

LAND GRANT-MERCEDES TRADITIONAL USE
RECOGNITION AND CONSULTATION ACT

NOVEMBER 19, 2020.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. GRIJALVA, from the Committee on Natural Resources,
submitted the following

R E P O R T

[To accompany H.R. 3682]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3682) to provide for greater consultation between the Federal Government and the governing bodies of land grant-mercedes and acequias in New Mexico and to provide for a process for recognition of the historic-traditional boundaries of land grant-mercedes, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Land Grant-Mercedes Traditional Use Recognition and Consultation Act”.

SEC. 2. DEFINITIONS.

In this Act:

(1) **ACEQUIA.**—The term “acequia” has the meaning of the term “community ditch” as that term is construed under New Mexico Stat. 73–2–27.

(2) **COMMUNITY USER.**—The term “community user” means an heir (as defined under the laws of the State) of a qualified land grant-merced.

(3) **GOVERNING BODY.**—The term “governing body” means the board of trustees authorized under State law with the control, care, and management of a qualified land grant-merced.

(4) **HISTORICAL-TRADITIONAL USE.**—The term “historical-traditional use” means, for a qualified land grant-merced, for noncommercial benefit—

- (A) the use of water;
- (B) religious or cultural use and protection;
- (C) gathering herbs;
- (D) gathering wood products;

(E) gathering flora or botanical products;
 (F) grazing, to the extent that grazing has traditionally been carried out on the land, as determined by the Secretary concerned in consultation with the governing body of the affected land grant-merced;

(G) hunting or fishing;

(H) soil or rock gathering; and

(I) any other traditional activity for noncommercial benefit that—

(i) has a sustainable beneficial community use, as determined by the Secretary concerned in consultation with the governing body of the affected land grant-merced;

(ii) supports the long-term cultural and socioeconomic integrity of the community, as determined by the Secretary concerned in consultation with the governing body of the affected land grant-merced; and

(iii) is agreed to in writing by the Secretary concerned and the governing body of the qualified land grant-merced.

(5) INDIAN TRIBE.—The term “Indian Tribe” has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

(6) QUALIFIED LAND GRANT-MERCED.—The term “qualified land grant-merced” means a community land grant issued under the laws or customs of the Government of Spain or Mexico that—

(A) is recognized under New Mexico Statutes Chapter 49 (or a successor statute); and

(B) has a historic or cultural record of use of lands under the jurisdiction of a Secretary concerned or their original or patented exterior boundaries are located adjacent to land under the jurisdiction of a Secretary concerned.

(7) SECRETARY CONCERNED.—The term “Secretary concerned” means the relevant Secretary of the Department of Agriculture or the Department of the Interior, with respect to land under the jurisdiction of that Secretary.

(8) STATE.—The term “State” means the State of New Mexico.

SEC. 3. GUIDANCE ON PERMIT REQUIREMENTS FOR QUALIFIED LAND GRANT-MERCEDES.

(a) IN GENERAL.—In accordance with all relevant laws, including subchapter II of chapter 5 of title 5, United States Code (commonly known as the “Administrative Procedure Act”) and all applicable environmental laws, and not later than 2 years after the date of the enactment of this Act, the Secretary concerned, acting through the appropriate officials of the Department of Agriculture and Department of the Interior in the State, in consultation with the New Mexico Land Grant Council, the governing bodies of qualified land grant-mercedes, and Indian Tribes, shall issue the written guidance described in subsection (b).

(b) CONTENTS OF GUIDANCE.—

(1) IN GENERAL.—Written guidance issued under subsection (a) shall include—

(A) a description of the historical-traditional uses that—

(i) a community user or a governing body of a qualified land grant-merced may conduct for noncommercial use on land under the jurisdiction of the Secretary concerned; and

(ii) require a permit from the Secretary concerned;

(B) administrative procedures for obtaining a permit under subparagraph (A);

(C) subject to subsection (c), the fees required to obtain that permit;

(D) the permissible use of motorized and nonmotorized vehicles and equipment by a community user or the governing body of a qualified land grant-merced for noncommercial historical-traditional use on land under the jurisdiction of the Secretary concerned;

(E) the permissible use of mechanized vehicles or equipment by a community user or governing body of a qualified land grant-merced for historical-traditional use on land under the jurisdiction of the Secretary concerned; and

(F) the permissible use of non-native material by a community user or the governing body of a qualified land grant-merced for any of the uses covered in paragraphs (2) and (3) on land under the jurisdiction of the Secretary concerned.

(2) ROUTINE MAINTENANCE AND MINOR IMPROVEMENTS.—Written guidance issued under subsection (a) shall address routine maintenance and minor improvements of infrastructure owned or used by a qualified land grant-merced on land under the jurisdiction of the Secretary concerned, including—

(A) cleaning, repair, or replacement-in-kind of infrastructure;

(B) maintenance and upkeep of a trail, road, cattle guard, culvert, or fence;

(C) maintenance and upkeep of a monument or shrine;

(D) maintenance and upkeep of a community cemetery;

(E) maintenance and upkeep of a livestock well, water lines, water storage container, or water tank; and

(F) any other routine maintenance or minor improvement associated with historical-traditional uses identified by any of the entities described in subsection (a) in the process of developing the guidance.

(3) MAJOR IMPROVEMENTS.—Written guidance issued under subsection (a) may describe the process for managing major improvements of infrastructure owned or used by a qualified land grant-merced on land under the jurisdiction of the Secretary concerned, including—

(A) construction or expansion of a community water or wastewater system;

(B) construction or major repair of a livestock well, water lines, water storage container, or water tank;

(C) construction or major repair of a monument or shrine;

(D) installation of a cattle guard;

(E) construction of a trail, road, or fence;

(F) construction or expansion of a cemetery; and

(G) any other major improvement associated with historical-traditional uses, as determined by the Secretaries concerned.

(4) NOTICE AND COMMENT.—Written guidance issued under subsection (a) shall set forth the policies and procedures for notice and comment on planning decisions, routine engagement, and major Federal actions that could impact historical-traditional uses of a qualified land grant merced, and methods of providing notice under subsection (a), including—

(A) online public notice;

(B) printed public notice;

(C) mail, including certified mail, and email notifications to governing bodies through a listserv; and

(D) mail, including certified mail, and email notifications to the Land Grant Council.

(c) FEES FOR QUALIFIED LAND GRANT-MERCEDES.—Where the Secretary concerned is authorized to consider the fiscal capacity of the applicant in determining whether to reduce or waive a fee for a permit for historical-traditional uses, the Secretary shall consider—

(1) the socioeconomic conditions of community users; and

(2) the annual operating budgets of governing bodies of qualified land grant-mercedes.

SEC. 4. CONSIDERATION OF HISTORICAL-TRADITIONAL USE IN LAND MANAGEMENT PLANNING.

In developing, maintaining, and revising land management plans pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712) and section 6 of the National Forest Management Act (16 U.S.C. 1604), as applicable, the Secretary concerned shall, in accordance with applicable law, consider and, as appropriate, provide for and evaluate impacts to historical-traditional uses by qualified land grants-mercedes.

SEC. 5. SPECIAL USE PERMITS FOR ROUTINE MAINTENANCE AND MINOR IMPROVEMENTS OF ACEQUIAS.

(a) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary Agriculture shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to promulgate such regulations as are necessary to carry out and implement the Forest Service's Acequia Guidance Document, dated July 2, 2019.

(b) PUBLICATION OF PROPOSED REGULATIONS.—The Secretary shall cause to be published in the Federal Register proposed regulations to implement this section not later than 21 months after the date of the enactment of this Act.

(c) EXPIRATION OF AUTHORITY.—The authority to promulgate regulations under subsection (a) shall expire 30 months after the date of the enactment of this Act.

(d) EXTENSION OF DEADLINES.—The Secretary may extend, for not more than 180 days, a deadline under subsection (b) or (c) if—

(1) the negotiated rulemaking committee referred to in subsection (e) concludes that the committee cannot meet the deadline; and

(2) the Secretary so notifies the appropriate committees of Congress.

(e) COMMITTEE.—

(1) **ESTABLISHMENT.**—The Secretary shall ensure that a negotiated rule-making committee is established under section 565 of title 5, United States Code, to carry out this section.

(2) **MEMBERS.**—The members of the committee shall be—

(A) the relevant Regional Forester (or a designee of the relevant Regional Forester); and

(B) the selected representative of a nongovernmental organization identified by the Secretary of Agriculture as having a statewide acequia membership, nominated by such organization to the Secretary of Agriculture.

(3) **REQUIREMENTS.**—The committee shall confer with, and accommodate participation by—

(A) representatives of any agency or commission of the State government established or designated by the State to advise public officials on proposed legislation affecting acequias; and

(B) State acequia elected officials.

(f) **EFFECT.**—The lack of promulgated regulations shall not limit the effect of the Forest Service’s Acequia Guidance Document, dated July 2, 2019.

SEC. 6. SAVINGS.

Nothing in this Act shall be construed—

(1) to impact the State’s authority to regulate water rights, in conformance with all State and Federal laws and regulations;

(2) to impact the State’s authority to regulate the management of game and fish, in conformance with all State and Federal laws and regulations;

(3) to impact any valid existing rights or valid permitted uses, including grazing permits;

(4) to create any implicit or explicit right to grazing on Federal lands; or

(5) to alter or diminish any rights reserved for an Indian Tribe or members of an Indian Tribe by treaty or Federal law.

Amend the title so as to read:

A bill to provide for greater consultation between the Federal Government and the governing bodies and community users of land grant-mercedes in New Mexico, to provide for a process for recognition of the historic-traditional uses of land grant-mercedes, and for other purposes.

PURPOSE OF THE BILL

The purpose of H.R. 3682 is to provide for greater consultation between the federal government and the governing bodies of land grants-mercedes and acequias in New Mexico.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 3682 enhances consultation between federal land management agencies and the governing bodies of New Mexico’s land grants-mercedes and acequias. Land grant-merced communities and acequia users have long been a presence on the New Mexican landscape, operating since before these lands were part of the United States. The bill recognizes the complicated history of interaction between the federal government and these communities and endeavors to clarify and improve these management relationships under existing statutes and regulations.

From the late 1600s through 1846, Spain and the Mexican Republic granted more than 150 land grants to communities and individuals throughout the area that would become the Southwestern United States to promote settlement on frontier lands.¹ In New Mexico, these grants included private tracts that were made in the name of the grants’ settlers as well as large tracts of communal

¹See generally N.M. LAND GRANT COUNCIL, BRIEFING ON LAND GRANT-MERCEDES HISTORY AND CURRENT LEGISLATION (2018), https://lgc.unm.edu/sites/default/files/desktop/hr_6487-taditional_uses_bill_lujan_0.pdf, of which the above text is largely excerpts.

lands that were set aside for use by all local residents to provide the necessary resources to sustain the entire community.

In 1848, the Treaty of Guadalupe Hidalgo (Treaty) that ended the Mexican-American War transferred more than half of Mexico's territory to the U.S. and required the U.S. to establish a process for adjudicating and recognizing land grant titles. The adjudication of land grant titles in New Mexico was subject to two different processes: the first process was administered by the Office of the Surveyor General of New Mexico from 1854 to 1891 and the second by the Court of Private Land Claims from 1891 to 1904. The established processes varied by state and were often subverted by corruption and problematic surveys. Land grants-mercedes have been recognized in state statute in New Mexico since the late 1800s, and in 2004 they were formally recognized under state law as political subdivisions of the state of New Mexico, affirming their local government status. Land grants-mercedes are governed by an elected board of trustees tasked with the control, care, and management of the land grant-merced common property and assets for the benefit of their respective communities.

In addition to community land grants-mercedes, Spain managed a centuries-old form of water delivery and governance, known as acequias, across New Mexico to create a cultural landscape and way of life centered around local agriculture. In New Mexico, acequias are governed as political subdivisions of the state and are composed of a board of private landowners that is responsible for the upkeep and maintenance of the acequias as well as for the administration of surface water rights along the acequias.

H.R. 3682, as updated by Chair Grijalva's amendment in the nature of a substitute, clarifies the processes through which land grants-mercedes and acequia users can access certain resources on federal land. The bill requires federal land management agencies to compile guidance on permitting processes and fees for certain activities, including resource uses and the maintenance of existing facilities. It also provides additional clarity on timelines and opportunities to comment on federal land management decisions, in order for these communities to more readily participate in the public processes accompanying major federal actions.

H.R. 3682, as amended, recognizes the importance of protecting culturally important sites for land grant communities and emphasizes the need to consider these uses in the process of planning federal actions. Additionally, the bill instructs the Secretary of Agriculture to begin a negotiated rulemaking regarding acequia infrastructure. This process should implement the existing U.S. Forest Service guidance as well as previous rulings on "routine maintenance" and "construction" from federal courts, such as in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005), in order to resolve longstanding concerns regarding acequia upkeep and maintenance.

The intent of the bill is not to undermine valid existing rights or to extend additional implicit rights, but to recognize long-practiced traditional uses by land grant-merced communities and acequia users on lands managed by the federal government and to clarify the existing relationship between land grant-merced communities and acequia users and the federal government in order to minimize conflict and confusion surrounding resource management.

COMMITTEE ACTION

H.R. 3682 was introduced on July 10, 2019, by Representative Ben Ray Luján (D–NM). The bill was referred solely to the Committee on Natural Resources, and within the Committee to the Subcommittee on National Parks, Forests, and Public Lands and the Subcommittee on Water, Oceans, and Wildlife. On June 18, 2020, the Subcommittee on National Parks, Forests, and Public Lands held a hearing on the bill. On July 29, 2020, the Natural Resources Committee met to consider the bill. The Subcommittees were discharged by unanimous consent. Chair Raúl M. Grijalva (D–AZ) offered an amendment in the nature of a substitute. The amendment was agreed to by unanimous consent. No additional amendments were offered. The bill, as amended, was adopted and ordered favorably reported to the House of Representatives by unanimous consent.

HEARINGS

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress—the following hearing was used to develop or consider H.R. 3682: legislative hearing by the Subcommittee on National Parks, Forests, and Public Lands held on June 18, 2020.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII AND
CONGRESSIONAL BUDGET ACT

1. *Cost of Legislation and the Congressional Budget Act.* With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 20, 2020.

Hon. RAÚL M. GRIJALVA,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3682, the Land Grant-Mercedes Traditional Use Recognition and Consultation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 3682, Land Grant-Mercedes Traditional Use Recognition and Consultation Act			
As ordered reported by the House Committee on Natural Resources on July 29, 2020			
By Fiscal Year, Millions of Dollars	2021	2021-2025	2021-2030
Direct Spending (Outlays)	0	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	1	3	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	< \$5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

H.R. 3682 would require the Bureau of Land Management (BLM) and the Forest Service to develop guidance clarifying how land grant communities in New Mexico can access resources and conduct traditional activities such as grazing and wood cutting on federal land. The bill also would direct the Forest Service to issue regulations on the maintenance of acequias, or community irrigation systems, located on federal land in the state.

Using information from BLM and the Forest Service, CBO estimates that the agencies would require 10 additional employees at an average annual cost of \$110,000 each for two years to collect information on traditional activities, determine the boundaries of land grant communities, and develop the guidance. The cost for those additional employees over the 2021–2022 period would total \$2 million. Based on the costs of similar activities, CBO estimates that the Forest Service would incur costs of \$1 million to issue regulations on the maintenance of acequias. In total, we estimate that implementing H.R. 3682 would cost \$3 million over the 2021–2025 period; such spending would be subject to the availability of appropriated funds.

Fees from grazing, the sale of forest products, and special use permits on federal land are classified in the budget as offsetting receipts, or reductions in direct spending. CBO expects that under H.R. 3682 BLM and the Forest Service would be more likely to waive or reduce fees paid by land grant communities. However, CBO estimates that any increases in direct spending would be insignificant over the 2021–2030 period.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goals and objectives of this bill are to provide for greater consultation between the federal government and the governing bodies of land grants-mercedes and acequias in New Mexico.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

UNFUNDED MANDATES REFORM ACT STATEMENT

This bill contains no unfunded mandates.

EXISTING PROGRAMS

This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

PREEMPTION OF STATE, LOCAL, OR TRIBAL LAW

Any preemptive effect of this bill over state, local, or tribal law is intended to be consistent with the bill's purposes and text and the Supremacy Clause of Article VI of the U.S. Constitution.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes to existing law.

SUPPLEMENTAL, MINORITY, ADDITIONAL, OR DISSENTING VIEWS

None.