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Lobato v. Taylor.

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LOBATO V. TAYLOR

JEFFREY A. GOLDSTEIN†

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I. Introduction

I am an attorney practicing law in Denver, Colorado. Since 1978, I have represented the successors in title to the original settlers of the Mexican Sangre de Cristo land grant in their legal effort to regain historic use rights to pastures, wood, and timber upon the mountains east of their homes and farms located in Southern Colorado. These rights were all necessary to their survival and were exercised for more than 100 years until extinguished by a 1964-Torrens Title Decree[1] entered without personal service upon them.

Professor Peter Reich has also addressed the AALS Winter Conference. His insight and analysis are important to an understanding of this historic legal struggle. His paper comments upon many of the points of property law addressed by the Colorado Supreme Court in its June 24,

† Jeffrey A. Goldstein, Esq., Brauer, Buescher, Goldhammer & Kelman, P.C., Denver, CO. This paper was presented at the Joint Program of Sections on Indian Nations and Indigenous Peoples, Law and Anthropology, and Property Law, at the Association of American Law Schools (AALS) Annual Meeting, Washington, D.C., Jan. 4, 2003. The program was titled "Property and the Role of Land-Based Cultural Heritage - Global and National." I want to thank the AALS for inviting me to participate with its members and distinguished guests on this panel. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the plaintiffs or of counsel in the case of *Lobato v. Taylor.*

1. Torrens is a system of land title registration that seeks "to enhance certainty of titles by establishing mechanisms to resolve all adverse claims to real property in one proceeding." Rael v. Taylor, 876 P.2d 1210, 1219 (Col. 1994). However, those seeking these protections must make diligent inquiry into the identity of all reasonably ascertainable claimants who must be named and served. *Id.* at 1226-27.

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2002 decision in *Lobato v. Taylor*.[2] He also addresses the role this case can play in the law school classroom as well as his authorship of a critical *amicus curie* brief submitted to the Court in this litigation.

This paper will focus upon the historical and legal background and context leading up to this landmark decision. *Lobato*, I submit, is not only a vindication of my clients' just claims, but also will have wide significance to the land struggles of local and indigenous peoples through the southwest and beyond. At the outset, I must point out that the Colorado Supreme Court's opinion has not yet been released for publication. This is because, in a most unusual move, the Court retained jurisdiction, "[a]s a matter of judicial economy, and as a matter of fairness, given the forty-one-year denial of access to the Taylor Ranch and this twenty-one-year litigation,"[3] to review what it described as the only remaining appellate issue "[b]efore we remand to the trial court for a permanent order of access."[4]

On December 4, 2002, the Court heard oral arguments on the remaining issue of whether the trial court had properly applied its 1994 ruling in *Rael v. Taylor*[5] concerning the due process issue of whether the landowners' property was taken without proper notice.[6] The resolution of that issue will determine the extent of the class to benefit from the *Lobato* decision.[7]

II. Historical Facts

On May 11, 1863, Carlos Beaubien, before a committee of settlers and in the presence of two witnesses, penned a most unique document, later to become the subject matter of this protracted litigation pursued before every state and federal jurisdiction constitutionally available to its litigants.[8]

Beaubien was born a French Canadian, but became a naturalized Mexican citizen when he married into an influential Taos family. He was the successor in interest to the Sangre de Cristo land grant, next in line to his son, Narciso Beaubien, and a friend's son, Luis Lee.[9] In 1844, these two teenagers were granted land in what is now North Central New Mexico and Southern Colorado as a part of Mexico's effort to settle its northern

2. No. 00-SC-527, 2002 WL 1360432 (Colo. June 24, 2002).
3. Lobato v. Taylor, No. 00-SC-527, 2002 WL 1360432, at *16 (Colo. June 24, 2002).
4. *Lobato*, 2002 WL 1360432, at *17.
5. 876 P.2d 1210 (Colo. 1994).
6. *See generally* Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).
7. For recent developments, see VII, p. 193, infra.
8. *Lobato*, 2002 WL 1360432, at *1-2.
9. *See Rael* 876 P.2d at 1213.

frontier as a buffer against U.S. "manifest destiny" and western expansion. Known as the Sangre de Cristo land grant, its two-mile high mountains often reflect the setting sunset in a flood of red.

In their 1863 grant application, Beaubien and Lee represented that the land was fertile, watered by the streams and rivers emanating from the mountains occupying its entire eastern edge, and that the land contained "all that is necessary for its settlement, the creation of Colonies, and the raising of horned and woolly cattle."[10] Before they were killed in the 1847 Taos rebellion, the two teenagers with the help of Narciso's father, had made arrangements with Charles Bent, friend of Kit Carson, to bring settlers upon the grant. Carlos Beaubien became the sole owner of the grant after the death of Narciso and Luis Lee. Settlement was attempted, but could not continue due to the outbreak of war between the United States and Mexico.

By 1860, Beaubien had further evidenced his compliance with the promises contained in the grant application for the establishment of settlements along the Culebra and its tributaries by: 1) entering into an agreement with the U.S. Army for defense of the new settlements through the establishment of Fort Massachusetts, 2) verbally promising town plots and farm lands to settlers agreeing to move from Taos and Rio Arriba Counties in what is now Northern New Mexico to the new frontier, and 3) bringing the land into productive use. Based upon representations to this effect, Congress approved Beaubien's application for confirmation of the grant. The size of the grant was eventually settled after litigation resolved by the U.S. Supreme Court in the case of *Tameling v. U.S. Freehold and Emigration Company*.[11]

III. The Beaubien Document

What is now known as the Beaubien Document was a formal writing, penned and signed on May 11, 1863 after the establishment of the Colorado Territory. It is unique in many respects, not the least because it was Colorado's first written community plan. The document provided for: 1) the lay out of town lots and roads, 2) the setting aside of land for the community Church and flour mills, 3) the orientation of dwellings to allow for proper drainage, 4) the setting aside of certain uncultivated lands to preserve limited water resources, 5) the establishment of the vega

10. Factual references to the record before the court are not included because the record will not be available to the public until the final judgment is entered. However, a wealth of documentary evidence and expert opinions have been gathered during the course of this 21 year litigation and, once organized into an archive will be of significant value to the legal and academic community.

11. 93 U.S. 644 (1877).

claimed to be the oldest commons west of Boston, and 6) for the settler's necessary "benefits of pastures, water, firewood and timber," with the provision that the settlers would "always [be] taking care that one does not injure another."[12] This last provision was of such importance to anyone settling in these high, mountain valleys, that similar language was included in Beaubien's Grant of Fort Massachusetts to the U.S. Army.[13] These provisions were the nineteenth century equivalent of modern community plans which provide for electricity, natural gas, water, roads, and access to grocery stores. Beaubien and the settlers could not have survived without these resources,[14]as the Court in *Lobato* also found. The document ended with the directive, that all who came to the area, whether or not with any rights to land, had the obligation to bear arms and defend the community.

After Beaubien's death in 1864, the underlying fee title to the grant was sold by his estate to William Gilpin, who was a land speculator and Colorado's first Territorial Governor.[15] Gilpin specifically promised to recognize and honor the settlement rights before then conceded by his predecessor in title.

In what is now the Taylor Ranch, and known locally as La Sierra, successor landowners enjoyed the continued and uninterrupted use of the grant for more than 100 years.

IV. The Torrens Action

In 1960, the last unfenced portion of the grant was sold by the Costilla Land Company to Jack Tarlan Taylor, who was a lumberman from North Carolina and ironically said to be a direct descendent of General and U.S. President Zachary Taylor. Taylor paid less than $7.00 per acre for the 77,000 acre parcel which included Culebra Peak, the most southern 14,000 foot peak in the Rocky Mountains.[16] This area had abundant streams and riparian areas, grassy mountain slopes, wildlife including a pure population of endangered Rocky Mountain Cut Throat Trout, herds of deer, elk, and bear, and all variety of wood and timber.

Why did Taylor get such a deal? Because there was a small cloud on his title, described later in the New Yorker Magazine as the universal

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12. *Id.*

13. Grant of Fort Massachusetts to the U.S. Army, Taos N.M. Court Reporter Record Appendix B, Taos County Records, Deed Records 120-21, (1853-1869) (on file with author).

14. *See generally Lobato*, 2002 WL 1360432.

15. Kay Matthews, *San Luis Residents Get Back Their Grazing Rights*, Colo. Cent. Mag, Sept., 2002, at 32, *available at* http://www.cozine.com/archive/cc2002/01030321.htm (last visited Apr. 8, 2003).

16. Tom Faxon, *An Oral History: Raphael J. Moses*, 27 Colo. Law., No. 3, Mar. 1998.

understanding of local residents that they could continue to exercise their historic usufruct rights in perpetuity. In fact, Taylor's deed contained express "subject to" language concerning the prescriptive claims of the local people and the "so-called settlement rights." Taylor was not without resources. Upon the advice of Byron White, he sought the help of a local San Luis Valley attorney, Rafael Moses.[17] Moses knew a lot about the issue. In 1938, his uncle wrote a letter to a leader of the community reaffirming the rights to pastures, wood and timber on the mountainous portions of the grant. He further opined that local property owners had the right to defend those rights against anyone. In spite of this knowledge, Moses was later to disclose that he consulted with Federal District Court Judge Alfred A. Arraj, for whom Denver's new Federal Court House is named, and they decided that an action could be commenced on grounds of diversity, more than 200 miles away from the land in Denver.[18] Taylor would go to court to rid the land of its "little cloud," by use of Colorado's Torrens Title Registration Act.[19]

By 1967, Taylor had obtained what he desired. Although Moses would later admit that his representation of Taylor was one of the biggest mistakes of his life, he and the other attorneys that Taylor hired after he failed to pay Moses his legal fees,[20] obtained the Torrens decree extinguishing the rights and won an appeal before the United States Court of Appeals for the Tenth Circuit in the case of *Sanchez v. Taylor*.[21]

With his legal victory in hand, Taylor repeatedly attempted to bar access to the Mountain, now known as the Taylor Ranch. What had been considered by all to be the legal use of La Sierra was now considered by Taylor to be poaching.[22] Costilla County, always reliant upon a subsistence economy for its survival, had now become the poorest county in the state. Wood stoves for heating and cooking could not be fueled, and many sought welfare assistance to insure these basic needs. Sheep and cattle herds thinned without access to summer pastures. By 1965 their populations had dropped by 50%, and today both livestock populations have been all but decimated.

In 1978, violence between Mr. Taylor, his hired hands, and the locals, was so widespread that the press ascribed the label of "Range War" to the dispute. Many, but not all of the elders of the community, had all put given up hope.

17. Faxon, *supra* note 14.
18. *Id.*
19. Faxon, *supra* note 23.
20. *Id.*
21. 377 F. 2d 733 (10th Cir. 1967).
22. *Matthews*, *supra* note 14.

V. Rael v. Taylor

However, by 1978, some new voices could be heard speaking out against the universally perceived injustice. Vietnam veterans, Chicano activists, and a few of the most respected elders in the community, including then 80-year-old Apolinar Rael,[23] had not given up. They formed the Land Right Counsel with a grant from the Catholic Churches' Campaign for Human Development and obtained papers from the Federal Court and archives throughout the Southwest. They researched and consulted with experts in Spanish and Mexican land grants, and they found some "progressive," sixties educated, ex-legal services, card carrying Lawyers Guild attorneys to take up their cause, of course on a "pro bono" basis.

In 1981, my law firm, Karp, Goldstein and Stern, drafted and filed a class action complaint on behalf of the successors in interest to the original settlers on the grant. We specifically set forth allegations collaterally attacking the Torrens decree on grounds that Taylor had failed to name and serve more than 90% of the property owners in Costilla County; and furthermore, that the Torrens Trial Court and the Tenth Circuit Court of Appeals had made serious errors of fact and law. In 1984, the complaint was dismissed on Defendant Taylor's motion for summary judgment, and that ruling was upheld by the Colorado Court of Appeals.[24]

In 1994, the case finally made its way to the Colorado Supreme Court, and in a four to three decision, the case was reversed and remanded for a trial on the issue of whether Taylor acted reasonably in failing to identify, ascertain, name and personally serve property owners in Costilla County.[25] This landmark decision not only gave hope to my clients, but also encouraged other attorneys, and even some law professors, to join the legal team.[26]

On remand the case was bifurcated. In October 1997, the trial court conducted a hearing on the due process issue and made its ruling which is

23. Becky Rumsey, *A Lost Land Grant: Can it be Reclaimed?*, High Country News, Oct. 18, 1993, *available at* http://www.hcn.org/1993/oct18/dir/lead.html (last visited May 15, 2003).

24. Rael v. Taylor, 832 P.2d 1011, 1015 (Colo. Ct. App. 1991).

25. *See generally* Rael v. Taylor, 876 P.2d 1210 (Colo. 1994) (en banc).

26. It is not possible in this short paper to give proper credit to my clients and all of the attorneys, legal workers, experts and others, who donated thousands of hours to this twenty-one year effort. Special recognition is due the trial and appellate team which includes: Watson Galleher, Robert Maes, Dave Martinez, Julia Waggener, William Schoeblerlein, Rabecca Fisher, Jerry Gordon, Elisabeth Arenales and Norman Haglund. *Amicus Curie* briefs were prepared by two distinguished law professors, Fred Cheever of Denver University Law School, and Peter Reich of Whittier School of Law. David Miller also prepared an *amicus curie* brief on behalf of the ACLU.

the subject of the recent oral argument made before the Colorado Supreme Court in *Lobato.*

The trial on the merits was held in the spring of 1998. At the conclusion of that trial, the court dismissed all of the landowner's claims, but nonetheless made a number of findings that supported the plaintiffs. The findings included that all title to property in Costilla County traces back to Beaubien without interruption, that the landowners exercised their rights upon the Taylor ranch without interference from the time of Beaubien up to Taylor's purchase of the ranch in 1960, and that the landowners could not have survived without access to that mountain land.

In spite of these findings however, the trial court followed the prior reasoning of the *Torrens* and *Sanchez* decisions, and concluded that the plaintiffs had established none of their claims. On appeal, the Colorado court of appeals upheld those findings, and also added that the Beaubien document failed to comply with the Territorial Laws of 1860, in that it did not identify by legal description the land to be burdened, it did not contain the grantee's "christian and surnames," and that it failed to include words of inheritance; finding all these elements necessary under that short lived statute.[27] The court of appeals also opined that the Beaubien Document was not ambiguous, and did not contain any latent ambiguity.[28] Its reference to the rights to pasture, wood and timber was not to the Taylor Ranch. Plaintiffs had failed to establish prescriptive rights because the land was open, unfenced grazing land, and therefore the element of adversity and exclusive use could not be established.[29] *Profits a prendre*[30] are different from easements and cannot be implied, but can only be established by express grant or dedication.[31]

In the meantime, the Taylor Ranch was sold to Lou Pai, former Enron executive, reported to have purchased the ranch with profits realized from the sale of one-third of a billion dollars of stock within the last four years.[32]

VI. LOBATO V. TAYLOR

In *Lobato*, the Colorado Supreme Court not only reversed the court of appeals, but also rejected the legal reasoning of the 10th Circuit in the

27. *Lobato*, 2002 WL 1360432, at *3.

28. *Id.*

29. *Id.*

30. "A right to profits a prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement." 28A C.J.S. *Easements* § 9.

31. *Lobato*, 2002 WL 1360432, at *4.

32. *See* Deborah Frazier, *Lasso Thrown Around Taylor Ranch*, ROCKY MOUNTAIN NEWS, Feb. 16, 2002; *see also* Alan Prendergast, *The Mystery of Pai,* DENVER WESTWORD, Apr. 18, 2002.

1967 *Sanchez* case. In rejecting these prior appellate decisions, the Court expressly restated Colorado public policy and law on a number of issues not only important to the Lobato plaintiffs and Colorado real property law, but also important to other indigenous land claims throughout the Southwest and perhaps beyond. The Court ruled that the use rights claimed by the landowners are *profits a prendre,* which are easements to go upon the land of another and to remove therefrom timber, minerals, game or other substances, and that like any other servitude, profits can be acquired by grant, prescription or necessity.[33]

In so ruling, the *Lobato* court, relying upon Colorado case law and the recently released third edition of the Restatement of Property, reversed not only the trial court and Court of Appeals decisions, but also rejected *Sanchez*. All of these courts, misapplying Colorado law, had ruled that profits could only be acquired by express grant.[34]

The Supreme Court ruled that Colorado law presumes that easements are appurtenant[35] and not in gross.[36] Additionally, the Court found that the Landowners could not rely upon Mexican law for the source of their rights, because, in this case there was insufficient evidence that settlements were established before the Treaty of Guadalupe Hidalgo. However, the courts found that Mexican law and custom are "highly relevant in this case in ascertaining the intentions of the parties involved."[37]

Thus, the Court enlightened the Beaubien Document and the Gilpin agreement by reference to Mexican law and custom, again reversing the approach of not only the lower courts in this action, but also the court in Sanchez.[38] The Colorado Supreme Court noted that:

> Beaubien wrote this document when he was near the end of his adventurous life in an apparent attempt to memorialize commitments he had made to induce families to move hundreds of miles to make homes in the wilderness. It would be the height of arrogance and nothing but a legal fiction for us to claim that we can interpret this document without putting it in its historical context.[39]

The Supreme Court ruled that, contrary to the lower courts' findings, the Beaubien Document is, on its face, ambiguous.[40] The intent of the

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33. *Lobato*, 2002 WL 1360432, at *4.
34. *See* Lobato v. Taylor, 13 P.3d 821, 833 (2000).
35. "Something that belongs or is attached to something else." BLACK'S LAW DICTIONARY 98 (7th ed. 1999); *Lobato*, 2002 WL 1360432, at *4.
36. "Undivided; still in one large mass." BLACK'S, *supra* note 45, at 786.
37. *Lobato*, 2002 WL 1360432, at *5.
38. *See Sanchez*, 377 F.2d 733.
39. *Lobato*, 2002 WL 1360432, at *6.
40. *Id.*

parties must therefore be determined by reference to extrinsic evidence.[41] Using the trial court's own findings, Mexican law and customs, expert opinions, evidence in the record of Beaubien, and Gilpin and the settlers' actions, the court concluded that, "the rights were granted and exercised from the time of the settlement and that the Beaubien Document memorialized them. Moreover, we conclude that the location for the rights is the mountain portion of the grant of which the Taylor Ranch is a part."[42]

In more than forty years of litigation, no court had expressed a willingness to look at the reality of the land and its history. The Colorado Supreme Court righted this injustice once and for all. Like the ancient scholar who was once asked by a student, "how can I determine the number of teeth in a horse's mouth?" The answer is clear; you have to look!

The Colorado Supreme Court ruled that technical defects in the Beaubien Document are not controlling in this case.[43] The Supreme Court was not surprised that Beaubien had failed to comply with the nuances of the conveyance of real property rights when he wrote a document in Spanish in a county that was, by and large, still operating under Mexican law and custom. But the law of implied easements recognizes that rights in real property may be implied even though not expressly conveyed.[44]

The Supreme Court ruled that "the evidence in this case overwhelmingly supports the conclusion that the landowners have implied rights in the Taylor Ranch" in the nature of implied servitudes,[45] that the landowners use was open and notorious, and "well known to Taylor and his predecessors in title."[46] The use continued without interruption for the statutory period of time, which in this case was 18 years; the trial court found that the uses continued at least up until the purchase of the land by Taylor in 1960.[47] The access must either be adverse, or pursuant to an intended, but imperfectly executed grant, which in this case was the Beaubien Document.[48]

The landowners established easement by estoppel.[49] The settlers met the elements of easement by estoppel, namely because of the foreseeability that they would not expect revocation of the permission granted to

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41. *Id.*
42. *Id.* at *9.
43. *Lobato*, 2002 WL 1360432, at *9.
44. *Id.*
45. *Id.*
46. *Id.* at *14.
47. *Lobato*, 2002 WL 1360432, at *14.
48. *Id.*
49. *Id.*

occupy the lands, that the settlers reasonably relied on the grant, and that to avoid revocation of the grant they would have to settle the area.[50]

> A condition of the conveyance of Beaubien's land, from Gilpin down to Taylor, was that the owner honors these rights. Although these promised rights were exercised for over one hundred years, although these rights were necessary to the settler's very existence, and although Taylor had ample notice of these rights, Taylor fenced in his land over forty years ago. It would be an understatement to say that this is an injustice.[51]

Finally, the Supreme Court found that the landowners had established an easement from prior use.[52] Initially, the landowners' and Taylor's properties were under common ownership; before the estate severance the rights were exercised; the use was not temporary; and the use was reasonably necessary to enjoy the land.[53]

In conclusion, we await the Supreme Court's determination of the due process issue. However, when the court rules on that issue, it is my belief that a grave injustice has been righted, and the court has set forth a clear and well reasoned legal analysis that should be of great help to others seeking justice in the struggle to regain historic use rights.

Furthermore, this case should supply real property law professors with a wealth of fodder to feed their students as they graze their way through the fertile mountains of their legal education.[54]

VII. Recent Development

On April 28, 2003, the Colorado Supreme Court, in a 4:2 decision (further clarified on June 16, 2003), ruled that current property owners in Costilla County or their predecessors in title not named and served in the Torrens or Salazar actions, need only show that their lands were settled at

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50. *Id.* The Mexican settlement system formed the basis for the expectation of land rights; the deeds and practices demonstrate that rights were intended, and because of the requirements for survival the rights were necessary. *Id.* at 14-15.

51. *Lobato*, 2002 WL 1360432. at *15.

52. *Id.*

53. *Id.* at *15-16.

54. The author suggests for further reading: Marianne L. Stoller, *Settlement Patterns and Village Plans in Colonial New Mexico*, 8 J. W. 1969, at 7-21; Marianne L. Stoller, *Grants of Desperation, Lands of Speculation: Mexican Period Land Grants in Colorado*, *in* Spanish and Mexican Land Grants in New Mexico and Colorado (Malcolm Ebright ed., Manhattan, Sunflower University Press, 1980); Arnie Valdez & Maria Valdez, The History, Architecture and Cultural Landscape of The Rio Culebra Villages (1992); and, Malcolm Ebright, Land Grants and Lawsuits in Northern New Mexico (1994).

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the last possible time that Beaubien's intentions remained in force to establish their claims to reasonable access rights on the Taylor Ranch.[55]

Specifically, the court ruled that, using the best available evidence, landowners must prove by a preponderance of the evidence that their property is included within the boundaries of property owned or occupied by settlers during the time of Gilpin's ownership of the lands of the Sangre de Cristo grant.

Furthermore, the court ruled:

> In light of our holding that Taylor failed to exercise reasonable diligence in personally naming and serving all reasonably ascertainable individuals with an identifiable interest in the Taylor Ranch, the costs of remedying this failure on remand must be borne by Taylor. In Colorado, costs are awarded to the prevailing party unless mandated otherwise by statute. C.R.C.P. 54(d). Because the plaintiff landowners have prevailed on their claims, Taylor now must pay the costs associated with identifying and notifying all persons who have access rights to the Taylor Ranch.[56]

Finally, the court clarified that the trial court could re-visit the issue of class certification on remand.

In the absence of an appeal to the U.S. Supreme Court, the Colorado Supreme Court's decision effectively ends the forty-one year old injustice created by the Torrens and Salazar Estate actions. The Court's holding is a victory, not only for the successors in title to the Sangre de Cristo land grant, but for other groups fighting to re-re-establish rights to their own land.

55. Lobato v. Taylor, No. 00-SC-527, 2003 WL 1962264 (Colo. Apr. 28, 2003).
56. *Lobato*, 2003 WL 1962264.