resolve the question whether the lands in dispute were or were not public domain. Transcript, p. 153, *Allen*, *supra* note 89. And yet, the reply letter from GLO Acting Commissioner C.G. Pollock ought to have put them on notice that the U.S. authorities viewed the two grants as having a common boundary with no intermediate public lands. By the time of trial the settlers had reason to know that some of their number probably were trespassers. Transcript, p. 155. *See also* testimony of B.M. Thomas of the U.S. Forest Service, with respect to the boundaries of government lands and of the respective grants. Transcript pp. 136-139, *Allen*, *supra* note 89.

¹⁴¹ The Company made its case that the eastern boundary of the Sangre de Cristo was contiguous with the western boundary of the Maxwell grant, and that that boundary was defined by the central spine of the Sangre de Cristo range. The most contested issue was the accuracy of the 1860s Kellogg Survey, conducted by the U.S. government to establish definitively the boundaries of the grant. The most vexed question was location of the southern and eastern boundary lines, the key question being whether all the headwaters of the Rio Costilla were embraced in the grant, or whether the grant left portions of the headwaters in a gore between the Sangre de Cristo grant, the Maxwell Grant and the Beaubien & Miranda Grant. Very trenchant testimony on the high probability that the grant would have embraced the totality of the watershed was offered by Amador Sanchez. *See Allen* transcript, pp. 82-83. The trial record on the pages following the Sanchez testimony includes depositions by a number of other individuals, including William Gilpin, all agreeing that the Kellogg survey boundaries did not coincide with the boundaries of the grant as confirmed by Congress. Letter from the U.S Surveyor General (Oct. 7, 1875) seem to clinch the issue of the inaccuracy of the Kellogg survey in describing the external lines of the grant. *See Allen* transcript at p. 94ff. The survey is explicitly rejected as erroneous at *Allen* transcript, p. 97.

Judgment of the court (McFie presiding) was rendered on December 27, 1909, following three days of trial on Dec. 6-8. Judgment in contempt against the defendants was entered on Dec. 27, 1909. *Allen* transcript, pp. 51-53. Defendants appeal dismissed by N.M. Supreme Court on Aug. 22, 1910. The Acequia Madre case was tried two years after the evidence was taken in *Allen*. The Company employed the same lawyers, and was in any case, still struggling for a satisfactory resolution with the *Allen* defendants. In van Diest's testimony, at *Allen* transcript, p. 101, there is an indication that the monument that marked the southeast corner of the grant may have been removed or obliterated. To same effect, *see* transcript at 114 where van Diest testified that in August 1909 he noticed the monument ("mohonera") at the crossing of Costilla Creek and the road across the summit to Trinidad, and marking a portion of the east boundary of the Sangre de Cristo land grant, was missing. Van Diest described the missing monument as having been located on the divide or watershed separating Colfax and Taos counties. Van Diest testified that he accompanied the U.S. Survey team on a survey of the south boundary led by C.C. Kennedy, Deputy U.S. Surveyor. *Allen* transcript at 100-01; 113-14.

¹⁴² Pluries Writ of Assistance, *supra* note 119.

¹⁴³ Preliminary Proposal, “History of the Community,” History of Community, *supra* note 22, at 11.

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* notes 122 and 126.

¹⁴⁶ Fernando Meyer, Jr, v. Thomas Keely (Case No. 4741 District Court of Santa Fe County) Renehan-Gilbert Papers, Box 15, Folder 95, New Mexico Archives and State Records Center, Santa Fe, N.M.

¹⁴⁷ See *Pluries Writ of Assistance*, *supra* note 119, at 21-22.

¹⁴⁸ Apparently, no transcript of the Santa Fe trial could be found, and the Company could not reconstruct the exact legal foundations of the Santa Fe decree or identify exactly who was bound by its terms. Letter from Franklin Brooks to E.R. Wright of Renehan and Wright (Nov. 19, 1915) (on file in the Renehan-Gilbert Papers, Box 15, Folder 95, at the New Mexico State Records Center and Archives, Santa Fe, N.M.) (hereinafter “Renehan-Gilbert Papers”). The Company wrote to Judge McFie to ask whether he might be able to prepare a summary of the circumstances of the settlement and of the findings of law that had led the settlers to drop their suit and accede to the Company’s compromise offer. Letter from Franklin Brooks to J.R. McFie. (Nov. 19, 1915) (on file in the Renehan-Gilbert Papers, Box 15, Folder 95). As a result, it was unclear whether it would be possible simply to obtain a court order to enforce the Santa Fe decree or whether a fresh against the Piña defendants would be necessary. Originally having structured its suit as an action to enforce the Santa Fe decree against Costilla and Piña settlers, the Company now faced the prospect of trying new law suits.

¹⁴⁹ Letter from E.B. Wright to J.B. Pitival, Archbishop of Santa Fe(Nov. 1, 1915) (on file in the Renehan-Gilbert Papers, Box 15, Folder 95). The copy of the letter appearing in the Renehan-Gilbert Papers is unsigned. That E.B. Wright was the signer is made plain in a letter dated November 4, 1915 from him to Franklin E. Brooks of the Costilla Estates Development Company. See Renehan-Gilbert Papers, Box 15, Folder 95.

Father Emile Barrat was appointed pastor at Costilla in January 1913 and remained in that post until September 1923 when he was made pastor of San Marcial, near Socorro, New Mexico. Father Barrat was born in Dugny (Verdun-sur-Meuse), Lorraine, France on July 9, 1881. He received Bachelor of Arts and Bachelor of Philosophy degrees from the University of Nancy before coming to America. He was ordained a priest in Tucson on December 7, 1904 by Bishop Granjon, and after serving as pastor of a new parish in Metcalf, Arizona, was chosen by Archbishop Pitival for the post of Assistant at Saint Francis Cathedral in Santa Fe. He served there from December 1911 until his move to Costilla in 1913. He died on February 2, 1944. This Biographical Sketch was kindly provided by Marina Ochoa, Director and Coordinator of Preservation, Archives and Museum, Commission for the Preservation of Historic Churches in New Mexico, Archdiocese of Santa Fe. The records of the archdiocese seem not to contain any documents shedding light on Father Barrat’s activities on behalf of the Costilla and Piña settlers or indicating any response to the Wright letter by Archbishop Pitival or other church authorities.

¹⁵⁰ Here are a few passages from the letter, to convey a sense of its tone:

My dear Archbishop:

... The reason for this letter is that it seems to us that Father Barrat’s attitude, based upon an entirely mistaken idea of the facts, is causing his ppeople unnecessary expense and trouble and can but lead to further difficulties in the same direction. The agitators who have apparently secured Father Barrat’s cooperation are attempting to claim that some fifty of these settlers, in and around Pena, have such holdings and claims upon the lands which they occupy that they can disregard the rights of our company.

. . . Notwithstanding these facts, and the fact that our company has been willing to give, without compensation, the homes that these people occupy and small tracts of land around them, and has also been willing to sell to them a title to the remainder of the land which they unlawfully occupy, these poor people have, through bad advice, for the last seven years, harassed themselves and us in unnecessary litigation and have spent needlessly, in the prosecution of it, far more than was sufficient to have bought their title and improved their lands.

. . . It has been the policy of our company to do whatever we could to help the local settlers, and not hinder them. We would prefer that they should stay, if they would stay lawfully. Their labor is desirable and it could be made a source of profit to themselves. . .

. . . I have no desire to involve you in a controversy, but I think it is fair to these poor people, whose interests we really and genuinely desire to protect, that some wise counselor should at least suggest to their local leaders that they advise themselves before acting.

Letter to Archbishop, *supra* note 149.

¹⁵¹ It seems certain that Father Barrat was not disciplined by the Archdiocese as a result of his efforts. He remained in his post at Costilla until September 1923, continuing to take an active part in advocating local interests with state authorities, until he was made pastor of San Marcial in Socorro New Mexico. See Biographical Note, *supra* note 149, and see letters to Governor O.A. Larrazola (June 21, 1919, and Mar. 24, 1920) (on file in the “Sangre de Cristo: Diversion of Water from Costilla River,” Land Grant Collection, Folder 94, New Mexico State Records Center and Archives, Santa Fe, N.M.), complaining of the loss of water to the Rio Costilla acequias as a result of Costilla Estates Development Company’s diversions.

¹⁵² Letter from Franklin Brooks to A.B. Renehan (Dec. 3, 1915) (on file in the Renehan-Gilbert Papers, Box 15, Folder 95). And see *Pluries Writ of Assistance*, *supra* note 119, at 74-75.

¹⁵³ Letters from A.B. Renehan to General Manager of Costilla Estates Development Co. (June 1, 1916, and June 23, 1916) (on file in the Renehan-Gilbert Papers, Box 15, Folder 95).

¹⁵⁴ Stipulation in Case Nos. 1130-1193 to continue all cases over to next term of court, followed by order to strike cases from docket. June 1, 1918. Gilbert-Renehan Papers, Box 15, Folder 96. The Company’s correspondence with its attorneys indicates that the Company failed to press forward because it could not get to the bottom of the question whether the lawyers who negotiated the Santa Fe agreement on behalf of the settlers were or were not authorized to speak for the Piña settlers. The Company feared that if the Piña settlers were not subject to the Santa Fe agreement, a new law suit would have to be launched against them, carrying the risk that if the current Piña settlers could produce written evidence of their titles, they might be able to establish color-or-title, and win.

¹⁵⁵ Letter from A.B. Renehan to George W. Bierbauer (Sept. 24, 1921) (on file in the Renehan-Gilbert Papers, Box 15, Folder 96).

¹⁵⁶ *Id.*

¹⁵⁷ Preliminary Proposal, “History of Community,” *supra* note 22, at 11-12.

¹⁵⁸ *Costilla Estates Development Company v. Clemente Mascarenas, et al.* (Taos Co. Dist. Court Civil Docket Nos. 1130 – 1193).

¹⁵⁹ See *supra* discussion in notes 122 and 126.

¹⁶⁰ Letter from A.B. Renhan to George W. Bierbauer (Feb. 24, 1922) (on file in the Renehan-Gilbert Papers). Expressing growing worry about the Company's indecision, Renehan wrote, "we are getting to the place where we will go out of court head first if something is not done," and asked whether the Company had made a decision whether to proceed in trying the cases. Another such letter, two months later, notes that the referee is impatient to act, and advising that if the referee is not to proceed, that the court be notified and the referee discharged. Letter from A.B. Renehan to George W. Bierbauer (Apr. 26, 1922) (on file in the Renehan-Gilbert Papers, Box 15, Folder 96, "Case # 5082: Meyer v. Keely and Costilla Estates Development Co.").

¹⁶¹ Letter from George W. Bierbauer to A.B. Renehan (May 9, 1922) (enclosed with letter from C.A. Robinson to A.B. Renehan (May 22, 1922)) (on file in the Renehan-Gilbert Papers. Box 15, Folder 96, "Case # 5082: Meyer v. Keely and Costilla Estates Development Co.").

¹⁶² Order of Reference, Costilla Estates Development Co. v. Lovato, et al. (Taos County Dist. Court Nos. 1130-1193) June 18, 1921. . Renehan-Gilbert Papers, Box 15, Folder 96, "Case # 5082: Meyer v. Keely and Costilla Estates Development Co." New Mexico State Records Center and Archives, Santa Fe, N.M.

¹⁶³ Letters from George W. Bierbauer to A.B. Renehan (Sept. 3, 1921 and Sept. 16, 1921); letters from A.B. Renehan to George W. Bierbauer (Sept. 24, 1921 and Oct. 3, 1921); letter from Renehan & Gilbert, attorneys, to Taos Co. Clerk (Nov. 17, 1921), filing stipulation and order continuing the referee in office and extending time for the referee to act (all letters on file in the Renehan-Gilbert Papers, Box 15, Folder 96, , "Case # 5082: Meyer v. Keely and Costilla Estates Development Co.").

¹⁶⁴ *Id.*

¹⁶⁵ Letter from C.A. Robinson to A.B. Renehan (June 10, 1922) (on file in the Renehan-Gilbert papers, Box 15, Folder 96).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, and see letter from A.B. Renehan to Bierbauer & Jackson, attorneys (June 15, 1922) (on file in the Renehan-Gilbert Papers, Box 15, Folder 96), in which Renehan expresses the view with respect to settlement of the Costilla Estate suit against the settlers that "I do not think it worthwhile to anticipate [that it] can be brought to fruition.

¹⁶⁸ See Knox, *supra* note 122, at 461-63.

¹⁶⁹ PRELIMINARY PROPOSAL, *supra* note 53, at 16-18, 20.

¹⁷⁰ *Id.*

¹⁷¹ See *supra* note 33, 53 and 77.

¹⁷² Alan Taylor, *A Kind of War: The Contest for Land on the Northeastern Frontier, 1750-1820*, 47 WM & MARY Q. 3 (1989).

¹⁷³ JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM* 3 (1956). Another revealing American episode of conflicting understandings of the origins of property rights, and indicating the potency of natural rights theory in frontier circumstances, is examined in detail in BRENDAN MCCONVILLE, *THESE DARING DISTURBERS OF THE PUBLIC PEACE, THE STRUCCLE FOR PROPERTY IN EARLY NEW JERSEY 167-176* (1999).

¹⁷⁴ See RICHARD SCHLATTER, PRIVATE PROPERTY, THE HISTORY OF AN IDEA 151-205 (1951); WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY (1977), for a consideration of the impact of natural rights theory on the law of property and on public conceptions of the nature of property rights.

¹⁷⁵ The literature focused on the failure of United States authorities to fulfill U.S. treaty obligations arising under the Treaty of Guadalupe Hidalgo, and especially the failure to protect property rights arising under Mexican law, is extensive. For an overview that reviews the history and literature and that conveys something of the sense of enduring wrong that prevails among many as a result of claimed U.S. failures, see U.S. GENERAL ACCOUNTING OFFICE, TREATY OF GUADALUPE HIDALGO, FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO GAO-04-59. June 2004, published concurrently in Spanish as, EL TRATADO DE GUADALUPE HIDALGO, HALLAZGOS Y OPCIONES POSIBLES CON RESPECTO A LOS RECLAMOS DE LARGA DURACION DE MERCEDES DE TIERRAS COMUNITARIAS EN NUEVO MEXICO GAO04-60 June 2004. See also Van Ness, *supra* note 19; EBRIGHT, *supra* note 7; WESTPHALL, *supra* note 23. The enduring sense of wrong and of

¹⁷⁶ JOHN LOCKE, TWO TREATISES ON GOVERNMENT 307, 319, 320 (Peter Laslett et., 1960) (1698).

¹⁷⁷ For a brief commentary on the engagement between traditionalist patterns of land ownership and occupancy and neo-liberal approaches to property definition, see, Sylvia W. Kang'ara, "Rethinking Property: Language, Meanings and Institutions," 13 HAGUE YEARBOOK OF INTERNATIONAL LAW 37-42 (2000).