



Challenges in Natural Resource Protection, Prosecution and Enforcement; and the Need for Creative Legislative Solutions

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- ❖ NMSA §49-1-1.1(C) defines a “land grant-merced” as:

“a grant of land made by the government of Spain or by the government of Mexico to a community, town, colony or pueblo or to a person for the purpose of founding or establishing a community, town, colony or pueblo...”

- ❖ A land grant merced is a political subdivision of the state of New Mexico, which is managed according to the by-laws adopted by the land grant, the Treaty of Guadalupe Hidalgo and the NM Statutory provisions. §49-1-1 NMSA 1978.
- ❖ Provisions controlling land grant mercedes are contained in the New Mexico State Statutes at §§49-1-1 through 49-1-18 NMSA 1978.

Nature of Land Grant Mercedes and Powers of the Board of Trustees

The Board has Power to:

- ❖ Manage the land grant-merced and real estate, prescribe the terms and conditions under which the common lands may be used and enjoyed and make all necessary and proper bylaws, rules and regulations...
- ❖ sue and be sued...
- ❖ prescribe the price to be paid for the use of the common lands and resources of the land grant-merced and prohibit a person failing or refusing to pay that amount from using a portion of the common lands ...
- ❖ make bylaws, rules and regulations, not in conflict with the constitution and laws of the United States or the state of New Mexico, as may be necessary for the protection, improvement and management of the common lands and real estate and for the use and enjoyment of the common lands and of the common waters of the land grant-merced....
- ❖ determine land use, local infrastructure and economic development of the common lands of the land grant-merced...

§ 49-1-15. Removal from land grant-merced; delinquency; forfeiture

- A. If a person holds in possession or claims in private ownership, within the exterior boundaries of a land grant-merced, any tract, piece or parcel of land to which, in the opinion of the board of trustees, the person has no right or title, the board may institute an action of ejectment in district court against the person. If upon the trial it is determined that such possession is without right, judgment shall be rendered in favor of the board for possession of the tract, piece or parcel of land and for such damages as it may have proved for the wrongful detention.

- B. Any delinquent heir shall lose all right that the heir may have had to use the common lands of the land grant-merced unless the heir pays in full all legal assessments or dues due by the heir.



DISCUSSION OF ENFORCEMENT ISSUES

ISSUE 1

Lack of People/Personnel to Enforce Violations

- a. Example; Anton Chico Land Grant
 - i. Largest Land Grant in NM.
 - ii. Over 114,000 acres or roughly $\frac{1}{4}$ the size of Rhode Island.
 - iii. Spans a portion of both Guadalupe and San Miguel County.
 - iv. All land managed by a five member Board of Trustees, who receive nominal compensation for their work on behalf of the land grant.
- b. No designated enforcement arm/branch/authority
 - i. Land Grant can likely create enforcement provisions and hire personnel through their by-laws but the powers of enforcement would be limited to the powers vested in the Board by Statute – purely civil authority.

§ 49-1-14. Salaries of trustees; records; expenditures

- A. *The board of trustees may fix in the land grant-merced bylaws and pay to its members a salary not to exceed two hundred dollars (\$200) to any member in one month. The salary as fixed shall be in full as compensation for the duties performed by the board or the individual members within the exterior boundaries of the land grant-merced and for attendance at regularly scheduled meetings. The secretary of the board may be allowed a salary not to exceed two hundred twenty-five dollars (\$225) in one month.*
- B. *Board members may be authorized per diem and mileage pursuant to the Per Diem and Mileage Act....*

ISSUE 2: Violations are Civil not Criminal

- ❖ Lack of ability to properly document violations or receive support with enforcement.
 - ❖ Police departments severely understaffed “Passing the Buck” on jurisdiction
 - ❖ Police departments hesitant or unwilling to enforce by-laws without court order
 - ❖ Police departments hesitant to respond to civil matters or draft a police report indicating that the Board is making a legal complaint about a violation which leads to proof issues when in court.
 - ❖ Lack of Education/Understanding of Land Grant Issues
- ❖ Obligation left to Board to document and pursue violations without assistance of law enforcement and seek civil remedy with the courts.

ISSUE 3: Power to Sue and be Sued: An imperfect remedy

Board can file a civil complaint and seek:


- Injunctive relief; and
- Damages

Standards for Injunctive Relief

- ▶ (1) without such relief, it will suffer irreparable harm before final resolution of its claims;
- ▶ (2) traditional legal remedies would be inadequate; and
- ▶ (3) it has some likelihood of success on the merits.

Challenges in Proving up Damages

- Can be very difficult or impossible to prove and usually requires the hiring of expert witnesses.
- Think about all the things you would need to show.

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1. How much of the resource was removed?
 2. When was the resource taken and where from? On what dates?
 3. Who witnessed removal of the resource for each separate violation?
 4. Could someone else have been responsible for taking the resource other than the person being sued?
 5. How many different violations occurred?
 6. How much does that type of resource typically sell for?
 7. Alternatively, how much has the value of the land decreased as a result of the removal of the resource?
 8. How do you properly value land grant community property?
 9. How do you assess the value of land before and after removal of the resource if you don't know what was taken or in what quantity?
 10. Alternatively, how much would it cost to restore the land to its original condition? Who can testify to that fact? Clearly requires an expert to answer.

Attorney Fees and Court Costs are Cost Prohibitive

1. Attorney Required
2. Est. Attorney Fees \$25,000 – 50,000 per year
3. Defendants have right to appeal
 1. magistrate court cases - *de novo*
 2. district court case - legal error
4. Only worthwhile to prosecute the most egregious cases.
5. Limited Action for Assessments Only
 - a. Other option Board has for heirs who are in violation is to seek reimbursement of unpaid assessments for removal of resources in lieu of actual damages
 - b. Could lead to unfairness - due process concerns

Post Judgment Violation of Court Orders

1. Must collect on judgment/ enforce injunction
2. Police Departments are often hesitant to enforce civil court orders unless a contempt order has been issued, which usually only occurs after a second or third violation of the court order has occurred.
3. Each step that the Board has to take to enforce a judgment costs more money.
4. Many Violators are “Judgment Proof”



Brainstorming: How Can We Legislate Some Solutions?

General Goals in Legislation

LEGISLATE ONLY AS NEEDED - ALLOW LAND GRANTS TO ADDRESS THEIR UNIQUE CIRCUMSTANCES THROUGH THEIR ADOPTION OF BY-LAWS WHEREVER POSSIBLE

ENSURE THAT LEGISLATION IS PRACTICAL ON THE GROUND

MIRROR OTHER LEGAL PROVISIONS THAT HAVE ALREADY BEEN DRAFTED AND SUCCESSFULLY IMPLEMENTED WHERE POSSIBLE

CONSULT WITH EXPERTS TO ENSURE THAT NEWPROVISIONS VIBE WITH EXISTING LAWS

THINK ABOUT HOW PROPOSED LEGISLATION FOR LAND GRANTS CAN BE TIED INTO ADDITIONAL OPPORTUNITIES FOR LAND GRANT ECONOMIC DEVELOPMENT SPECIFICALLY TRY TO CREATE LOCAL JOB OPPORTUNITIES

Allow the Board to Have Some Criminal Prosecutorial Authority

1. Amend 49-1-1 to allow the issuance of citations by the Board or person(s) designated by the Board in place of arrest for a criminal violation
 - i. Allow issuance of citation to be prima facie evidence that a violation occurred which can be used in both the criminal and civil proceeding.
 - ii. Helps to eliminate the need to file police reports and places the onus on the person who is in violation to explain whether they were in violation of the by-laws.
- A. Make illegal removal of resources from a land grant a misdemeanor under the criminal code and provide up to 6 months of jail time and/or fines (paid to state) for theft of natural resources from the land grant.
- B. Allow the Board some prosecutorial authority and the ability to proceed without the assistance of counsel in certain magistrate court proceedings.

Provide Additional Civil Remedies

1. Create new statutory provision under Land Grant Statutes allowing additional civil remedies for theft of natural resources from the land grant provided the Board has properly adopted a by-law, rule or regulation that outlines the rules for removal of natural resources.
2. Provide a civil penalty payable to the Land Grant to help address the issues with the cost/difficulty of proving up damages.
 - A. Example \$5000 civil penalty to be paid to the Board of Trustees for illegal removal of resources.
 - B. Perhaps the Board would be permitted to collect the greater of either the civil penalty or the actual damages proven at trial or to collect both?
 - C. Note similar powers have been granted to acequia associations with relation to interference with easement rights at §73-2-5 NMSA 1978 – maybe mirror the language in that statute?
3. Create a statutory provision allowing the Board to collect attorney fees for any suit brought in which natural resources were illegally removed from a land grant.
4. Consider establishment of legal defense fund or alternatively provision of funds to UNM Law Clinic, New Mexico Legal Aid, the Attorney General or some other Non-Profit Legal service organization to support Natural Resource Protection related litigation on the land grants.

“ Work Together to Create Ways to Resolve Enforcement Issues

Adopt

If citations are permitted, Board can adopt a by-law that allows them to hire staff to patrol the land grant and issue citations. Removes this responsibility from law enforcement agencies.

Delegate

Expressly delegate enforcement authority for enforcing judgments to an agency who already has policing power such as State Police or Game and Fish.

Fund

Provide additional funding to the policing agency to create a land grant department and hire staff (ideally land grant heirs) to assist land grants with natural resource protection and enforcement.

It may be necessary for the land grants to acquire additional resources to help support enforcement

Educate

Provide education to enforcement agency concerning the operation and management of land grants.



QUESTIONS AND COMMENTS

Please refer to handout – proposed legislation/food for thought