Lobato v. Taylor: How the Villages of the Rio Culebra, the Colorado Supreme Court, and the Restatement of Servitudes Bailed out the Treaty of Guadalupe Hidalgo

Ryan Golten

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Lobato v. Taylor: How the Villages of the Rio Culebra, the Colorado Supreme Court, and the Restatement of Servitudes Bailed Out the Treaty of Guadalupe Hidalgo

ABSTRACT

In 2002, the Colorado Supreme Court ended one of the state's longest legal battles by announcing that the descendants of individuals who settled the Sangre de Cristo Land Grant in southern Colorado have the right to use the lands within the original Grant. In a shocking ruling, Lobato v. Taylor reversed over 40 years of case law that had rejected local landowners' claims to these so-called "settlement rights." The claims dated back to an 1863 document by Charles Beaubien, who received the Grant from the Mexican government in the mid-1800s and documented the rights of the initial settlers to use the resources on the Grant's mountain tract. Lobato held that the successors of these settlers established implied rights to the mountain tract by prescription, prior use, and estoppel under the modern Restatement of Servitudes. In a significant departure from past land grant decisions from the past century, the court interpreted these common law doctrines broadly in order to honor the original intent of the parties and serve the interests of justice. This equitable approach allowed the court to consider evidence of the settlers' original expectations, subsequent use of the land, and Mexican legal and cultural norms of the time to interpret the rights established at common law. Lobato provides important tools for vindicating historic rights that trace back to our antecedent sovereigns, and for using the laws and practices of previous regimes to inform these rights under the American common law.
I. INTRODUCTION

Of the countless conflicts over land in the American Southwest, perhaps none are as historically complex, legally controversial, or socially devastating as those involving the loss of lands from the original land grants under Mexico and Spain. For 500 years, the land and its inhabitants have transitioned through the governance of three sovereigns with widely varying legal regimes. Claims to property rights that arose under the legal regimes of Spain or Mexico, however, are routinely rejected by American courts. Some scholars and advocates argue that common law courts are simply unequipped to recognize the fundamentally distinct property interests that originated under our antecedent sovereigns.\(^1\)

Recently the U.S. Supreme Court let stand an astounding 2002 decision by the Colorado Supreme Court that announced a new approach to interpreting centuries-old land grant claims.\(^2\) Bringing to a close one of the oldest and most well-known lawsuits in Colorado history, \textit{Lobato v. Taylor} announced that landowners in the San Luis Valley have rights to graze livestock, collect firewood, and harvest timber on land grant property that they and their predecessors have used for 150 years.\(^3\) In recognizing these rights at common law, the court considered evidence of Mexican law and custom to interpret the intent and expectations of the original nineteenth century settlers of the Grant, evidence that American courts had previously refused to consider, finding it irrelevant to rights created under the American common law.

By acknowledging the legal relevance of Mexican property law and cultural norms to resolving contemporary land claims, the \textit{Lobato} decision signals a new turn in land grant law. For over a century, American courts have rejected land grant claims by refusing to recognize Mexican or Spanish law as a source of property rights and by narrowly construing common law property doctrines. While \textit{Lobato} left unresolved the relevance of Mexican law and treaty agreements to land grant claims, the decision nonetheless offers a new approach to construing these claims under the implied and equitable doctrines of the common law. Instead of emphasizing the mechanistic doctrines that have long stymied courts and land grant advocates, \textit{Lobato} turned to the deeply rooted, American common law principles of honoring parties' intent and expectations, using Mexican law and custom as relevant historical


\(^3\) Lobato v. Taylor, 71 P.3d 938, 956 (Colo. 2002).
evidence. By reconciling nineteenth century Mexican understandings of land use with the requirements of Anglo-American property law, Lobato offers courts a model for recognizing some of the oldest and most important property rights in the American Southwest.

A. The Context

Much of the tension between the U.S. and the Mexican and Spanish legal systems traces back to the 1848 Treaty of Guadalupe Hidalgo, in which Mexico ceded to the United States the territory of New Mexico, which included present-day southern Colorado. The United States, in turn, guaranteed that existing property rights in the ceded territory would be "inviolably respected." However, to give legal effect to claims that originated before 1848, American courts are frequently asked to interpret Spanish and Mexican legal concepts and documents, neither of which tend to satisfy the common law's emphasis on magic language and unencumbered, fee simple title. Most American courts lack the willingness, imagination, and perhaps even the legal tools necessary to translate these pre-Treaty land claims, along with concepts of shared property rights and common control over resources, into the language and principles of the common law.

The Lobato case presented the problem of interpreting land claims that evolved as the United States gained sovereignty over former Mexican territory. In the mid-1800s, the predecessors of the Lobato plaintiffs left their communities in northern New Mexico to settle the Sangre de Cristo Land Grant in the San Luis Valley of what is now


5. See Lobato, 71 P.3d at 946. The words "inviolably respected" replaced language from a draft article 10, which guaranteed that all land grants would be presumed valid under American law to the same extent as they had been under Mexican law. The deletion of article 10 resulted in an ambiguous standard that was inconsistently interpreted by American courts, generally to the detriment of the land grantees and their heirs. MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 28-29 (1994). For a more thorough discussion of the Treaty history and language, see id. at 28-37 (arguing that, in negotiating the Treaty, the goal of the United States was to gain additional territory without being beholden to Mexican property claims, and that, rather than being fairly "negotiated," the Treaty and related provisions were imposed on Mexico by the United States).

6. See MONTOYA, supra note 1, at 175-82.

south-central Colorado. They did so at the urging of French-Canadian Charles Beaubien, who in the mid-1840s acquired the one million-acre Land Grant from the Mexican government, under the condition that he would settle it with a permanent agricultural community. To encourage settlement, Beaubien promised the settlers they would receive sufficient


9. Lobato, 71 P.3d at 943. Governor Manuel Armijo originally granted the Sangre de Cristo to Narciso Beaubien, Charles' 13-year-old son, and Stephen Luis Lee, an American—not a Mexican citizen—as part of the Mexican government's effort to fortify its northern frontier against the encroaching United States. See Montoya, supra note 1, at 211-12. Charles Beaubien gained ownership of the Grant after his son and Lee were killed in the infamous Taos Uprising of 1847, at which point Beaubien inherited his son's portion and purchased Lee's interest. See id. Beaubien and Lee's petition, filed two days after Christmas 1843, had emphasized that the land was ideal for farming and ranching, and illustrates that the purpose of the Grant was to settle the land with a permanent agricultural community:

Louis Lee, a naturalized citizen and resident of the first demarcation of Taos, and Narciso Beaubien, a citizen, and also a resident of the above-named place, appear before your Excellency in the manner and form best provided by law and most convenient to us, and state that, desiring to encourage the agriculture of the country, and place it in a flourishing condition, and being restricted with lands wherewith to accomplish said purpose, we have seen and examined with great care that embraced within the Costilla, Culebra, and Trincheras Rivers, including the Rito of the Indians and the Sangre de Cristo to its junction with the Del Norte River, and finding in it the qualities of fruitfulness, fertile lands for cultivation, and abundance of pasture and water, and all that is required for its settlement, and the raising of horned and woollen cattle, and being satisfied with it, and knowing that it is public land, we have not hesitated to apply to your Excellency, praying you, as an act of justice, to grant to us the possession of a tract of land to each one within the afore-mentioned boundaries, promising to commence the settlement of the same within the time prescribed by law, until the colony shall be established and permanently fixed, provided your Excellency be pleased to grant it to us. Such is the offer we make, and swear it is not done in malice.

See Tameling v. U.S. Freehold & Emigration Co., 93 U.S. 644, 647 (1876) (emphasis added). For a detailed account of the petition and the issuance and confirmation of the Grant, see J.J. Bowden, Private Land Claims in the Southwest (1969) (unpublished partial J.D. thesis, Southern Methodist University) (on file with author). The Ute Indians inhabiting the San Luis Valley at the time drove back initial efforts by the Mexican settlers to colonize the Grant. See id. at 886. However, by 1870, there were almost 3000 former Mexican citizens living on the southern part of the Sangre de Cristo grant. Peters & Stoller, supra note 8, at 5. Upon relocating to the Sangre de Cristo grant, the settlers received narrow strips of land along a stream, or vara strips, for individual farming and were allowed access to the mountain tract for grazing and additional resources. For an in-depth discussion of the process for issuing land grants under Mexican and Spanish law and custom, see Ebracht, supra note 5, at 21-28. For a discussion of the meaning of vara strips, see Marianne L. Stoller, Report on the History and Claims for Usufruct Rights by the Residents of the Culebra River Villages on Portions of the Sangre de Cristo Land Grant 14-15 (1997) (submitted to the district court and on file with Dr. Stoller); Lobato, 71 P.3d at 943.
land for home sites, cultivation, grazing, and other subsistence purposes, in keeping with Mexican and Spanish custom. Over 100 families moved to the remote land grant at the foot of the towering Sangre de Cristo Mountains on the precarious northern frontier of Mexico. From this point on, these families and their successors depended on the nearby mountain tract, known as La Sierra, or later as the Taylor Ranch, for grazing, firewood, hunting, fishing, and timber.

In 1863, Charles Beaubien fulfilled his commitment to the original settlers by executing and recording a document (Beaubien document) that described the settlers' rights to access shared resources on the Grant—a document that would later prove pivotal in the Lobato litigation. The Beaubien document contained provisions for various aspects of life and development on the Grant, including the use and care of the water, regulation of roads, land for churches, location of mills, and pasturing of animals. In a clause that, according to the court in Lobato,

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11. Lobato, 71 P.3d at 955 (citing Dr. Marianne Stoller's report offered at trial).
12. Id. at 943. One of the many translations of the document is reproduced in Rael, 876 P.2d at 1213:

Town of San Luis of the Culebra, May 11, 1863 Book 1, Page 256

It has been decided that the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo and the Vallejos, and other inhabitants of said towns, for pastures and community grounds, etc. And that the Rito Seco waters are hereby distributed among the said inhabitants of the town of San Luis, and those on the other side of the Vega, whose lands lie in the vicinity and cannot be irrigated by the water of the Rio Culebra. After measuring off three acres in front of the Church, which are hereby donated to it, the Vega shall be for the use of the inhabitants of this town and of the others up [unintelligible] the Vallejos Creek and also for the benefit of those who may in the future, settle on the Gregorio Martin Creek (San Francisco) from the road down to the narrows. It is understood that the lots shall run East and West, 50 varas, and never North and South and no one shall have a right as they might have thought, to place any obstacles or hindrances to interfere with the rights of others. The regulations as to roads shall be also observed so as to allow every one to have access to his farm lands. Also, in using the water, care shall be taken not to cause damage to any one.

All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others. No stock shall be allowed in said lands, except for household purposes. All those who come as settlers shall agree to abide by the rules and regulations and shall help, as good citizens and be provided with the necessary weapons for the defense of the settlement.

TWO WITNESSES (Signed) Carlos Beaubien

13. Stoller, supra note 9, at 15–16.
pertained to La Sierra, the document guaranteed that "all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another."14

After his death the following year, Beaubien's heirs sold the Grant to William Gilpin, the first territorial governor of Colorado.15 Pursuant to an agreement that Beaubien had made with Gilpin before his death, Gilpin affirmed his promise to honor the rights of the local farmers to La Sierra.16 These rights have been restated and preserved in every subsequent deed involving this mountain tract.17

The settlers' descendants and successors consistently used the resources on La Sierra for over one hundred years. In 1960, a North Carolina lumberman named Jack Taylor purchased one of the original Grant's few remaining large parcels, a 77,524-acre mountain tract above San Luis, Colorado, that comprised La Sierra.18 A New Yorker article at the time described a "cloud" on the title to Taylor's property, stating that "[t]he cloud turned out to be the virtually universal belief in Costilla County that the descendants of the Sangre de Cristo Grant settlers had the legal and moral right to pasture cattle and gather wood and cut timber and hunt game on the Mountain Tract, no matter who owned it."19 Given these claims to the mountain, the land was cheap despite its rich resources.20 With plans to log the mountain, Taylor soon fenced the

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16. *Rael*, 875 P.2d at 1213-14. The conveyance also required Gilpin to convey the vara deeds to the remaining settlers. *Lobato*, 71 P.3d at 943. Beaubien apparently chose to sell the Grant to Gilpin due to his onerous back taxes, as he also owned a half interest in the neighboring Maxwell Land Grant. See Peters & Stoller, *supra* note 8, at 4; Montoya, *supra* note 1, at 212.
18. *Id.* at 943. Like each one preceding it, Taylor's deed included the clause that his ownership was subject to the "claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlement rights in, to, and upon said land." *Id.* In 1973 Taylor purchased another 2500 acres adjoining his property, known as the "Salazar estate," where previous owners had filed a successful Torrens action to register the property in fee simple. *Id.* at 944. Together, Taylor's property comprises what is known as the "Taylor Ranch," or La Sierra, and is jointly the subject of the *Lobato* litigation. *Id.*
20. Taylor bought the land for what seemed like a bargain price of five hundred thousand dollars. *Id.* See Jeffrey A. Goldstein, *Panel Presentation: Lobato v. Taylor*, 5 SCHOLAR 183, 186-87 (2002-2003). In addition to 14,000 foot Culebra Peak, the property included flowing streams and lush riparian areas, forested mountain slopes, and an array of wildlife including deer, elk, bear, and a population of endangered Rocky Mountain Cut Throat Trout. See *id.* at 186; Stoller, *supra* note 9, at 21-24.
property and did everything he could to keep out the local community and prevent their use of the land and its resources.21

B. The Lawsuit and the Lobato Decision

In 1981, the descendants and successors of the original land grant settlers brought an action against Taylor to recognize their historic claims to “usufructuary” or “settlement” rights, including the rights to harvest timber and firewood, graze, hunt, fish, and recreate on La Sierra, regardless of its private ownership.22 The plaintiffs claimed they were guaranteed usufructuary rights to La Sierra under Mexican law, which the United States had promised to honor in the Treaty of Guadalupe Hidalgo, and under the American common law, by either grant or prescription.23

For decades courts refused to recognize the plaintiffs’ claims.24 Then, in a striking reversal of the lower court decisions, the Colorado Supreme Court in Lobato defined in clear common law terms the settlement rights that Beaubien had created under American law but that were based on Mexican notions of land use and property rights. The court analyzed these property rights as easements, and more generally as servitudes, under the Restatement (Third) of Property: Servitudes (Restatement of Servitudes), considering evidence of Mexican law and culture to inform these common law rights.25 In a stunning slap in the face of the lower courts, the Lobato court stated:

We are attempting to construe a 150 year-old document written in Spanish by a French Canadian who obtained a

21. By this time, the community had already organized the Asociación de Derechos Civicos to protest the sale and Taylor’s exclusive use of the land. See Trillin, supra note 19, at 122. Violence broke out repeatedly when Taylor used force to keep local residents off the property. See id. at 125–28. Once the title to his property was cleared, Taylor began to clear-cut La Sierra, inspiring widespread resistance and outrage that continue to this day. See Olivia Martínez & Rachel Gonzales, From Taylor to Pai: The Historical Struggle for La Sierra, in THE STRUGGLE FOR LA SIERRA: A BEYOND CHICANISMO EXPERIENCE 10, 12 (2003) [hereinafter BEYOND CHICANISMO].


25. Lobato, 71 P.3d at 945. A “servitude” is a burden on one person’s land that gives certain rights to another. BLACK’S LAW DICTIONARY 573 (West 1996). An “express easement” is a type of servitude that a landowner voluntarily places on his/her property that is intended to bind future owners of that property. Id. at 215.
conditional grant to an enormous land area under Mexican law and perfected it under American law. 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.\textsuperscript{26}

In both its tone and legal analysis, the court departed from a long line of decisions that had refused to consider legal rights with roots in Mexico and Spain, and that had relied on a technical and increasingly archaic reading of property rights at common law.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{26} Lobato, 71 P.3d at 947.
\item \textsuperscript{27} For a detailed explanation of the dismantling of land grants under U.S. law, see generally EBRIGHT, supra note 5, at 45-54. Among the legal obstacles facing land grant advocates and heirs, the most common have been (1) the Tameling decision, see discussion infra notes 51-54 and accompanying text (precluding claimants from looking behind a congressional confirmation of a land grant to rights that may have preexisted it under Mexican and Spanish law); (2) the misconfirmation of land grants due to mistake and fraud, see discussion infra notes 55-59 and accompanying text; (3) the Sandoval decision, see discussion infra note 49 and accompanying text (holding that that the common lands of community land grants were held by the governments of Mexico and Spain and passed to the United States as public domain lands); (4) the fact that once community land grants were confirmed as private grants, speculators and lawyers were able to acquire interests and force partition suits; (5) lands long believed to be commonly held, which were used by a community for hundreds of years, often failed to satisfy the requirements of adversity and exclusivity necessary to prove adverse possession or prescriptive use under the common law, see infra notes 28-30; (6) rights by grant or dedication required magic words and documentation at common law that had often not survived the settlement process. See infra notes 28-30.
\end{itemize}

Many of these later legal problems stemmed from the heavy legal burdens and practical obstacles that faced land grantees and settlers in the mid to late 1800s, when the United States began to confirm and adjudicate land holdings under the Surveyor General and later the Court of Private Land Claims. See infra text accompanying note 36. Under the grossly under-funded and under-resourced Surveyor General, land grant heirs and settlers were required to defend their property rights, without proper notice or other due process guarantees, on a first-come, first-served process in which many were defrauded and manipulated by American lawyers. See EBRIGHT, supra note 5, at 45-54. Later, under the much less lenient Court of Private Land Claims, the burden of proof was squarely placed on land grant claimants to defend their asserted rights against skilled and highly resourced government lawyers in adversarial proceedings. Not surprisingly, many land grant heirs lost their land rights through this process. See also N.M. Land Grant F. & Mexicano Land Educ. & Conservation Tr., The General Accounting Office Report Preliminary Comments, at http://www.southwestbooks.org/gaolgfresponse.htm (last visited June 22, 2005) (discussing the ways in which New Mexico land grants were incorrectly confirmed, and ultimately partitioned and sold in many cases, in ways that the 2004 Report by the General Accounting Office failed to recognize). See GOV'T ACCOUNTING OFF. (GAO), TREATY OF
The Lobato court charted new territory in two important respects. First, the court used Mexican and Spanish law, custom, and historical use not as a source of legal rights but to elucidate the intent and expectations of the original parties and settlers of the Grant. The court also demonstrated the capacity of the common law, led by the recently simplified Restatement of Servitudes, to recognize concepts of common use, even of privately owned land, despite the lack of express language in the Beaubien document typically required by American courts. The court's emphasis on equitable concepts of fairness, justifiable expectations, and original intent is a shift from American courts' narrow reading of the common law and suggests an emerging significance of the modern Restatement of Servitudes in vindicating land grant rights.

The Lobato court's ability to translate Mexican property interests into the common law offers hope for heirs of land grantees and settlers with similar land claims in Colorado and New Mexico, many of whom have lost property rights during more than a century of land grabs and legal maneuvers. The history of the Sangre de Cristo Grant, an analysis of the Lobato court's reasoning, and a review of easement and land grant cases in Colorado and New Mexico suggests that the Lobato case may bear importantly on other land grant litigation in the Southwest. This is particularly true of the court's use of evidence of historic practice, as well as law and custom, to fill in gaps from missing or ambiguous deeds and other documents. In these ways and undoubtedly others, the decision offers important tools and guidance for courts, advocates, and land grant litigants.


The first phase of litigation over the Taylor Ranch began in 1960. In the century between Charles Beaubien's death in 1864 and this time,


28. This decision defies the claims of some scholars, who conclude that the complex and interwoven property concepts of Mexico and Spain are simply irreconcilable with the common law. Compare Montoya, supra note 1, with Ebright, supra note 5, at 266-67 (explaining that the common law was in fact familiar with such patterns, as land tenure in medieval England frequently involved common and overlapping land holdings). See also Richard D. Garcia & Todd Howland, Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Case, 16 Chicano-Latino L. Rev. 39, 61-63 (1995).
William Gilpin and his successors in interest had subdivided and sold off most of the original land grant. During this time, pursuant to their understanding of their settlement rights, the original settlers and their successors used the resources on La Sierra without protest from the private landowners. In 1960, however, Taylor fenced the mountain and began his battle against the local community.

A. The Torrens Action

Within months of purchasing La Sierra, Taylor filed a Torrens title claim in U.S. District Court for the District of Colorado to register his title in fee simple and extinguish any claims of the local community. In defense of their usufructuary rights, the named defendants raised essentially the same arguments that they would assert for the next 40 years. They claimed that they were entitled to use the land based either on the terms of the Grant itself, the language of the Beaubien document, or the doctrine of prescription as a result of their historic use of La Sierra. Specifically, the defendants argued that their predecessors had received the right to use the resources on La Sierra from the Mexican government in 1844, and the United States was bound by Treaty to respect these rights. Further, apart from their rights under Mexican law, they argued that Beaubien explicitly granted their predecessors

29. Immediately upon his acquisition of the Grant, Gilpin began to parcel up the land in order to sell to British, Dutch, and American investors for speculation and development. See Peters & Stoller, supra note 8, at 4. See also MONTOYA, supra note 1, at 9, 114-20 (describing the similar process of land speculation in the neighboring Maxwell Grant). In the late 1870s, the Trinchera Estates Company purchased the northern portion of the Grant; the southern half became the Costilla Estates. See Peters & Stoller, supra note 8, at 4. The southern half was later sold to the United States Freehold Land and Emigration Company and ultimately became the Taylor Ranch. Id. at 6.

30. Lobato, 71 P.3d at 943, 954-56. In addition to barricading the roads and fencing the land with barbed wire, Taylor treated the local community with blatant racism and frequent violence. See, e.g., Trillin, supra note 19, at 128 ("That's what the anti-Anglo thing is, it's an inferiority complex. They know they're not equal, mentally or physically, to a white man and that's why they stick together so."). Taylor was notorious for his brutal treatment of those he found on the property. See Martinez & Gonzales, supra note 21, at 12-13.

31. Lobato, 71 P.3d at 943 (citing Taylor v. Jaquez, No. 6904 (D. Colo. Oct. 5, 1965)). The Torrens title registration system, begun in Australia in the mid-nineteenth century, was designed to clear out overlapping claims to paper titles by settling all adverse claims in one proceeding. See MONTOYA, supra note 1, at 213; Rael v. Taylor, 876 P.2d 1210, 1219 (Colo. 1994). By invoking diversity jurisdiction as an out-of-state citizen, Taylor was able to litigate his Torrens claim in Denver, 240 miles from his opponents. Sanchez v. Taylor, 377 F.2d 733, 736 (10th Cir. 1967).

32. Sanchez, 377 F.2d at 734-35.

33. Id.
settlement rights under American law in 1863—rights that were reiterated in all subsequent deeds to the Taylor Ranch. Even if the conveyance did not specifically satisfy the strict requirements of the American law of servitudes, the defendants claimed that their predecessors' consistent, uninterrupted use of La Sierra for over 100 years granted them enforceable legal rights to La Sierra.\textsuperscript{34}

The federal court rejected these arguments based on reasoning that had long preceded and would long haunt the defendants until the \textit{Lobato} decision in 2002.\textsuperscript{35} The court rejected the defendants' Mexican law and Treaty claims based on a long line of cases holding that, when Congress confirmed Beaubien's title to the Sangre de Cristo Grant in 1860, any judicial review of the terms of the Mexican Grant was foreclosed.\textsuperscript{36} In other words, the court would not look behind the patent to examine the history of the Sangre de Cristo Grant. Even if the plaintiffs' predecessors were granted usufructuary rights to La Sierra under Mexican law, any such rights were not reviewable and not enforceable by courts after Congress confirmed the land and issued a patent to Beaubien.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{36} Sanchez, 377 F.2d at 737 (citing Tameling v. U.S. Freehold & Emigration Co., 93 U.S. 644 (1876)). The Act was pursuant to the system for confirming Spanish and Mexican land claims in the newly acquired territory. In 1855, Beaubien had petitioned Surveyor General William Pelham to confirm the Sangre de Cristo Grant at 1,038,195.55 acres, and after Pelham's favorable recommendation, Congress confirmed Beaubien's ownership of the entire Grant as recommended by Pelham. See \textit{BOWDEN, supra} note 9, at 887. For a discussion of the confirmation process for land grants in Colorado and New Mexico, see Stoller, \textit{supra} note 10, at 6–8; \textit{MALCOM EBRIGHT, THE TIERRA AMARILLA GRANT: A HISTORY OF CHICANERY 1–4} (Center for Land Grant Studies Press, 1993) (criticizing the easily manipulated confirmation process and distinguishing the implications for large, "speculative" grants such as the Sangre de Cristo and Maxwell grants from "settlement" grants such as the Tierra Amarilla grant). \textit{See, e.g.}, United States v. Maxwell Land-Grant Co., 121 U.S. 325 (1887); Flores v. Brusselbach, 149 F.2d 616, 616–17 (10th Cir. 1945); H.N.D. v. Suazo, 105 P.2d 744 (N.M. 1940); Martinez v. Mundy, 295 P.2d 209, 214 (N.M. 1956). This is discussed at greater length \textit{infra} notes 51–52 and accompanying text.
\item \textsuperscript{37} \textit{See Sanchez, 377 F.2d at 737, noting:}
\begin{quote}
We find no error in the trial court's conclusion that appellants, as a matter of law, have no rights in Taylor's land under Mexican law or the original grant. Any conflicting rights prior to the confirmatory Act of 1860 which might have arisen or existed by reason of the original grant from Mexico, considered in the light of Mexican law and the Treaty of Guadalupe Hidalgo, were thereby extinguished.
\end{quote}
The \textit{Lobato} plaintiffs later argued that this conclusion ignored the fact that, in recommending confirmation, Surveyor General Pelham had relied on Beaubien's initial petition, which, rather than attempting to extinguish the local settlement claims to the Grant, relied on these claims to prove the Grant's validity, stating:
The federal court also held that the language of the Beaubien document was insufficient to confer legal rights to La Sierra because the document did not specify the precise location for exercising such rights, nor did it contain the magic language of conveyance, grant, or dedication for the mountain tract that was required under the common law. The court rejected the defendants' prescriptive claim by holding that their common use of the land was neither exclusive nor hostile against both the true owner and the public in general. As was typical of American courts, the federal court required that, to prove prescription or adverse possession, a claimant had to show that use was adverse, open, notorious, exclusive, and continuous. The federal courts concluded that the defendants' use was neither "exclusive" nor "hostile" because they used the land together with the other local residents, believing they had a right to such access. Accordingly, the district court entered a Final Decree of Confirmation and Registration, which the Tenth Circuit subsequently affirmed.

For the next 15 years the successors of the original land grant settlers and their supporters prepared to bring their own court action.

Claimant is prepared further to prove, if deemed necessary, that since the said grant came into his possession he has had made extensive settlements on the same, and that it is becoming under his ownership rapidly populated. The claimant therefore respectfully asks a speedy acknowledgment of his claim.


38. Sanchez, 377 F.2d at 737-38.
39. Id. at 738.
40. Id.; see, e.g., Martinez, 295 P.2d at 214 (rejecting a similar prescriptive claim after finding that the local residents used the land sporadically, rather than continuously, and with the implied permission of the landowner, because they entered the property at places where fences were down or in disrepair).
41. See Sanchez, 377 F.2d at 738.
42. Id. at 733, 735.
43. This effort took immense amounts of organizing, education, research, fundraising, and outreach. The community, largely through the efforts of the Land Rights Council (LRC), an organization with inspiration and roots in the Chicano Movement, and its legendary founding elders, Apolinar Rael and Juan LaCombe, organized a campaign of research, fundraising, activism, and legal strategizing. LRC’s efforts ranged from extensive legal and historical research, including compiling local histories, collecting documents, and going door-to-door to talk with community members, to finding pro bono lawyers and framing legal strategy, educating the community, and using the media to organize and generate interest in the Taylor Ranch issue on a local, statewide, and national level. Daniel Salcido, Historical Discontinuity and a Struggle in Transition, in BEYOND CHICANISMO, supra note 21, at 26, 27-31 (2003); Martinez & González, supra note 21, at 13-14. It also included endless meetings, lost time with family, constant trips to Denver, and perpetual emotional strain, as LRC activists who lived in the skirts and shadows of La Sierra experienced the conflict on a daily level. See Interview with María Mondragon-Valdés, author of
In 1981, one hundred Costilla County landowners filed a class action lawsuit against Jack Taylor in Colorado state court, alleging usufructuary rights to the mountain tract dating back at least to 1863. The plaintiffs first argued that Taylor's Torrens decree was void because he had failed to give them proper notice of his action. They then asked the court to find that the 1863 Beaubien document either memorialized or created rights to collect timber and firewood, graze, hunt, fish, and recreate on La Sierra. This latter claim required the court to determine whether the Beaubien document expressly granted these rights or, alternatively, if the document could not satisfy an express grant, whether rights could be implied because circumstances indicated that Beaubien intended to convey such rights to the plaintiffs. Finally, the plaintiffs argued that their rights were created under Mexican law prior to 1848, and that U.S. courts were bound by the Treaty of Guadalupe Hidalgo to honor these rights.

The plaintiffs' theories required the state courts to review complex historical facts and esoteric common law doctrines, all of which involved a number of obstacles for the plaintiffs. Among the most significant was case law that precluded using Mexican or Spanish law as a source of legal rights in modern land grant claims. If the plaintiffs...
pointed to Anglo-American law as the source of their rights, on the other hand, a number of factors made it difficult for them to prove that their predecessors received property rights that modern American courts would recognize. Even if these rights were technically created under American law, they were done so in nineteenth century Spanish in the context of a distinct culture, notion of land use, and set of laws and legal customs. The plaintiffs lacked the clear, written description of their rights generally demanded by U.S. courts.  

B. The Problem of Precedent

1. Claims Based on Mexican, Spanish, or Treaty Law

The plaintiffs' theory that their rights were created before 1848 and were enforceable under treaty law has been uniformly rejected in land grant cases for over 100 years under Tameling v. U.S. Freehold & Emigration Co.  

Tameling held that, when Congress confirmed the Sangre de Cristo and other large Mexican land grants in 1860, the confirmation functioned as a de novo grant, and, because Congress was acting in its sovereign capacity, courts could not look behind Congress's judgment.  


50. Nonetheless, the documentation in Lobato was fairly significant compared with other land grant claims, particularly in light of the fact that each subsequent deed to La Sierra referred to claims by the local community.

51. See, e.g., United States v. Maxwell Land-Grant Co., 121 U.S. 325 (1887); Flores v. Brusselbach, 149 F.2d 616, 616-17 (10th Cir. 1945); H.N.D. v. Suazo, 105 P.2d 744 (N.M. 1940); Martinez v. Mundy, 295 P.2d 209, 214 (N.M. 1956).

52. Tameling, 93 U.S. 644, 662-63 (1876) (citing Act of June 21, 1860, ch. 167, 12 Stat. 71 (1860)). According to the 1860 Act, its terms “shall only be construed as quitclaims or relinquishments, on the part of the United States and shall not affect the adverse rights of any person or persons whosoever.” Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967). Despite this language, courts have consistently held that they are precluded from determining adverse claims because the issue is a political, not a judicial, consideration. Id. In Tameling, the U.S. Freehold Land & Emigration Company, then owners of the southern part of the Sangre de Cristo Grant, had filed an ejectment suit against John Tameling, who had purchased 160 acres allegedly located on the same land. Tameling v. U.S. Freehold Land and Emigration Co., 2 Colo. 411, 415 (1874). In his defense, Tameling argued that when it issued the Grant, the Mexican government was limited by the 1824 Mexican Colonization Law to granting each grantee 11 square leagues, and therefore the two grantees could only have owned 22 square leagues, or 96,000 acres, rather than the roughly one million acres shown on the patent. Id. Similarly, he argued that Congress could not legally have confirmed the Grant for more than what was created under Mexican law, which the United States was obligated to recognize under the Treaty of Guadalupe Hidalgo. Id. The Supreme Court disagreed. It held that, even if Congress had confirmed more land than the Sangre de Cristo grantees were allowed to receive under Mexican law,
Courts were therefore precluded from questioning what other rights to the land may have existed prior to Congress’s confirmation. Though both the holding and reasoning of Tameling continue to be disputed, the decision has effectively precluded courts from analyzing the pre-1860 nature or legal status of land grants that were confirmed by Congress.

Given Tameling’s bar to judicial review, the Lobato plaintiffs faced an uphill battle in raising any objections to Congress’s confirmation of the Grant. Indeed, this bar had consistently thwarted land grant heirs who argued that they were deprived of property rights because Congress wrongly confirmed their lands by mischaracterizing the nature, size, or other aspect of the original grant. In a series of five

this patent should be construed as a de novo grant issued by the United States and thus inherently valid. Tameling, 93 U.S. 644, 663 (1876). For a detailed description of the case, see Peters & Stoller, supra note 8, at 2, 13-14 (discussing, inter alia, the possibility of collusion between John Tameling and the U.S. Freehold & Emigration Company in bringing the suit in the first place). For a discussion of arguments that Congress’s confirmation should nonetheless not preclude other adverse or concurrent claims to the confirmed land, based on the standard language of congressional patents, see Sanchez, 377 F.2d at 737; HND v. Suazo, 105 P.2d at 745.

53. Tameling, 93 U.S. at 663.
54. Id. Tameling was particularly significant as the first case to determine the legal effect of the 1860 Act of Congress. See Peter & Stoller, supra note 8, at 11-12 (explaining, inter alia, that, although the short, three-page opinion was based solely on one statute and a case out of Missouri, it nonetheless became controlling for all subsequent litigation concerning land grants confirmed by the 1860 Act of Congress); EBRIGHT, supra note 5, at 21-22 (describing the effect of the erroneous Tameling decision on the Tierra Amarilla Grant, which had been misconstrued by Congress by the 1860 Act as “a case of the blind leading the blind”); MONTOYA, supra note 1, at 171-87 (criticizing the opinion and describing its effects on the adjudication of the Maxwell Land Grant); see also Flores, 149 F.2d at 617 (using the rationale of Tameling as its reason for refusing to consider plaintiffs’ claims that the Tierra Amarilla Grant was created as a community grant under Mexican law and custom).

Congress thereby conclusively confirmed the title to the grant as a private land grant and its action is final and not subject to judicial review.... [A]ppellants assert a claim of title predicated on the theory that the Grant was a community grant and that they are the successors to the original Mexican Community. That contention was foreclosed by the conclusive effect of the Act of Congress in confirming the Grant as a private land grant in Francisco Martinez.

Id.

55. See, e.g., Lobato v. Taylor, 13 P.3d 821, 828 (Colo. App. 2000) (affirming the lower court’s finding that, “by virtue of the Act, confirmation was ‘absolute and unconditional’ in Charles Beaubien” under Tameling, and “any purported rights that might [have] existed...were extinguished by the 1860Confirmatory Act...and if the confirmation of title was contrary to the treaty provisions, the question was political, not judicial”).
56. See, e.g., Reilly v. Shipman, 266 F. 852 (8th Cir. 1920); Yeast v. Pru, 292 F. 598 (D.N.M. 1923); Catron v. Laughlin, 11 N.M. 604 (1903) (all three cases holding that courts are precluded from looking behind Congress’s confirmation of land grants to ascertain the correct identity of the original grantees). For a recent discussion and critique of the ways in
cases surrounding the Tierra Amarilla Land Grant in northern New Mexico, for instance, state and federal courts consistently refused to consider the claims by the local community that Congress had mistakenly confirmed the Grant as a private grant rather than a community grant, and that refusal to honor the Grant’s legal status under Mexican law, as required by the Treaty of Guadalupe Hidalgo, unjustly deprived them of their common ownership of the Grant’s common, unallotted lands. The New Mexico Supreme Court, in the first of these cases, explained that even if the United States had wrongly characterized the Tierra Amarilla Grant as a private grant made to specific individuals, the congressional patent was unreviewable under Tameling. The result was no different in Lobato.

2. Claims Based on the Common Law of Servitudes

The same courts that consistently rejected Mexican and treaty law as a source of rights also had difficulty acknowledging such rights in which the federal government incorrectly confirmed New Mexico land grants following the Treaty of Guadalupe Hidalgo, see The New Mexico Land Grant Forum and the Mexican Land Education and Conservation Trust, supra note 27 (criticizing the government’s failure to recognize and take responsibility for the loss of lands in the confirmation process). For the official GAO Report on the federal government’s role in confirming community land grants in New Mexico, see GOVT ACCOUNTING OFF., supra note 27.

57. These five cases—two in the New Mexico Supreme Court and three in the federal courts— are Flores v. Brusselbach, 149 F.2d 616 (10th Cir. 1945); Martinez v. Rivera, 196 F.2d 192 (10th Cir. 1952); Payne Land & Livestock Co. v. Archuleta, 180 F. Supp. 651 (D.N.M. 1956); H.N.D. v. Suazo, 105 P.2d 744 (N.M. 1940); Martinez v. Mundy, 295 P.2d 209 (N.M. 1956). For a thorough explanation of the history of the Tierra Amarilla grant and the problem presented by Congress’s mistaken confirmation of the Grant as a private grant, see generally EBRIGHT, supra note 36.

58. The court explained that, even if Congress had mischaracterized the nature of the Grant, under United States v. Sandoval, the title to any preexisting common lands remained in the Mexican government and passed to the United States in 1848 as public lands. H.N.D., 105 P.2d at 745–47 (citing United States v. Sandoval, 167 U.S. 278 (1876)). See discussion supra note 41. Like the Sangre de Cristo grant, the Tierra Amarilla grant was a large grant made in 1832 by Governor Armijo during hostilities with the United States. See H.N.D., 105 P.2d at 744–45. Like the Sangre de Cristo and other grants made during the so-called “Mexican period,” the Tierra Amarilla grant was confirmed by the 1860 Act of Congress after a recommendation by the Surveyor General, and a patent was issued to one individual, Francisco Martinez. Id. at 745. Land grant heirs argued that, under Mexican law and custom, the grant was made as a community grant. Id. at 746–47. Accordingly, the Mexican government retained legal title over such lands with the trust duty to preserve them for the community, all of which—including the same trust duties—passed to the United States as specified in the Treaty of Guadalupe Hidalgo. Id. at 747.

59. See, e.g., Sanchez v. Taylor, 377 F.2d 733, 736–37 (10th Cir. 1967) (explaining that, starting with Tameling, “the Supreme Court has consistently held that the confirmatory Act of Congress is final and conclusive as to the nature and validity of such a grant and is therefore not subject to judicial review”).
common law terms. Even if claimants argued that their rights were created under the American common law, to avoid the problem of using Mexican law as a source of law, courts struggled to determine the nature of such rights because Mexican and Spanish documents frequently lacked the express language required at common law to describe the intended recipients and to identify the land itself.

As the Lobato litigation would show, the requirement of magic language particularly impacted land grant claims that relied on eighteenth and nineteenth century legal documents, many of which lacked the terms and phrases that American courts required to convey interests in land. Claimants often argued that ambiguous Spanish terms should be construed broadly, with reference to their historical context to illuminate the documents’ text. In the Tierra Amarilla cases, for instance, in addition to making Mexican law and Treaty claims, the local community argued that Francisco Martinez, a named recipient of the Grant, conveyed enforceable common law rights to the Grant’s common lands through the numerous deeds, or hijuelas, that he issued to the Grant’s initial settlers between 1861 and 1866. Thus, even if the Tierra Amarilla Grant was private, making it analogous to the Sangre de Cristo Grant, the hijuelas arguably articulated the rights that Martinez believed he was obligated to convey under the terms of the original Grant and controlling Mexican law, much as Beaubien did in his 1863 document. As the lower courts had done in Lobato, the New Mexico courts rejected the claimants’ theory, concluding that the lack of adequate words of conveyance in the hijuelas, combined with their ambiguous description of the common lands, prevented them from

60. See EBRIGHT, supra note 5, n.70 and accompanying text (describing the problem of American courts objecting to Spanish documents as lacking sufficient words to describe common lands or to convey interests in land, and explaining how these interpretations were often due to a misunderstanding of the custom and language of the time).

61. Under the laws and practices of Spain, an hijuela was technically a document given to a party entitled to a share of a deceased person’s estate that contained the details of that person’s share. See Martinez, 295 P.2d at 217; Payne Land & Livestock Co., 180 F. Supp. at 654. See also EBRIGHT, supra note 5, at 22 n.62 (explaining that, in the case of the Tierra Amarilla Grant, the term is used “in the sense of a deed for a share in a land grant, including a tract of land which was private and conveyance of rights to use the unallotted land which was owned communally”).

62. H.N.D., 105 P.2d at 745, 748. Martinez executed over 100 of these documents to the original settlers of the Tierra Amarilla Grant, conveying land that was said to “remain with the right of pastures, woods, water, lumbers, watering places, and roads, common and free.” Id. at 745.

63. Id. Further, the plaintiffs argued, even if the 1860 Act of Congress converted the grant into a private grant that was unreviewable based on Tameling, the hijuelas essentially converted the land back into a community grant. EBRIGHT, supra note 5, at 25.
being a valid conveyance under the American common law. The courts also rejected the claim that even if Mexican and Treaty law could not be used as a source of rights to the common lands, Mexican law and custom should nonetheless be used to illuminate Martinez's intent in drafting the *hijuelas*. These issues were nearly identical to those in *Lobato* regarding the Beaubien document's validity as a source of common law rights.

Two other issues posed significant challenges to the *Lobato* plaintiffs. First was the way in which American courts categorized and compartmentalized different types of servitudes, or rights to another's land. After centuries of judicial crafting, the common law had come to require elaborate and distinct elements for each type of servitude. Thus, prior to the recent *Restatement of Servitudes*, the technical distinctions between equitable servitudes, easements, and covenants had resulted in complex fictions that were developed to fit certain interests into particular types of servitudes. Such fictions inevitably resulted in a stilted kind of formalism that precluded considerations of equity and implied rights.

A final hurdle faced by the *Lobato* plaintiffs was the common law's requirement of adversity and exclusive use to satisfy a claim of prescription. These elements were often impossible to meet when claimants believed they validly held their rights in common. In such cases, private landowners could successfully argue that because the local community's access was in common, it was not "exclusive." Similarly, if the landowner consented to such use, the use could not be sufficiently "adverse." In the Tierra Amarilla litigation, for instance, courts repeatedly rejected claims that the *hijuelas* conveyed use rights under the law of servitudes because of the claimants' common use of the land.

Despite this adverse precedent, the *Lobato* plaintiffs argued that the Beaubien document expressly granted their families rights to *La Sierra* that burdened Taylor's property as on-going servitudes.


65. See *H.N.D.*, 105 P.2d at 746, 748; see also Sanchez v. Taylor, 377 F.2d 733, 737 n.3 (10th Cir. 1967).


67. See discussion infra notes 102-150 and accompanying text.

68. See, e.g., *Martinez*, 295 P.2d at 216-17. The strict requirements of these doctrines had in many cases become quite arbitrary. For instance, while historically a *prescriptive* easement required the element of adversity, lawyers were able to circumvent claims of adverse use by arguing that in fact, the owner had provided *permission* to use the property, thus rendering the rule meaningless as a legal principle.

69. See *Sanchez*, 377 F.2d at 737-38.
Alternatively, if the Beaubien document did not satisfy the requirements of an express grant, they argued that their rights were enforceable as implied easements to La Sierra, based on their history of open, continuous, and uninterrupted use of the land. This latter theory ultimately prevailed, but only after the plaintiffs convinced the Colorado Supreme Court to focus on the equitable approach to the law of servitudes taken by the new Restatement and old Colorado easement cases.

C. The Lobato Litigation: What Happened Below

Before the plaintiffs could attack the substantive problems described above, they had to prove that their claims were not procedurally barred by the earlier Torrens decision. This alone took the courts over a decade to resolve before the Colorado Supreme Court seriously considered the merits of the case.

1. The First Hurdle: Getting to the Merits

Procedural issues delayed the lower courts in Lobato for over 20 years. The first state court to consider the plaintiffs' claims granted summary judgment for Taylor in 1986, holding that the plaintiffs' action was barred in part by res judicata based on the earlier Torrens decision. After the state court of appeals upheld the dismissal, in 1994 the Colorado Supreme Court reversed and remanded, stating that the lower court should have determined whether Taylor had satisfied due process in the Torrens action before determining that the plaintiffs' claims would be barred by res judicata. The Colorado Supreme Court directed the lower court to determine whether the notice provisions in the Torrens

70. Although they focused on the equitable doctrines of prescription and adverse possession in the Torrens action, the Lobato plaintiffs also successfully based their claims on the implied doctrines of easements by estoppel and prior use. See discussion supra notes 49–52.

71. For the remainder of this article, where relevant, "Torrens action" refers to the Torrens action brought in the Salazar estate as well.

72. Rael v. Taylor, No. 81CV5 (Costilla County Dist. Ct. Sept. 22, 1986) (Judgment for Defendant on Motion for Judgment on the Pleadings or for Summary Judgment), aff'd, Rael v. Taylor, 832 P.2d 1011, 1013 (Colo. App. 1991). In affirming, the court of appeals rejected the plaintiffs' argument that they were neither named nor in privity with those named in the Torrens action, since the fact that they were successors in interest to the property should have put them on notice as to the earlier actions. Id. at 1014.

73. Rael v. Taylor, 876 P.2d 1210, 1229 (Colo. 1994). As to the effect of the Torrens decree, the court explained that res judicata would only bar the claims of those persons not personally named and served in the Torrens action if Taylor had made a diligent inquiry into the identity of all reasonably ascertainable claimants. Id. at 1226–27.
action were constitutional and to hold a trial on the merits for those plaintiffs who did not receive adequate notice.\(^7\)

On remand in 1997, the trial court bifurcated the proceedings, first determining that ten of the plaintiffs had not received adequate notice in the Torrens actions and therefore could not be bound by the decrees.\(^7\) As to those plaintiffs, the court held an eight-day bench trial in which the plaintiffs presented 22 witnesses, including four experts, and the defense presented one witness.\(^7\) The trial court ultimately ruled for the defendants. It held that the Beaubien document was too ambiguous in describing the parties, location, and nature of the rights to have been a valid source of the plaintiffs' asserted usufructuary rights, and that their use was not sufficiently adverse to constitute a prescriptive claim.\(^7\)

Nonetheless, the extensive testimony presented at trial led the district court to make several important factual findings. First, the district court found that all of the plaintiffs' land titles traced back to Charles Beaubien's ownership of the Grant.\(^7\) Second, it determined that the local landowners consistently exercised their rights on La Sierra from the time of settlement under Beaubien until Taylor’s purchase of the ranch.\(^7\) Finally, it concluded that the local community could not have survived without access to La Sierra.\(^7\) Despite the lower court’s ultimate ruling, these favorable findings would prove crucial to the final outcome of the case. First, however, the case went to the court of appeals, which considered and rejected each of the plaintiffs' theories based on reasoning that the state's highest court would strike down two years later.\(^8\)

\(\)\(^7\) Id. at 1228–29. Specifically, the Court ordered the trial court to determine whether Taylor used reasonable diligence in notifying those parties with an ascertainable interest in La Sierra. Lobato v. Taylor, 13 P.3d 821, 826 (Colo. App. 2000).

\(\)\(^7\) Id. at 944; Appellants' Opening Brief, supra note 37, at 12.

\(\)\(^7\) Lobato, 13 P.3d at 826, 830-31; Lobato v. Taylor, 71 P.3d 938, 944 (Colo. 2002). Before the merits phase, the trial court dismissed the plaintiffs' Mexican law claim, based on Tameling, and denied class certification. Lobato, 13 P.3d at 826.

\(\)\(^7\) Lobato, 13 P.3d at 830.

\(\)\(^7\) Id.

\(\)\(^8\) Id. Specifically, the findings included the following: (1) plaintiffs' predecessors in title grazed cattle and sheep, harvested timber, gathered firewood, fished, hunted, and recreated on defendants' land from the 1800s; (2) none of the land was fenced prior to 1960, and plaintiffs were never denied access to the land for the uses enumerated above; and (3) the chain of title of all land now owned by plaintiffs and defendants extended from Charles Beaubien in 1860. Id. See also Goldstein, supra note 20, at 189.

\(\)\(^8\) Because the appeals court affirmed the dismissal of Plaintiffs' claims on the merits, it found it unnecessary to review the due process ruling. Lobato, 13 P.3d at 826.
2. The Substantive Holdings Below

a. The Beaubien Document Did Not Grant Enforceable Rights

The court of appeals upheld the district court’s rejection of express rights based on the Beaubien document, holding that the document did not meet the formal requirements of conveying interests to land under 1863 Colorado property law.82 First, the court of appeals held that the document was insufficiently clear as to the intended parties and location of the rights.83 As had occurred in the Tierra Amarilla litigation, the court highlighted the document’s general reference to the grantees as “community members” and “inhabitants” of the villages, as well as its lack of specific language describing the land at issue, despite clear testimony at trial that identified the land described in the document as La Sierra.84 In addition, the court held that the document lacked the terms of inheritance required to devise rights to profits à prendre.85

Further, the court of appeals rejected historical evidence of the initial settlement and subsequent use of the land. The court held that this evidence was irrelevant to interpreting the Beaubien document because of the strict requirements for conveying these types of use rights. While the court of appeals agreed with the plaintiffs’ argument that the

82. Id. at 829-32.
83. Id. at 830-32. Specifically, the court wrote:

[U]nder the law in effect in Colorado territory in 1863, a document conveying any interest in real property had to meet certain formal requirements, including the requirement that it contain “the christian and surnames of the...grantees...and...an accurate description of the premises, or the interest in the premises intended to be conveyed.”

Id. at 831 (citing General Laws of the Territory of Colorado, Act Concerning Conveyances of Real Estate § 2 (1861)). Plaintiffs first argued on appeal that the lower court’s rejection of the document as a valid conveyance was based on its misinterpretation of nineteenth century property laws and canons for construing documents. See Appellants’ Opening Brief, supra note 37, at 25-27 (“While these complex legal provisions provided a convenient path for the court of appeals to escape the maze of substantive issues presented for review, application of these technical laws, without reference to, and analysis of, the entire 1863 statutory scheme, was erroneous.”). The Lobato court ultimately avoided this entire discussion by accepting the plaintiffs’ theory that their use rights were valid under the law of servitudes.

84. Lobato, 13 P.3d at 831.
85. Id. (“[T]o the extent the rights purportedly granted in the Beaubien document are profits à prendre in gross—that is, personal rights held distinct from any ownership of land—the document did not contain [the words of limitation “and heirs and assigns”] required under then-existing Colorado law to pass such rights on to the original inhabitants’ successors, including plaintiffs.”). A “profit à prendre,” or “profit,” is “an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another.” Lobato v. Taylor, 71 P.3d 938, 945 (Colo. 2002) (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(2)).
asserted rights could be characterized as profits à prendre, it
distinguished these rights from access easements. Although similar to
easements in many aspects, the court of appeals held that, unlike
easements, profits à prendre must be granted by express language and
that extrinsic, historical evidence could not aid an ambiguous
conveyance.  

Thus, while the court of appeals conceded that the Beaubien
document set forth "certain rights and privileges to be had by settlers
residing in towns located within the boundaries of the Sangre de Cristo
grant," it nonetheless refused to hold that the Beaubien document
created an express grant. In doing so, the court of appeals rejected the
landowners' argument that the document should be broadly construed
and its language contextualized.

b. The Asserted Rights Could Not Be Implied under the Law of
Servitudes  
The appeals court similarly refused to apply equitable doctrines
to the plaintiffs' claims. The plaintiffs had argued that their usufructuary
rights were enforceable based on implication and under the doctrine of
prescription. The court of appeals rejected these arguments by
distinguishing the plaintiffs' asserted rights from easements to which the
laws of implied servitudes would apply, and by imposing strict
requirements for proving prescriptive rights to open land.  

The court of appeals first characterized the plaintiffs' asserted
rights as profits à prendre in gross, rather than rights appurtenant to the
land, and concluded that, unlike easements, profits in gross could not be
established by implication. Easements, the court stated, confer
privileges to access another's land, without granting the right to take
anything of value, while profits à prendre represent the right to take a

86.  Lobato, 13 P.3d at 832. In distinguishing Lazy Dog Ranch v. Telluray Ranch Corp., 965
P.2d 1229 (Colo. 1998), the case relied upon by the plaintiffs, the court characterized Lazy
Dog as having dealt with easements, rather than profits, and disagreed with the plaintiffs'  
interpretation that Lazy Dog allowed extrinsic evidence whenever a document is  
ambiguous. Lobato, 13 P.3d at 832.

87.  Lobato, 13 P.3d at 832. Further, the appeals court elaborated that, even if extrinsic
evidence were permissible in this instance, such evidence was presented at trial but was
insufficient to establish that the document conveyed enforceable rights. Id.

88.  Id. at 829, 833.

89.  Id.

90.  Id. at 821.

91.  Id. at 832-33. An "appurtenant" right is "[s]omething that belongs or is attached to
something else," while rights "in gross" are personal rights unconnected to the dominant
estate. See BLACK'S LAW DICTIONARY 98, 786 (7th ed. 1999); Lobato, 71 P.3d at 945.
product or part of the land itself. Based on a narrow interpretation of earlier Colorado easement cases, the court held that, in contrast to easements, extrinsic evidence could not be used to imply rights to the more valuable profits. The appeals court therefore refused to enforce the landowners' rights absent express language.

The appeals court also rejected the plaintiffs' prescriptive claims. It held that the community's historic use of La Sierra was neither exclusive nor adverse, despite the plaintiffs' theory that adversity should be presumed under Colorado's law of prescriptive easements. Again, the court of appeals distinguished the rules for access easements from those relevant to the types of profits at issue, explaining that "the public" may not acquire profits by prescription, because such use would exhaust the profits claimed. Further, the court stated that the local community's use was defeated by its essentially "permissive" use of the mountain tract.

The plaintiffs appealed each of these issues to the state supreme court. Certainly the decision threatened to go the same way as earlier opinions. However, in June 2002, the Lobato court reversed 40 years of state and federal court opinions by upholding the usufructuary rights of the local landowners. In doing so, Lobato turned what had been a legal morass, riddled with archaic property doctrines and inconsistent precedent, into an important victory for the local community and land grant advocates throughout the Southwest.

III. THE LOBATO DECISION AND HOW THE COURT GOT THERE

A. The Minefields Avoided: What Lobato Did Not Do

Instrumental to the Lobato decision was the Colorado Supreme Court's use of the modern Restatement of Servitudes and Colorado

92. Lobato, 71 P.3d at 952 (citing Alexander Dawson, Inc. v. Fling, 396 P.2d 599 (Colo.1964)).
93. Lobato, 13 P.3d at 832-33 (citing Proper v. Greager, 827 P.2d 591 (Colo. App. 1992)).
94. Id. at 831–32.
95. Id. at 834–35. The appeals court also rejected plaintiffs' arguments that their continuous use of La Sierra should have put Taylor on notice in order to establish or presume prescription, particularly given the presence of ranch managers who supervised the Taylor Ranch. Id.
96. See id. at 834. The historical requirement of exclusivity defeated similar prescriptive claims in the Tierra Amarilla litigation. See Martinez v. Mundy, 295 P.2d 209 (N.M. 1956) ("The claim being in common with and similar to that of the general public in this area, the [successors of the hijuela grantees] certainly could not acquire a private easement unto themselves.").
97. Lobato, 13 P.3d at 834–35.
easement cases to emphasize the equitable concepts of honoring original intent and avoiding injustice. However, perhaps equally important to the court’s resolution of the case were those issues that the courts avoided altogether.

In crafting the Lobato opinion, the court had to navigate pitfalls that for decades had thwarted a resolution of this and other land grant cases. While the careful organization of the opinion conveys a sense of inevitability, the court’s succinct conclusions were far from inevitable. One of the most significant pitfalls was the legal problem presented by Tameling and arguments about the relevance of the Treaty of Guadalupe Hidalgo to the plaintiffs’ claims. The court avoided having to directly confront these issues of Mexican and Treaty law by identifying the common law as the exclusive source of the plaintiffs’ legal rights. Thus, the court rejected the plaintiffs’ claim that their rights derived from Mexican law and that the United States was bound to respect them under the Treaty of Guadalupe Hidalgo, but unlike the lower courts, Lobato avoided any mention of Tameling. The opinion simply stated that Mexican law never applied because the Grant was settled after Mexico ceded the territory to the United States in 1848. Although this conclusion ignored important legal questions about the nature of the Grant, thereby doing little to vindicate Mexican or Treaty law, it nonetheless allowed the court to import evidence of Mexican law and custom into its common law analysis.

B. How the Restatement of Servitudes and Colorado Equity Law Bailed Out the Treaty of Guadalupe Hidalgo

While Lobato affirmed the lower courts on the Mexican and Treaty law issue, it reversed the court of appeals on the issue of implied

98. See discussion supra Part II.B (explaining that Tameling precluded courts from reviewing the contours of the land grant after Congress’s de novo confirmation in 1860).
100. Id.
101. Id. The court’s exclusive focus on those rights created under American law obviated the need to legally define the Sangre de Cristo Grant as a private, community, or empresario grant under Mexican law, again avoiding the problem of dealing with rights and obligations created by Mexican law. The court merely explained that the Grant was made to two men “for the purpose of settlement” and focused the rest of its attention on the legal function and intent of the Beaubien document in common law terms. Id. at 943. Still, in describing the Grant this way, the opinion clearly treated the Sangre de Cristo Grant as a private grant—a feature that distinguishes it from the number of community grants in New Mexico. For a description of other private land grants made by Governor Armijo during the “Mexican period,” see EBRIGHT, supra note 5, at 24–27. See also EBRIGHT, supra note 36, at 4–6 (distinguishing community and private land grants).
rights, holding that the rights set forth in the Beaubien document were implied by prescription, estoppel, and prior use. In doing so, *Lobato* followed what it characterized as a modern trend of simplifying the law of servitudes based on concepts of equity, and abandoning the unnecessary, legal technicalities long associated with the common law of servitudes.\(^\text{102}\)

1. The Settlement Rights Were Profits

The court's first step was to re-characterize the rights described in the Beaubien document to make them cognizable as equitable servitudes. The lower courts had rejected the plaintiffs' claims of express and implied rights to *La Sierra* by distinguishing these usufructuary interests from traditional easements. This had prevented the landowners from using historical evidence to interpret the rights implied in the Beaubien document or from applying the equitable laws of implied easements.\(^\text{103}\) Thus, the *Lobato* court held that the plaintiffs' asserted rights to *La Sierra* were profits à prendre,\(^\text{104}\) but then expressly rejected the lower courts' parsimonious distinction between profits and easements, following the new *Restatement*'s approach of equating the two different interests for purposes of creating and conveying rights.\(^\text{105}\) The court then defined profits as easements to which the law of implied easements applied.\(^\text{106}\)

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102. See *Lobato*, 71 P.3d at 953 n.11 (quoting *Introduction*, *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES*, at 3: "Notably, one of the goals of the Restatement is to 'present [] a comprehensive modern treatment of the law of servitudes that substantially simplifies and clarifies one of the most complex and archaic bodies of 20th century American law....It is designed to allow both traditional and innovative land-development practices using servitudes without imposing artificial constraints as to form or arbitrary limitations as to substance.'"). See also *RESTATEMENT (FIRST) OF PROPERTY § 450 (1944).*

103. See discussion supra notes 29–30.

104. *Lobato*, 71 P.3d at 945.

105. *Id.* at 952–53.

106. *Id.* at 945, 950. The modern *Restatement* erases technical distinctions between different types of servitudes by combining easements, equitable servitudes, and covenants into a single category of servitudes. *Id.* at 945 (quoting *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2*). An earlier version of the *Restatement* applied the same rules to profits à prendre and easements, since they both describe interests in the land of another. *RESTATEMENT (FIRST) OF PROPERTY § 450 Special N. (1944).* While the *Third Restatement* revived the term "profit" for descriptive purposes, the same rules still govern profits and easements. *Lobato*, 71 P.3d at 952 n.10 (quoting *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 Reporter's N.*). In following the approach of the modern *Restatement*, the *Lobato* court expressly disagreed with the court of appeals, which had concluded that different rules may apply to profits and easements. *Lobato v. Taylor*, 13 P.3d 821, 827 (Colo. App. 2000).
Crucial to the court's treatment of these settlement rights as a type of easement was the Restatement of Servitude's overall simplification of the law of servitudes.\textsuperscript{107} Calling this area one of the "most complex and archaic bodies of 20th Century American law,"\textsuperscript{108} the authors of the Restatement chose to eliminate the nuanced distinctions between equitable interests to better serve the policy and purpose behind such doctrines.\textsuperscript{109} The new Restatement collectively defines servitudes, easements, profits, and covenants as "servitudes" for the purpose of asserting one's interest in the land of another.\textsuperscript{110} Similarly, the Restatement treats profits as a type of easement for purposes of proving one's rights to another's land. These simplified definitions eliminate the technical distinctions that had developed for each individual interest and often prevented claimants from satisfying any of them.\textsuperscript{111}

In defining profits \textit{à prendre} as a type of easement, to which the same rules applied, the court also rejected the lower courts' reliance on \textit{Alexander Dawson, Inc. v. Fling}, 396 P.2d 599 (Colo. 1964), which had declined to uphold the plaintiffs' implied rights to fish in defendant's lake when the parties' contract had expressly limited plaintiffs to right to boat and swim. Unlike the lower courts, the \textit{Lobato} court distinguished \textit{Fling} as a case limited by an express contract, rather than as announcing a distinction between the rules for easements (e.g., boating) and profits (e.g., fishing). See \textit{Lobato}, 71 P.3d at 952 (citing \textit{RESTATEMENT (FIRST) OF PROPERTY § 450 Special N., § 1.2 (1944)}).

\textsuperscript{107} On appeal, the plaintiffs had relied on this "streamlined" interpretation of the law of servitudes to convince the high court that it was appropriate to consider extrinsic evidence in order to understand the meaning of the document. See Appellants' Opening Brief, supra note 37, at 31 ("Although the complexity of this subject of servitudes seems to have stymied the lower courts, between reference to the simplified Restatement principles and long-standing Colorado law, the analysis of this subject now is considerably easier. The law has not changed, it has just been streamlined for ease of application.").

\textsuperscript{108} \textit{Lobato}, 71 P.3d at 953 n.11 (quoting \textit{Introduction, RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES}, at 3: "This Restatement presents a comprehensive modern treatment of the law of servitudes that substantially simplifies and clarifies one of the most complex and archaic bodies of 20th century American law....It is designed to allow both traditional and innovative land-development practices using servitudes, without imposing artificial constraints as to form or arbitrary limitations as to substance.").

\textsuperscript{109} See \textit{id} at 951 (quoting \textit{RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES} § 2.12 cmt. a., to highlight the rationale for recognizing easements based on prior use) ("The rule stated in this section is not based solely on the presumed actual intent of the parties. It furthers the policy of protecting reasonable expectations, as well as actual intent, of parties to land transactions.").

\textsuperscript{110} \textit{RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES}, Tentative Draft No. 1 (1989), Introduction xxiii-xxvi; see \textit{id} § 2.2, cmt. d. (2000) ("Although labels are not determinative, the terms "easement," "profit," "covenant" and "servitude" normally indicate that a servitude is intended.").

\textsuperscript{111} For instance, recognizing the outdated, technical requirements for the doctrine of prescription discussed \textit{supra}, the Restatement now allows a plaintiff to meet the requirements of prescription by proving \textit{either} adverse use or an imperfectly conveyed title. See \textit{Lobato}, 71 P.3d at 953-55.
Having recognized the plaintiffs' settlement claims as servitudes, the remainder and bulk of the Lobato opinion outlined the legal sources of these servitudes. The court ultimately upheld these rights under the doctrines of prescription, estoppel, and implied use, as informed by the 1863 Beaubien document, its historical context, and the plaintiffs' historic use of La Sierra.112

2. The Beaubien Document Was a Source of Enforceable Rights

Although the Lobato court held that the Beaubien document failed to satisfy the requirements of an express grant, it held that the document, while ambiguous on its face, was nonetheless a source of implied rights to La Sierra.113 By relying on Colorado's law of interpreting easements, the court used Mexican law and custom, not as a source of law, but to help understand what Beaubien had intended when he created the document.

Prior to the Colorado Supreme Court's decision in Lobato, it was sharply debated whether courts should allow such historical evidence to ascertain the nature and location of the rights described in the document and to determine if these corresponded to the plaintiffs' asserted rights to La Sierra. The answer depended largely on whether the Beaubien document was considered ambiguous (and how to make such a determination) under Colorado easement law, as well as whether the law of easements could apply to profits in the first place.114 Here Lobato explicitly reversed the lower courts, holding that, under Colorado easement law, the document was ambiguous and any ambiguity should be resolved by looking at the circumstances under which Beaubien created the document.115 To do so, the court followed Lazy Dog Ranch v. Telluray Ranch Corp., which had relied on the equitable approach in the new Restatement.116 Under Lazy Dog and the Restatement, Lobato held that extrinsic evidence may be relevant to resolve whether an easement deed is ambiguous and, if the deed is found to be ambiguous, to ascertain the original intent of the parties.117 The court emphasized that "[i]t would be

112. The last section of the opinion then limited the scope of the plaintiffs' usufructuary rights to La Sierra to pasture, firewood, and timber. Lobato, 71 P.3d at 956.
113. Id. at 946-49.
117. The Lobato court clearly disagreed with the court of appeals, which had distinguished Lazy Dog as a case about easements rather than profits, and found that Lazy Dog did not apply since it considered the Beaubien document to be "patently unambiguous" on its face. Lobato, 13 P.3d at 832; Lazy Dog, 965 P.2d at 1235 (citing
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." To interpret the Beaubien document, the court considered those factors used in Lazy Dog: the character of the relevant property and surrounding area, the subsequent use of the property, and the nature of a development plan for the area.119

The Lobato court used these same factors to reason that La Sierra was the tract of land that Beaubien intended to burden with the settlement rights.120 The court was heavily influenced by evidence showing that the resources described in the Beaubien document were uniquely available on La Sierra.121 The court also relied on the trial court’s findings that the plaintiffs and their predecessors had exercised these rights on La Sierra for over 100 years.122 Lastly, the court was persuaded by the language in Taylor’s deed, which explicitly referred to the “settlement rights” of the local community, confirming that the plaintiffs’ asserted rights attached to the land that Taylor purchased.123

The court used a similar analysis to conclude that, in his 1863 document, Beaubien intended to grant appurtenant rights, or rights that would run permanently with the land, rather than those rights being in gross and belonging only to the first settlers.124 Here again, the court used Spanish and Mexican law and custom to illuminate what the

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RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, Tentative Draft No. 4, 1994). As discussed in Lazy Dog:

[T]he Restatement (Third) of Property has eschewed a strict “four corners” rule in favor of a more context-based inquiry. The Restatement (Third) of Property first notes that “a servitude should be interpreted to give effect to and be consistent with the intention of the parties to an expressly created servitude.” [The Restatement] explains further that “the intention of the parties to an expressly created servitude is ascertained from the servitude’s language interpreted in light of all of the circumstances.”

Id. (internal citations omitted). Further, Lazy Dog explained that the concept of examining deeds in light of surrounding circumstances was far from novel, having been recognized in the first Restatement as necessary when the language of a document is unclear or incomplete. Id. at 1236. The court stated that the “weight and momentum of authority,” including other jurisdictions as well as the Restatement, favored the more flexible, contextual approach. Id.

118. Lobato, 71 P.3d at 947.
119. Id. at 947–48; Lazy Dog, 965 P.2d at 1235, 1237.
120. Lobato, 71 P.3d at 948 (holding that the location of the rights to pasture, water, firewood, and timber in the Beaubien document was La Sierra, based on evidence of both the nature of the land itself and the historical use of the local community).
121. Id. (citing Dr. Marianne Stoller’s report and testimony at trial).
122. Id.
123. Id.
124. Id. at 938, 949-50. For a definition of “gross” and “appurtenant” rights, see supra note 91.
parties must have understood the Beaubien document to mean. The court cited contemporary land grant scholarship to explain the Mexican settlement system at the time. It emphasized that common access to resources such as pasture for grazing and wood to heat and frame their homes was a necessary incentive to attract settlers, supplement their vara strips, and maintain these subsistence-based communities. For private land grants such as the Sangre de Cristo Grant, which might pass through many hands, appurtenant rights to the land insured the permanent viability of these settlement communities. Stating that easements are presumed to run with servient estates, the court concluded that the settlement rights were easements that legally connected the settlers' valley plots with necessary resources on the mountain tract.

125. Lobato, 71 P.3d at 949.
126. A vara was a common unit of measurement in Mexico and Spain that amounted to just under a yard. The vara strips along the Culebra valley are narrow strips of individually owned, cultivated land with frontage on a stream for irrigation purposes. See Stoller, supra note 9, at 14-15.
127. For an explanation of the system of private and community land grants under Spanish and Mexican law, see EBRIGHT, supra note 5, at 23. For a description of subsistence patterns under the Mexican system of land tenure, see IRA G. CLARK, WATER IN NEW MEXICO, A HISTORY OF MANAGEMENT AND USE 34 (1987). The court explained that Mexican land grants of this period were designed to secure the northern frontier by establishing permanent agricultural and pastoral communities in these sparsely populated areas, and that the territorial governor conveyed large tracts of land to individuals such as Beaubien with the express condition that they would attract settlers to the grant. See Tameling v. U.S. Freehold Land & Emigration Co., 2 Colo. 411, 416 (1874), aff'd, 93 U.S. 644 (1876).
It is well known as a matter of history, that from a time coeval with the establishment by Spain of colonies in this country the king and likewise his provincial governors, were in the habit of making extensive grants of land to individuals for pastoral, agricultural and colonization purposes. After Mexico had achieved her independence, the same policy was pursued by the supreme and local governments of that country.

Id. At trial, Dr. Marianne Stoller testified that the land that the villagers historically accessed on La Sierra matched the land described in the Beaubien document. See Lobato v. Taylor, 13 P.3d 821, 832 (Colo. App. 2000). Further, the court noted that the 1864 agreement between Beaubien's heirs and William Gilpin, written pursuant to an oral agreement between Beaubien and Gilpin, further confirmed that these settlement rights ran with the land. Lobato, 71 P.3d at 949. The document specifically recognized the settlement rights to the land by stating that the "express condition that the settlement rights before then conceded by said Charles Beaubien to residents of Costilla, Culebra & Trinchera, within said Tract included, shall be confirmed by the said William Gilpin as confirmed by him." Id.

128. Lobato, 71 P.3d at 949 n.7 (distinguishing the importance of access rights to a private grant from those to a community grant, since the fact that communal lands were held by the community in perpetuity ensured permanent access to them).
129. Id. at 949-50.
3. The Rights Were Enforceable as Implied Servitudes

In upholding the settlement rights as implied easements, the court flatly rejected the lower courts’ conclusion that the rights at issue were profits to which prescription and other implied rights could not apply under the law of servitudes. After determining that Beaubien intended to convey these rights in his 1863 deed, but did so imperfectly, the court relied heavily on the Restatement of Servitudes and Colorado easement law to uphold the plaintiffs’ rights as implied servitudes.130

The court relied on the modern Restatement’s focus on fairness and honoring the original intent of the parties, particularly regarding conveyances that were clearly intended yet imperfectly executed.131 Absent express language, it stated that an easement could be implied by circumstances that illustrate the original parties’ intent to create such interests.132 The court then upheld the plaintiffs’ claims under the doctrines of prescription, estoppel, and prior use.133

Rights by Prescription, Estoppel, and Prior Use

The court first upheld the asserted rights under the doctrine of prescription. In contrast to the absolute requirement of adversity that the lower courts demanded for proving a prescriptive claim, the Lobato court used the approach taken by the modern Restatement, which allowed an easement by prescription if the asserted use was shown to be (1) open or

130. The court rejected the court of appeals’ conclusion that the law of implied easements exclusively applied to access rights and was inapplicable to profits or use rights. See Lobato, 13 P.3d at 832–33 (relying on Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 P.2d 599 (1964)). The Lobato court explained that the appeals court had overstated Fling, which failed to find implied use rights when the terms of a deed expressly limited the plaintiffs to certain uses. Lobato, 71 P.3d at 952. Thus, Fling did not apply to the Lobato claims of implied rights, where the document at issue did not express a contrary intent. Id. Rather, Lobato emphasized the “modern trend” of applying the same equitable concepts equally to all servitudes, whether access easements or profits à prendre, as both types of interests involved the same policy and practical concerns of effectuating a party’s intent when they fail to comply with strict common law rules of conveyance. Id. (citing RESTATEMENT OF PROPERTY, supra note 85, § 450 Special N. (1944)).

131. Lobato, 71 P.3d at 950 (“This well-established area of property law is concerned with honoring the intentions of the parties to land transactions and avoiding injustice.”).

132. Id. at 946–50.

133. The court recognized that, in the absence of a legally sufficient conveyance, the rights must nonetheless satisfy an exception to the Statute of Frauds. Id. at 938, 950 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.1). Such exceptions include implied servitudes created by prescription, estoppel, prior use, or “other circumstances surrounding the conveyance of other interests in land, which give rise to the inference that the parties intended to create a servitude.” Id. (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.8 cmt. b).
notorious, (2) continuous without effective interruption for 18 years (Colorado’s statutory time period), and (3) either adverse or pursuant to an attempted but ineffectively conveyed grant. The court held that the plaintiffs’ historical evidence of open use and the language of the Beaubien and Gilpin documents, as well as subsequent deeds, satisfied the first prong of open or notorious use. The court held that the second prong for a prescriptive claim was satisfied by the continuous, uninterrupted use from the mid-1800s until 1960, as found by the trial court. Finally and most notably, Lobato held that, under the liberalized third prong of the recent Restatement, the Beaubien document provided ample evidence of Beaubien’s intent to convey usufructuary rights to La Sierra. This evidence was supported by language in subsequent deeds to the mountain tract and by evidence of customary settlement practices. Citing Colorado case law that omitted the requirement of adversity for prescriptive easements, the court held that the prescriptive claim was not defeated by the fact that the community’s historic use was permissive rather than adverse.

The court also held that the plaintiffs established implied rights under the implied doctrine of estoppel. In doing so, the court highlighted Colorado’s practice of recognizing equitable rights even when parties cannot meet the express requirements of the common law. The court again relied on the approach taken by the modern Restatement, which eliminated the requirement of deception or misrepren-

134. Id. at 950 (citing Restatement (Third) of Property: Servitudes § 2.17).
135. Id. at 954.
136. Id.
137. Id.
138. Id.
139. Id. at 954–55 (citing Wright v. Horse Creek Ranches, 697 P.2d 384, 388 (Colo. 1985); Proper v. Greager, 827 P.2d 591, 595–96 (Colo. App. 1992)).
140. Id. at 950–51.
141. Id. (citing Restatement (Third) of Property: Servitudes § 2.10). The court found useful a number of early twentieth century Colorado ditch cases that upheld ditch easements through estoppel, without a requirement of deception, thus agreeing with plaintiffs that ditch rights were analogous to the settlement rights in Lobato. See id. at 951 (citing Graybill v. Corlett, 60 Colo. 551, 154 P. 730, 730–31 (Colo. 1916) (upholding a landowner’s right to use and maintain a water ditch across his neighbor’s land when the parties had made an oral promise upon which the ditch user relied for irrigation); Hoeyne Ditch Co. v. John Flood Ditch Co., 68 Colo. 538, 191 P. 108, 111 (Colo. 1920) (upholding a ditch user’s equitable right to use defendant’s ditch pursuant to an oral promise, by applying the “well settled” rule that, “although an oral contract relating to realty is within the statute [of frauds], where a consideration has passed, and it has been fully performed by both parties and possession taken in pursuance thereof, the bar of the statute is removed and equity will enforce the right thus acquired’’).
sentation from the traditional common law doctrine of estoppel. The court held that it was reasonable for Beaubien, the owner of the servient estate, to anticipate that the settlers would substantially change their positions based on the promise of usufructuary rights, because this was (1) customary under Mexican law, (2) intended by Beaubien (as evidenced by the relevant documents and actual practice), and (3) necessary in light of expert testimony about the need for the unique resources of the mountain tract. The court further concluded that Beaubien's solicitations and the settlers' relocation to the Sangre de Cristo Grant demonstrated that the settlers substantially changed their positions by reasonably relying on such a belief. The court emphasized that it would be an injustice not to recognize the plaintiffs' usufructuary rights, given Beaubien's clear intent to convey such rights and the significant sacrifices made by them and their predecessors.

Finally, the court upheld the plaintiffs' rights based on the Restatement's definition of implied easement by prior use, a doctrine long recognized in Colorado. Under the modern Restatement's analysis, the court held that (1) Beaubien had originally owned both the mountain tract and the usufructuary rights thereto, (2) the settlers exercised these rights before Beaubien legally severed them, (3) the usufructuary rights were permanent rather than temporary, (4) these settlement rights were reasonably necessary to the subsistence of the settlers and their successors on the Sangre de Cristo Grant, and (5) Beaubien had not shown any express or implicit intent to the contrary. As to this last

142. Id. at 950-51.
143. Id. at 955-56.
144. Id. According to the court, "reasonable reliance" depended on the nature of the transaction and the sophistication of the parties. Id.
145. Id. (citing RESTATMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10). The court emphasized that Beaubien had lured the plaintiffs' predecessors to the northern frontier by promising ample resources for their subsistence needs. Further, the settlers arguably fulfilled the condition of the Sangre de Cristo Grant by settling the land with a permanent agricultural community, thereby enabling Beaubien to secure his title to the Grant. Id.
147. Id. at 956 (citing Tameling v. U.S. Freehold Land & Emigration Co., 2 Colo. 411, 413 (Colo. Terr. 1874)).
148. Id. (relying on testimony that the resources from the mountain tract were essential to survival in the San Luis Valley, indicating that the settlers must have exercised these rights before Beaubien memorialized them in 1863).
149. Id.
150. Id. Again, this finding relied heavily on the lower court's findings of fact and mirrored the arguments in the estoppel claim.
151. Id.
element, the court held that, in fact, given Mexican customary practice, the language from the documents, and the expectations of the parties, Beaubien and the land grant settlers, as well as their successors, understood that Beaubien had conveyed to the settlers usufructuary rights to La Sierra.152

4. The Scope of the Rights

After recognizing the plaintiffs' rights to La Sierra as implied servitutes under the doctrines of prescription, estoppel, and prior use, the majority then significantly limited the scope of those rights to include only the timber and firewood necessary for each household and sufficient pasture for each family’s livestock, but not the right to hunt, fish, or recreate on the mountain tract.153 The court retained jurisdiction to determine the scope of the class entitled to claim these rights.154 On April 28, 2003, the Colorado Supreme Court held that the rights to pasture, timber, and firewood on La Sierra were available to all Costilla County landowners or their predecessors who were not named and served in the earlier Torrens actions and were able to trace their title to the initial settlement of the Sangre de Cristo Grant.155 The court

152. Id.
153. Id. In his dissent, Justice Martinez argued that, under the same analysis used by the majority, the plaintiffs’ had proven these latter rights as well, based on evidence of the importance of these rights at the time of settlement and the community’s historic use of these rights. Id. at 958–62 (Martinez, J., dissenting).
154. Id. at 957.
155. Lobato v. Taylor, 70 P.3d 1152, 1156 (Colo. 2003), as modified on denial of rehearing (June 16, 2003) [hereinafter Lobato II]. This included all settlement during William Gilpin’s ownership of the Grant beginning in 1864, described in supra note 129. Id. at 1158–59. Specifically, on remand landowners must demonstrate, by a preponderance of the evidence, that their land was owned or occupied by the settlers during the time that Gilpin owned the property. Id. The court also required the Defendants (formerly Taylor, then ex-Enron executive Lou Pai) to pay the costs of identifying and serving all individuals who have usufructuary rights to La Sierra, as defined in the 2002 Lobato case:

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.

Id. at 1167; Deborah Frazier, Ranch Opened After 44 Years: Families Regain Access to Land Once Used by Ancestors, ROCKY MNTN. NEWS, June 12, 2004, at 13A. Further, the court allowed the plaintiffs to raise the class certification issue again to the trial court on remand. Lobato II, 70 P.3d at n.14.
remanded these issues to the trial court in Costilla County. On June 11, 2004, District Judge Gaspar Perricone, the same judge who had rejected the plaintiffs' claims over 20 years before, granted nine families immediate access to La Sierra and set up a year-long process for identifying and tracing the titles of an estimated 1000 additional successors to the original settlers who were not personally notified in the earlier Torrens action. As of this writing, Judge Perricone had extended this access to about 100 people earlier this year and to an additional 400 in July. The next round of claims will be considered later this year.

IV. CONCLUSION: WHERE LOBATO LEAVES LAND GRANT LITIGATION: IMPLICATIONS, CRITICISMS, AND DISTINCTIONS WITHOUT A DIFFERENCE

While the 40-year case has taken a monumental toll on San Luis and its neighboring communities and local landowners still have a long way to go to reclaim their lost rights to La Sierra, the Lobato decision provides courts with important tools for enforcing land claims with cultural and legal roots in Mexico or Spain. Its approach also presents some interesting ironies. For instance, Lobato suggests that ambiguities in historical documents may allow courts to look outside the language of a document to its surrounding circumstances, rather than necessarily preventing the creation of valid rights. Thus, in Lobato, the ambiguity and lack of specificity in the Beaubien document became the document's greatest strength rather than its fatal flaw. Similarly, the court's approach to construing a grant that was attempted but ineffectively conveyed took advantage of another type of ambiguity. Rather than acting as a bar to claimants' rights, in Lobato this legal imperfection was an important tool for circumventing the traditional requirement of adversity to prove a prescriptive claim.

Perhaps yet another irony is that, by avoiding Tameling's bar to claims based on Mexican law, Lobato seemed to suggest that, the later in time the land grant, the more likely courts are to enforce claims based on

156. Lobato II, 70 P.3d at 1156.
157. Sylvia Lobato, Land Grant Heirs Win Vital Victory: Judge Rules Against Owners of Taylor Ranch, Ensures Access, VALLEY COURIER (San Luis Valley, Colorado), June 12, 2004, at 1. Judge Perricone additionally ordered Defendants to pay an estimated $100,000 in costs for the title search, and denied Defendants' motions to restrict and further delay access to the property. Frazier, supra note 155.
159. See generally Tierra Amarilla cases cited in supra note 57 and accompanying text.
American law. While the court's analysis was tailored to the unique facts surrounding the 1863 Beaubien document, its contextual approach is certainly applicable to other large, private grants made during the end of Mexican rule over New Mexican territory. Many of the facts in Lobato are shared by other New Mexican land grants, such as the size, conditionality, time period, and purpose of the original Sangre de Cristo Grant. In many of these instances, land was conveyed to individuals or communities with the purpose and condition of settling the northern border, and subsequent deeds or hijuelas represented the fulfillment of these conditions. The Lobato court found it significant that it was "attempting to construe a 150 year-old document written in Spanish by a French Canadian who obtained a conditional grant to an enormous land area under Mexican law and perfected it under American law." Therefore, perhaps most importantly, Lobato suggests that, under the common law, rights to other land grants, such as the Tierra Amarilla Grant, must be read in light of the Mexican law and custom that surrounded and informed them.

While Lobato may help vindicate land grant claims to which the American common law may apply, the court arguably did little to advance efforts to vindicate Mexican and international treaty law. Here, the court avoided a principled analysis of the rights to the Land Grant under Mexican law, sidestepping the plaintiffs' Mexican law claims by simply concluding that the Grant was settled after 1863. By

160. See Lobato v. Taylor, 71 P.3d 938, 947 (Colo. 2002) ("[W]e find that the document, when taken together with the other unique facts of this case, establishes a prescriptive easement, an easement by estoppel, and an easement from prior use.") (emphasis added).
161. Id. Also important to the Lobato court was the fact that the Beaubien document seemed to "memorialize commitments he had made to induce families to move hundreds of miles to make homes in the wilderness," circumstances that are indeed true for land grant settlers throughout present-day New Mexico. Id. While private, Mexican-period land grants such as the Maxwell and Pablo Montoya grants may not share the important documentary history of La Sierra, in which each post-1863 deed to the mountain tract referred to the claims of the local community, they nonetheless share many of the persuasive factors in the Lobato case.
162. Id.
164. For instance, while Lobato relied on Mexican law and custom to inform the intent and expectations of the parties in 1863, it failed to discuss the type of grant created under Mexican law or whether this was relevant to the reasonableness of the parties' reliance, in light of the legal customs of the time. See discussion supra, Part III. While the Lobato court treated the Sangre de Cristo Grant as essentially a private grant, there are different theories
making Mexican law inapplicable as a source of law, \textit{Lobato} raises some important issues and ironies. Is it worth deemphasizing Treaty claims if courts are able to vindicate land grant rights under the common law? Does it justify perpetuating the loss of land grant claims to insist that rights be based on Treaty and international law? Are courts the proper place to wage these political battles, or is it enough to have courts developing tools to chip away at historic injustices?

about what type of grant it actually was, with each theory bearing unique legal implications, even under U.S. law. \textit{Cf. García & Howland, supra note 28, at 45} (describing the Sangre de Cristo Grant as an \textit{empresario} grant that contained both private land and communal land and arguing that the Mexican settlers should have received \textit{title} to the mountain tract in common under Mexican law). For instance, if the grant was an \textit{empresario} or community grant in which the mountain tract was held in common, then the title to such lands would have been lost under \textit{Sandoval}. \textit{See id.} at 45-46. \textit{See also} discussion \textit{supra note 101} and accompanying text. On the other hand, if the use rights were legally \textit{created} at the time of the original land grant, then the United States was arguably obligated to apply Mexican law or custom under the 1848 Treaty. \textit{See Appellants' Opening Brief, supra note 37, at 15-16} (citing a number of experts who opined that the settlers' usufructuary rights were created by the Grant and thus legally enforceable under Mexican law). According to Plaintiffs, these rights were not affected by the 1860 Act of Congress, since the Surveyor General had not recommended that Congress extinguish the settlement rights of the local community and the Act only confirmed the claim "as recommended for confirmation by said surveyor-general in his reports..." \textit{Id.} at 18-19 (citing Act of June 21, 1860, ch. 167, 12 Stat. 71 (1860)). Further, the Act stated that "the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any person or persons whomsoever." \textit{Id.} at 19.

Likewise, by avoiding the legal status of the Grant under Mexican law, the court failed to analyze whether the Grant was complete at the time it was granted in 1844, and, if so, whether it was then subject to defeasement if the conditions of settlement were not met, or, on the other hand, if the grant was based on conditions subsequent to its conveyance to Beaubien and Lee, in which case the transfer was not actually complete until the land was settled in the 1860s, when American law applied. In the first scenario, the Grant and the settlement rights it contemplated would have been controlled by Mexican law and subject to U.S. recognition under the Treaty of Guadalupe Hidalgo, but the relevance of such law was debatable under \textit{Tameling}, under which Congress's 1860 confirmation would render the Mexican legal conditions irrelevant. In the second scenario, because U.S. law clearly controlled by 1863, the recognition that the Grant was incomplete or failed to vest may have vitiated the plaintiffs' use of Mexican custom and practice to inform the intent of the parties in 1863. \textit{See EBRIGHT, supra note 5, at 36-37.}

Yet another argument is that the Grant never vested, since the vesting of the Sangre de Cristo Grant was arguably conditional on settlement within two years. \textit{See Stoller, supra note 9, at 3. But see Garcia & Howland, supra note 28, at 42} (describing the conditions of fulfilling land grants as being less important by this period, as the Mexican government was increasingly desperate to settle northern lands in order to hold off American advancements). According to this latter view, the Sangre de Cristo Grant may have been reasonably understood as vested even without the conditions being fully satisfied, which may have justified the settlers and their successors in relying on their usufructuary rights as legally binding and enforceable. \textit{See Lobato, 71 P.3d at 955} (discussing the reasonable expectations of the settlers under Mexican law and custom as applied to implied rights by estoppel).
Perhaps the real significance of *Lobato* is not the way it failed to use Mexican, international, or treaty law, but the way it succeeded in using the equitable tools of the common law in ways that will undoubtedly prove useful to other courts and claimants. The court’s analysis of implied servitudes under the modern *Restatement* and the equitable principles underlying its analysis will be far-reaching. Furthermore, *Lobato* provides new tools for examining the historical context of land grant claims in cases involving ambiguous historical documents. *Lobato* proved that the common law is flexible enough to recognize these historic claims to crucial resources in the Southwest.

The outcome in *Lobato* is in large part a testament to the commitment, skill, and tenacity of the plaintiffs and their community, supporters, and attorneys. While the legal battle is over, the practical resolution of the conflict is still unfolding. Those individuals whose titles are traceable to the original settlers of the land grant now have the power and responsibility to decide how to exercise their usufructuary rights to *La Sierra*. The Land Rights Council in San Luis is currently creating a sustainable land use plan for the estimated 1000 Costilla County residents who will be able to access the resources on *La Sierra*.

165. Still, the decision has come at an enormous cost. After losing access to *La Sierra* in the 1960s, residents of San Luis and neighboring communities lost access to unique resources that had sustained the local economy and culture for over a century, and a generation has been deprived access to resources central to its economic and cultural well-being. Some estimate that 7500 residents left the community in the 1960s as a result of Taylor’s restricting access to the resources on La Sierra. Frazier, *supra* note 155. With an economy based nearly entirely on farming and ranching, nearly 50 percent of Costilla County residents received public assistance by 1990, ranking the county in the top two statewide in terms of numbers of residents receiving public assistance. Stoller, *supra* note 9, at 44, 58 (suggesting that some of this assistance would be unnecessary if residents were allowed to access the mountain resources that their families traditionally used). The case has generated tremendous amounts of court and attorney fees (although most of the legal support has been pro bono), and countless hours and ultimately years gathering documentation essential to the Taylor Ranch litigation. See Interview with Maria Mondragon-Valdés, *supra* note 43.

166. The Land Rights Council received a grant of $75,000 in late 2003 to prepare a sustainable land use plan for *La Sierra*, which is currently being implemented by LRC planning director Arnold Valdés. The study includes research about the numbers of sheep and cattle that were historically grazed on the mountain, as well as how much wood was traditionally harvested. See Deborah Frazier, *Land War Ends but New Battle Looms: Property Owners Try to Figure How to Share Landscape*, ROCKY MTN. NEWS, Dec. 13, 2003 (on file with author) (noting statements of Maria Valdés, who wrote the grant proposal for LRC); Taylor Ranch Has New Owners, DAILY CAMERA (Boulder, Colo.), Aug. 11, 2004 (on file with author). As the land and its watershed have been plundered by timber interests since 1960, there is certainly much to be healed. See Pablo Carlos Moya, *Taylor Ranch Damage Appalling, Visitors Find*, PUEBLO CHIEFTAIN, July 2004, at 5; Karl Hess, Jr. & Tom Wolf, *Treasure of La Sierra*, REASON, Oct. 1999, available at http://reason.com/9910/fe.kh.treasure.html (last visited June 22, 2005).
Whatever the contours of the plan, they will have to be negotiated with the newest owners of the Taylor Ranch, who inherited the case from Taylor and his successor, ex-Enron executive Lou Pai. Much is at stake in what happens on the newly accessible mountain tract—for the community, for the mountain, and for other land grant heirs, whether battling for access rights to private lands or for title to lands that were historically held in common.

_Lobato_ offers an important opportunity for those attempting to vindicate land and water rights with roots in Mexican or Spanish land grants. These rights have been routinely denied for over a century because courts have lacked a framework through which to interpret rights grounded in the history, culture, and laws of our antecedent sovereigns. It would have been difficult to imagine decades ago that the _Restatement of Servitudes_ would provide the means for vindicating the land rights of the community of San Luis. Certainly this case disproves those who argue that U.S. courts are unable to recognize property rights arising under antecedent sovereigns and different systems of law. However ironic, it seems fitting that the American common law would be the tool to help bridge the gap between these sovereigns and, in so doing, to help bail out the Treaty of Guadalupe Hidalgo.