30 January 2022

United Nations

Office of the High Commissioner

Expert Mechanism on the Rights of Indigenous Peoples

Emailed: ohchr-expertmechanism@un.org

The American Indian Movement-West welcomes the opportunity to provide the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) with the following submission to inform the study on “Treaties, agreements, and other constructive arrangements between Indigenous Peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.”

Introduction

We, the undersigned organizations and individuals, are united by a deep commitment to the goals set out by the EMRIP. We assert that the Treaty of Guadalupe Hidalgo (the Treaty) merits further scrutiny by EMRIP to fulfill the aspirations and human rights of Chicanos (Indigenous Mexican Americans) in the United States of America and indigenous peoples around the world (see copy of the Treaty of Guadalupe Hidalgo: <https://www.ourdocuments.gov/doc.php?flash=false&doc=26&page=transcript>

The Treaty, signed on February 2, 1848, concluded armed conflict between the United States of America (U.S.) and the United Mexican States (Mexico). By its terms, Mexico ceded 55 percent of its territory, including parts of present-day Arizona, California, New Mexico, Texas, Colorado, Nevada, and Utah, to the U.S. In the “Study on treaties, agreements and other constructive arrangements between States and indigenous populations: final report” by Miguel Alfonso Martínez , Special Rapporteur, Martínez highlights that the Treaty warrants further scrutiny because “of apparent special significance for the indigenous nations along the borders of the United States” (see Appendix G review the complete report of the Study on treaties, agreements and other constructive arrangements between States and indigenous populations.” Final report by Miguel Alfonso Martínez, Special Rapporteur, 22 June 1999 E/CN.4/Sub.2/1999/20).

The Treaty is a prime example of the consequences of a State with dominant power dictating the terms of surrender and responsibilities of the Parties. It also exemplifies the lack of consultation with indigenous peoples by colonial-settler States in treaty negotiation processes, which included critical issues of land, citizenship, relocation, and an imposed State border that continue to impact the rights and livelihood of indigenous peoples.

Bilateral Agreement

The Treaty is a bilateral agreement between two States that denied the participation of the affected peoples living in the “conquered” territory. Specifically, it excluded Mexicans of indigenous origin and the indigenous peoples that have populated the area since time immemorial, termed “Indians” and “savage tribes.”

The Treaty codified international legal obligations for each State to fulfill toward the peoples living in the newly annexed territory. Once the Treaty went into effect, these obligations were immediately abrogated and disregarded over time. Thus, the Treaty was not just an instrument to end war or set a new State borderline; it conveys international human rights affecting indigenous peoples.

Unilateral Amendments

Critical questions exist as to the actual validity of the Treaty because of particular factors such as whether the appointed consul for the U.S., Nicholas Trist, had appropriate authority to sign the Treaty on behalf of the U.S., whether the U.S. Congress properly instituted the Treaty, and whether the actions of the U.S. Congress willfully violated its implementation. For example, the U.S. Congress arbitrarily and unilaterally altered Article IX and struck Article X of the Treaty, ensuring land rights for those Mexicans holding Spanish or Mexican land grants.

Equal Guarantees

Article VIII states, “In the said territories, property of every kind, now belonging to Mexicans now established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.” (Article VIII, Treaty of Guadalupe Hidalgo, 9 U.S. Statutes 922 [1848]). The Article also specifies the citizenship rights of Mexicans living in the ceded territories. The U.S. Senate left Article VIII intact and approved it.

Postponed Enjoyment of All Rights

Article IX, as originally drafted, sought to protect the rights of the Mexican citizens by assuring that the ceded territory would be admitted to one or more states of the U.S. “as soon as possible.” Contrarily, the U.S. Senate changed Article IX to read that the ceded territory “shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged by the U.S. Congress) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.”

Unilateral Annulment of Land Rights

Article X states, “All grants of land made by the Mexican Government or by the competent authorities…shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico.” The U.S. Senate, at President Polk’s recommendation, refused to approve Article X as drafted by U.S. and Mexican diplomats and ratified by the Mexican legislature.

Reaffirmed Land Rights

After the U.S. Senate removed Article X and following objection to its removal by the Mexican government, diplomatic discussions resulted in the Protocol of Queretaro signed on 26 May 1848 by Mexican and U.S. diplomats just before the Treaty’s formal ratification on 30 May 1848.

The Protocol of Queretaro states, “The American Government, by suppressing the Xth article of the Treaty of Guadalupe Hidalgo did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants of land, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.”

These questions, notwithstanding, the Treaty remains an act of international consequence. It specifically affected the former Mexican (indigenous) citizens. The very act of remaining in their homeland, north of the new border and beyond one year following enactment of the Treaty, entitled them to full citizenship and the many indigenous peoples who were de facto made wards of the U.S. Although the U.S. Congress unilaterally struck out Article X, a critical section, the intent of Article X is no less viable and therefore pleads for attention and review.

Warrant Further Scrutiny

Basic principles of treaty law, principles of international human rights, and the Martínez Report are the basis for EMRIP to “warrant further scrutiny” of the Treaty. This may entail EMRIP creating a means by which Mexico and the U.S. are brought together, including representatives of the Chicanos and other indigenous peoples living in the territory encompassed by the Treaty. Facilitating such sessions can serve to assess the rights conveyed in the Treaty, how they are to be re-instituted or implemented today.

Notably, the Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples (E/CN.4/Sub.2/AC.4/2004/7, Geneva, 15-17 December 2003) concluded, among other things, that: The experts note that historical treaties, agreements and other constructive arrangements between States and indigenous peoples should be understood and implemented in accordance with the spirit in which they were agreed upon. The experts also note that treaties, agreements and other constructive arrangements between States and indigenous peoples have not been respected, leading to the loss of lands, resources, and rights. That non-implementation threatens indigenous peoples’ survival as distinct peoples.

Free, Prior, and Informed Consent (FPIC)

Although the Treaty is a bilateral agreement between Mexico and the U.S., it includes articles and provisions about indigenous peoples negotiated without consultation. Thus, the caution expressed by the Expert Seminar suggests that greater harm could result where indigenous peoples were ignored or silenced. Of the more than 400 treaties the U.S. has signed with indigenous peoples, the Treaty may be the only one of its kind that lacked indigenous peoples’ consultation when it was negotiated. Similarly, the Jay Treaty involved the U.S. and Canada and granted certain rights of passage and commerce to the “natives,” but did resolve an armed conflict.

The Treaty is notable for the following factors:

1. The Treaty is a living international document, in full force and effect, explicitly protecting certain human rights of indigenous peoples. Numerous cases involving indigenous peoples’ rights to religious, cultural, and traditional freedoms and practices; land rights including access to communal grazing areas, water access, and property ownership based on Spanish and Mexican land grants; and boundary claims related to the border between the U.S. and Mexico have been adjudicated for decades (see *Botiller v Dominguez* 130 U.S. 238(1889) Supreme Court holding contradicting previous legal precedent in relation to treaty law; see also United States v. Julian Sandoval 167 U.S.278(1897) U.S. Supreme Court ruled against land grant heirs in relation to communal land holdings; see also United States v. Abeyta holding that the Treaty of Guadalupe Hidalgo protected Indians in the free exercise of their religion; see also Havasupai Tribe v. United States 752 F.Supp.1471 (District Court Arizona) 1990 Denying that the Treaty provided any other rights to the religious protections of Indian people other than that provided by US Constitution. For further legal cases on the Treaty see APPENDIX A.
2. The Treaty complies with the implied reference to human rights protections in the founding documents of both the U.S. and Mexico, and other Treaty and international agreements of the time which can be traced to the present-day system and practice of international law which formally recognize the principles of human rights, that is, rights which adhere to the human person by their nature as opposed to rights which are protected by reason of place of birth ( see a copy of The Treaty of Guadalupe Hidalgo and its Modern Implications for the Rights of Mexican Americans, Treatise by Armando Rendón, The American University Law School, 1982, at <https://docs.google.com/document/d/e/2PACX-1vT2Xbbr-91QkFprPidNaTk9fWEDHIWWukpsbrwjmTO52YCBP6lrAvlLQ2XTRAYEEjceaXUyZWwseaNd/pub>)
3. With reference to the call for papers by the EMRIP, we explicitly assert that the Treaty is precisely the type of instrument that the UNHRC obligates EMRIP to address and, “that there is an urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements made between States and indigenous peoples, the implementation of which can contribute to the implementation of the UN Declaration of the Rights of Indigenous Peoples at the domestic or national level.”

Regarding #3, above, ample evidence exists that Chicanos are an indigenous peoples and, they, along with the many other indigenous peoples within the Treaty territory are party to this international document and thereby should have standing as an indigenous peoples within the criteria of international laws protecting indigenous peoples. We would welcome a thorough review and analysis of our assertions.

In the Treaty, the terms “Mexican” and “savage tribes” are used to discriminate between two essentially indigenous peoples based on a questionable distinction: Mexicans in the “ceded” territory, even though they were of indigenous origin, were extended citizenship as Americans under the Treaty because they had been citizens of another country, however, “savage tribes,” meaning other indigenous peoples were not. Yet, recent actions by indigenous peoples in the U.S. and multi-indigenous organizations attest, Chicanos (Mexican Americans), are recognized as an indigenous peoples.

For example, at the Sixth International Indian Treaty Conference held in Fort Belknap, Montana, in 1980, by Resolution, the Assembly of 98 Indian Nations of the Western Hemisphere, stated:

“*Recognizing* the Treaty of Guadalupe Hidalgo was signed in good faith, but the articles not adhered to, specifically the Mexican land grants, Indian rights and the assaults on the sovereignty of Indian peoples and their land…

*Hereby resolves* that the liberation struggle of the Chicano people and the Papago be supported in their right to self-determination and of the recognition of their indigenous heritage to the spiritual land of Aztlan.”

Through the process of colonization inflicted for centuries on Chicanos and other indigenous peoples: relegating their children to segregated schools and boarding schools; erasing their history through de jure governmental actions; maintaining these peoples as a subordinate working class; denying access to the ballot; and further segregating them through redlining and other means of substandard housing in poverty areas and reservations, the stage was set for creating a second-class people of both the Mexicans and the “savage tribes.” Historically then, when asserting their human rights under the Treaty, Chicanos and other indigenous peoples have been silenced, ignored, or rejected (see Francisco Maestas et al. v. George H. Shone et al. (1914), filed by Mexican Americans in Alamosa, Colorado, against the Alamosa School District Superintendent and Board of Education in 1913. Alamosa County. Combined Court. Alamosa, CO 81101. District Civil Roll #1, for an early school (and successful) school desegregation case).

The UN Declaration on the Rights of Indigenous Peoples, Article 37 states that, “indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”

Article 37 does not preclude indigenous peoples affected by treaties between two or more States but who were denied participation in the negotiation of those treaties from ever attaining the status of a formal party to such a treaty. While the Treaty of Guadalupe Hidalgo was not signed between a State and an indigenous peoples, it does contain provisions affecting indigenous peoples, as third parties. Further, Article 37 indicates that there is no statute of limitations to interpreting the meaning of the UN Declaration to open the Treaty to further study.

Special Rapporteur Miguel Alfonso Martínez intimated as much when, in presenting his international study of Indigenous Peoples’ Rights in 1999, he stated: “The Special Rapporteur is of the opinion that one should avoid making oneself a prisoner of existing terminology.” Martínez adds in Paragraph 54: “a narrow definition of ‘a treaty’ and ‘treaty-making’ would hinder or pre-empt any innovative thinking in the field. Yet it is precisely innovative thinking that is needed to solve the predicament in which many indigenous peoples find themselves at present,” and at Paragraph 55, it “would impede (or even preclude) any proper account of indigenous views on these issues, simply because of the widely-held rationale that indigenous peoples are not “States” in the current sense of the term in international law” (Study on treaties, agreements and other constructive arrangements between States and indigenous populations.” Final report by Miguel Alfonso Martínez, Special Rapporteur, 22 June 1999).

In addition, Special Rapporteur Martínez made specific reference to the Treaty in Paragraph 49: “It follows that the issue of treaties affecting indigenous peoples as third parties may continue to be relevant insofar as they remain in force and insofar as indigenous peoples already participate – or may in the future – in the implementation of their provisions. Among the 10 instruments previously considered for analysis, apart from the Lapp Codicil, several others would warrant further scrutiny, among them the 1794 Jay Treaty (see copy of the Jay Treaty at <https://avalon.law.yale.edu/18th_century/jay.asp> and the 1848 Treaty of Guadalupe Hidalgo, both of apparent special significance for the indigenous nations along the borders of the United States with Canada and Mexico respectively.” Martínez is asserting that the same rules should apply for treaties between a State and an indigenous peoples and for treaties between two or more States where indigenous peoples are excluded from participating as third parties, but **“…may in the future**.” (Emphasis added)

The issue then is whether a State, here Mexico and the U.S., can foreclose a right to an indigenous people covered in the Treaty simply because it has chosen to do so. We argue that a thorough scrutiny of the Treaty will show that it is very much in effect and open to current analysis and practice of international principles of law and human rights.

We recommend that EMRIP:

* Include in this current study, the Treaty of Guadalupe Hidalgo in which indigenous peoples were not formal Parties to the Treaty but have been and are adversely affected by the denial of rights under such a treaty and as recommended by Martínez in the original study of treaties.
* Request the Special Rapporteur on the Rights of Indigenous Peoples to consider rights violated in this border area, with specific consideration of the Treaty.
* Study the Treaty of Guadalupe Hidalgo, based on #11 of the EMRIP Concept Note, to “assess the extent to which Article 37 of the UN Declaration has been and is being implemented or considered nationally…It will demonstrate the connection between article 37 and other rights notably the right to self-determination, the right to maintain and strengthen their political, legal, economic, social, cultural institutions, the right to lands, territories and resources, and the right to redress, as outlined in the UN Declaration…”
* Specify the need for new joint problem solving approaches that correct the lack of FPIC and to facilitate constructive dialogue to include the Parties to the Treaty of Guadalupe Hidalgo, Chicanos and other indigenous peoples affected within the boundaries of the current Southwest U.S., understanding that the Treaty is a human rights document that affords a legal framework of international human rights law to address the shortcomings of the Treaty, and recommend methods to create respect for and promote the cultural, economic and political rights of Chicanos and other indigenous peoples afforded by human rights law and international norms.
* Recognize the need for a framework integrating offices under the UNHRC to oversee negotiating between the Parties of the Treaty of Guadalupe Hidalgo, drafting of appropriate documents, and ensuring legal principles and practice are applied through a juridical process as necessary. This would fulfill the recommendations made in the Martínez Study on the Rights of Indigenous Peoples.

**SIGNATORS**

|  |  |
| --- | --- |
| **Amber Lee Ortega**, member of Tohono O'odham Nation (Desert People), a descendant of Hia-Ced O'odham (Sand People), and descendant of A'al Vaippia (Quitobaquito Springs) | **David J. Garcia**, Tohono O'odham Nation (Desert People) O'odham Elders Council (Grass Roots) Former Tohono O'odham Legislator |
| **Antonio Gonzales**, Executive Director,AIM-West | **Ernesto Mireles**, Chair, MeXicanos 2070 Board of Directors |
| **Armando Rendón, Esq**., Founding Board Member of MeXicanos 2070 | **Gabriel Hernandez**, Founding Board Member,National Xicano Human Rights Council |
| **Carlos Hernandez, J.D.**, MeXicanos 2070 | **Joel Cabral**,Jefe de la Tribu Lipan Apache de Mexico |
|  | **Continental Network of Indigenous Women of the Americas** |

APPENDIX A

**Court Cases and the Treaty of Guadalupe Hidalgo**

The following are examples of court decisions within the United States judicial system that interpret the Treaty of Guadalupe Hidalgo. The cases cited were chosen due to their contradictory interpretations of the Treaty of Guadalupe Hidalgo and demonstrate how these contradictions have adversely effected the rights of indigenous and Chicano people. The following case law are not exhaustive by any means, as whole volumes could be written about the contradictory interpretations of the Treaty of Guadalupe Hidalgo. Further scrutiny of the Treaty of Guadalupe Hidalgo, as recommended by Former Rapporteur Miguel Alfonso Martinez, could clarify and remove potential barriers to the full breath and implementation of article 37 of the UN Declaration on the Rights of Indigenous People.

***Botiller vs Dominguez* 130 U.S. 238(1889**)

United States Supreme court decision in *Botiller* overruled California Supreme Court decision in the case of Dominga Dominguez.

Dominguez sought to recover possession of her land that had been claimed by settlers under homestead laws [[1]](#footnote-1) The settlers argued Dominguez had no legal title to her land due to her not proving ownership to the California Board of Land Commisioners , as stipulated by the California Land Act of 1851. Dominguez argued that since she had “perfect” title, the treaty protections applied to her and it was not necessary to confirm with the California Land claims commission which was established by the California Land act of 1851.

The district court and the California Supreme Court agreed, however, when the case appeared before the U.S. Supreme Court, the Supreme Court reversed the decision of the California Supreme Court and held that no title of Spanish or Mexican origin can be valid unless confirmed by the claims commission within the allotted time period. What’s interesting here is the court’s language and the insights it gives into the thinking that undergirds its holding, as stated

**“**That portion of this territory which afterwards became a part of the United States, under the designation of the 'State of California,' had been taken possession of during the war, in the year 1846. Most of it was in a wild state of nature, with very few resident white persons, and very little land cultivated within its limits. [[2]](#footnote-2)

And later the Supreme Court acknowledges it won’t or can’t rule on a case involving a treaty between two nations, Mexico and the United States:+

“With regard to the first of these propositions it may be said that so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute, enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing theprovisions of a treatywith a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.[[3]](#footnote-3)

The Supreme Court’s decision in *Botiller* contradicted previous holdings in regard to self-executing treaties, and in the event that congress violated the terms of the treaty it was a matter of international law (which would necessitate discussions between Mexico, the United States and effected third parties)[[4]](#footnote-4).

The Decision in *Botiller* has been relied on as recently as 2004 in the General Accounting Office Report on Treaty of Guadalupe Hidalgo Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico (GAO Report 2004).

The report makes no mention of the *Botiller* holding being potentially in conflict with customary international law “law of nations,” another example of lack of consistency in domestic courts with regard to the Treaty of Guadalupe Hidalgo[[5]](#footnote-5). The fact that the General Accounting Office would rely on the *Botiller* holding, a case which one legal scholar characterized as “Decisions such as *Botiller* .. join ranks with relatively contemporaneous cases such as *Plessy v. Ferguson,* *Dred Scott v. Sandford*, and *The Chinese Exclusion Case* as stark reminders of a not-so-distant and intolerant past”[[6]](#footnote-6) It further demonstrates the adverse effect, through a mishmash of rulings, the judicial bodies have had on the self-determination and sovereignty of the indigenous and Chicano peoples.

The following cases are examples of conflicting court decisions in regard to the religious freedoms guaranteed to indigenous peoples under the Treaty of Guadalupe Hidalgo.

# United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) **US District Court for the District of New Mexico - 632 F. Supp. 1301 (D.N.M. 1986) April 9, 1986**

# **The United States v. Abeyta case involved issues of religious freedom and protections of these freedoms guaranteed by the Treaty of Guadalupe Hidalgo and the First Amendment of the U.S. Constitution.**

# **Defendant Abeyta, a member of the Isleta Pueblo, was charged with violating The Bald and Golden Eagle Protection Act, 16 USC § 668. Abeyta filed a motion to dismiss the action for the reason that the Act does not apply to him** [[7]](#footnote-7) **Abeyta stated this due to the protections afforded him by the Treaty of Guadalupe. The District Court of New Mexico agreed with Abeyta and granted his Motion to Dismiss**[[8]](#footnote-8)

# **The court was unequivocal in its language and stated firmly that the Treaty of Guadalupe provided for legal and religious freedoms of the native people, as stated**

# **“**The court agrees that the Treaty of Guadalupe Hidalgo did confirm and perpetuate religious rights, including the use of eagle feathers in the rituals of Abeyta's religious fellowship, and that Congress did not abrogate this protection when it sought to conserve and nurture America's eagle population **“**[[9]](#footnote-9)

# **The District Court goes on to state:**

“Because the Treaty of Guadalupe Hidalgo afforded protection to the pueblos, however, it is in this dimension more than a settlement between then hostile nations: *it is a living Indian treaty. It memorializes a pledge to the Mexican nation that the United States would honor the rights of Indians living in the ceded territory at the time the treaty was executed. As such, it is a treaty of the United States securing the rights of Native Americans, and it is to be construed according to the special principles controlling interpretation of Indian treaties***.**See State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977); see also Pueblo of Isleta v. Universal Constructors, Inc., 570 F.2d 300 (10th Cir.1978) “[[10]](#footnote-10).

And again

“The treaty rights asserted by Abeyta are of high import. The Treaty of Guadalupe Hidalgo, unlike the treaties considered by other courts, is an international compact securing religious freedom to Mexican citizens in the ceded territories. The court need not and does not decide what hunting rights might attach to the New Mexico pueblos by virtue of the 1848 accords between the United States and Mexico. It is the guarantee of religious liberty in article IX of the treaty that, according to the government, Congress abrogated when it enacted the eagle protection laws”[[11]](#footnote-11).

# However, in Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990),

The Arizona district court arrived at a completely different holding and outright challenged the District Court of New Mexico’s interpretation in the previously mentioned Abeyta case.

The Havasupai nation in its complaint alleged that the Plan by Forest Service violated several rights and protections among these, the right to free exercise of religion and aboriginal right of access. The Havasupai invoked the Treaty as giving them protection and a religious right of access. The Arizona district court was not convinced by this argument and stated

“The District Court for the District of New Mexico determined that the Bald Eagle Protection Act did not repudiate the guarantee of religious freedom under the Treaty of Guadalupe Hidalgo. The district court considered the Treaty as an international compact securing religious freedom to Mexican citizens in the ceded territories. Id. at 1306. The district court concluded that it was up to Congress to abrogate the Treaty. Id. at 1306-07. In light of the fiduciary relationship to the Indians, the district court determined that Congress did not intend to repudiate the protections the court believed had been created by the Treaty. Id. at 1306-07”[[12]](#footnote-12).

The court’s rationale continues: “This decision from the District Court for the District of New Mexico is not binding upon this court, nor does this court find it to be persuasive. First, the validity of the decision is questionable in light of United States v. Dion, [476 U.S. 734](https://supreme.justia.com/cases/federal/us/476/734/), 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986). In Dion, the Supreme Court concluded that a treaty[9] with the Yankton Sioux Tribe did not protect an Indian from prosecution under the Bald Eagle Protection Act. Id. at 743, 106 S. Ct. at 2222. See, also, U.S. v. Thirty Eight Golden Eagles, [649 F. Supp. 269](https://law.justia.com/cases/federal/district-courts/FSupp/649/269/1631557/), 277-278 (D.Nev.1986) (holding, contrary to Abeyta, that Bald Eagle Protection Act was “not a facially unconstitutional burden to an Indian's right to free exercise of religion)”[[13]](#footnote-13)

And most telling,

“*The second and more compelling reason, however, is the plain language of the Treaty of Guadalupe Hidalgo itself*. The Treaty residents of what is now Arizona and New Mexico, formerly of Mexico, had the right to,

"Free exercise of their religion without restriction" until they became "incorporated into the Union of the United States." Thereafter they would be entitled to "the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution." *The Treaty, by its own terms, does not create any right beyond the constitutional religious freedom rights. The Treaty simply affords those rights to residents in the area prior to statehood. The court finds and concludes that no specific fiduciary duty is created by the Treaty of Guadalupe Hidalgo”[[14]](#footnote-14)*.

Both Courts are interpreting the Treaty of Guadalupe Hidalgo (which as a treaty should serve as the supreme law of the land) and both arrive at two very different conclusions. The inconsistent and at times harmful holdings of the United States’ judicial bodies, from state, district and even to the Supreme Court level have served as barriers to the right to self-determination, the right to maintain and strengthen distinct political, legal, economic, social, cultural institutions, the right to lands, and territories and resources and right to redress.

The following are other examples that attest to the confusing and inconsistent holdings of US courts in regard to the Treaty of Guadalupe Hidalgo.

**RAEL V. TAYLOR,876 P.2d 1210 (Colorado Supreme Court, 1994).**

**Case involving a 77,000 acre parcel of land that is part of the *Sangre de Cristo* Land Grant. The *Sangre de Cristo* Grant was awarded by Mexico in 1843 to Narciso Beaubien, the son of a nationalized Mexican citizen of French-Canadian heritage. The grant was for more than one million acres in what was then part of NM territory, today Colorado. By 1854, following the 1848 Mexican Cession, Charles (aka Carlos) Beaubien, Narciso’s father, had inherited the grant when Narciso was killed in the 1847 Taos Revolt.**

**Carlos petitioned the surveyor general who recommended and the U S Congress confirmed the grant. See Sánchez, *supra at 31-35, 95-97.* This extensive grant became the scene of much speculation and chicanery although life in the established villages continued in same fashion until the 1960s when a North Carolina lumber baron named Taylor purchased 77,000 acres of theretofore communal land at a “dirt cheap” price. Taylor “fenced out” the land grant heirs and in 1965 obtained a court ruling confirming his ownership and denying the heirs any right to the land. Life in the villages was upset and many heirs left to work in nearby cities. Other heirs stayed and fought against the injustice which included periodic “range wars.” The issue of land became one focal point during the Chicano Movement years; Reies López Tijerina being most frequently associated with this effort. And it was young Chicano Movement activists who picked up the fight and led what ultimately resulted in a 1994 Colorado Supreme Court ruling that the heirs have “access rights” to the grant although the court did not disturb Taylor’s fee simple title.**

**Summary: The *Rael* case illustrates how land grants were coveted, manipulated, and sources of speculation following the 1848 Mexican Cession which resulted in great land loss to Mexicanos and in violation of the TGH.**

**UNITED STATES V. JOSEPH, 94 U.S. 614 (1877). Following the reasoning in the *Lucero* case (below) the U.S. Supreme Court ruled that Taos Pueblo Indians were not “Indians” for purposes of federal policy since under Mexican law they were distinctive from Indians and the court upheld their land grants. During this same period the Court and Congress were reluctant to confirm collectively-owned land grants of Mexicano communities. See Conejos Land Grant above.**

**Summary: Congress and the U. S. Supreme Court treated Pueblo land grants and land grants to Mexicanos differently even when their reasoning should have been the same.**

**UNITED STATES V. LUCERO, 1 N.M. 422, (1869).**

**This case involved a land dispute between Mexicanos and Cochiti Pueblo. The precedential stakes in the case were high as the case would decide whether Pueblo land could be bought and sold as Congress had in 1858 confirmed the titles of 17 Spanish land grants to seventeen Pueblos in NM. One issue was whether Pueblo Indians became federal citizens under the Treaty of Guadalupe Hidalgo thereby occupying a distinctive position as opposed to other Indians and that Congress did not intend to treat Pueblos as other Indians. Mexico had extended citizenship rights to “civilized” Indians. Other Indians were seen as “savages.” Another issue set off a decades-long legal contest with the executive branch that advocated treating Pueblos like other Indians. If the Indian Trade and Intercourse Act of 1834 (which prohibited the sale of Indian lands) did not apply to the Pueblos then their property could be bought and sold. The *Lucero* court “uplifted” the Pueblos by considering them “civilized” but “shafted” them by allowing their land to be bought and sold. The case also served to reinforce the divide between Mexicanos and the Pueblos in terms of “whiteness.”**

**Summary: The *Lucero* decision underscores the legal thicket resulting from the different classifications of Indians under the Treaty. All of this is important because at the core of all the legal wrangling was the need to create a legal pretense that would permit additional land speculation by North Americans at the expense of native people.**

**UNITED STATES V. JULIAN SANDOVAL, 167 U.S. 278 (1897)**

**One of the major consequences of the 1848 Mexican Cession was the massive transfer of wealth – overwhelmingly in the form of land – from Indians and Mexicanos, who had proprietary claims to millions of acres of land, to the U.S. Government and North American individuals and corporations. This loss of land base resulted in the impoverishment of indigenous people and enrichment of the federal government and private parties. Much of this lost land became part of the U.S. Forest Service and Bureau of Land Management while other parts were distributed to private parties under the Donation Land Claim Act of 1850, Homestead Acts of 1862, 1866, 1873, 1904, 1906, 1909, 1916 and 1930, and Desert Lands Act of 1877.**

**In 1894 heirs to the San Miguel del Vado community land grant petitioned the U.S. Court of Private Land Claims for recognition of their 315,000 acre Spanish land grant of 1794. The heirs were *genizaros/mestizos*. The U.S. Supreme Court confirmed a mere 5,000 acres when it confirmed individual plots but ruled that the communally owned lands belonged to the sovereign; meaning that following the 1848 Mexican Cession the communally owned lands now belonged to the federal government.**

**Summary: The San Miguel del Vado/Sandoval case symbolizes the failure of the U.S. government to abide by the property rights Article VIII of the Treaty.**

**U.S.A. V. AMBER ORTEGA, CASE NO.** 20-mj-08904-N/A-LAB**, U.S. District Court, Tucson Division.**

**In 2020, Ortega was charged with misdemeanor counts of interference with agency functions and violation of a closure order when she and others were protesting construction of the border wall along the Mexican border. The area of the protest had a long history of food gathering and sacred ceremonies by the Tohono O’odham indigenous nation. Ortega’s defense hinged on the 1993 Religious Freedom Restoration Act which states that the federal government may not “substantially burden a person’s exercise of religion.” Protection of cultural rights is also a part of the Treaty of Guadalupe Hidalgo. In November 2021 the trial court judge ruled against Ortega and refused to allow Ortega to defend herself in this fashion. Then in January 2022 the same judge reversed her prior ruling and found Ortega not guilty based on new evidence that proved the government had placed a “substantial burden” on Ortega’s exercise of religion.**

**Summary: The Ortega case illustrates that as society moves towards greater understanding and appreciation of cultural differences, new laws are enacted protecting these human rights, many of which are part of earlier treaty rights that had not been enforced. The Ortega case also demonstrates how many of the legal issues and challenges faced by indigenous peoples in previous centuries are still present today.**

APPENDIX B

**Contributors to preparation of this reply to EMRIP**:

David J. Garcia, Tohono O'odham Nation (Desert People) O'odham Elders Council (Grass Roots) Former Tohono O'odham Legislator

Antonio Gonzales, (Comca’Ac/Chicano), Executive Director, AIM-West ([www.aim-west.org](http://www.aim-west.org/))  participant in numerous UN bodies since 1983 including the annual Permanent Forum on Indigenous Issues since 2009.

Gabriel Hernandez, Founding Board Member, National Xicano Human Rights Council

Carlos Hernandez, Founding Board Member, MeXicanos 2070

Amber Lee Ortega, member of Tohono O'odham Nation (Desert People), a descendant of Hia-Ced O'odham (Sand People), and descendant of A'al Vaippia (Quitobaquito Springs)

Armando Rendón, (Kickapoo/Chicano) Founding Board Member, MeXicanos 2070; CEO, Somos en escrito Literary Foundation

1. Griswold del Castillo , The Treaty of Guadalupe A Legacy of Conflict (1990) pgs.75-77 [↑](#footnote-ref-1)
2. Botiller et al. v. Domínguez 130U.S.238(1889) [↑](#footnote-ref-2)
3. Ibid [↑](#footnote-ref-3)
4. DAVID BENAVIDES & RYAN GOLTEN, Righting the Record: A Response to the GAO’s 2004 Report Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico [↑](#footnote-ref-4)
5. Ibid [↑](#footnote-ref-5)
6. Christine Klein, Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo, 26 N.M. L. REV. (1996). [↑](#footnote-ref-6)
7. United States v. Abeyta 632 F.Supp.1301 (1986) [↑](#footnote-ref-7)
8. Ibid [↑](#footnote-ref-8)
9. Ibid [↑](#footnote-ref-9)
10. Ibid [↑](#footnote-ref-10)
11. Ibid [↑](#footnote-ref-11)
12. #  Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990)

 [↑](#footnote-ref-12)
13. Ibid [↑](#footnote-ref-13)
14. Ibid [↑](#footnote-ref-14)