

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 15
Issue 2 *Spring 2008*

Article 4

2008

Lobato v. Taylor: Torrens Title Lost to Legal Fictions

Todd Barnet

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Todd Barnet, *Lobato v. Taylor: Torrens Title Lost to Legal Fictions*, 15 Mo. Env'tl. L. & Pol'y Rev. 309 (2008)
Available at: <https://scholarship.law.missouri.edu/jesl/vol15/iss2/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

LOBATO V. TAYLOR: Torrens Title Lost to Legal Fictions

Todd Barnet*

INTRODUCTION

The goal of Legal Fiction analysis is primarily to promote intellectual honesty and accurate assessment of case decisions, in an environment of ubiquitous legal fictions. In *Lobato v. Taylor*, the court appears to have relied more heavily than usual on legal fiction to justify the court's aberrant application of American common law.

In 2002, in an about face from prior decisions and at great cost to land title security, the Supreme Court of Colorado decided for 19th century, historical settler's rights to easements by prescription, prior use and estoppel, in the long – contested case of *Lobato v. Taylor*.¹ Easements were awarded to the assigns of the original Mexican settlers, concerning the "Taylor Ranch," located in what is now southern Colorado. The inferior courts had previously denied Plaintiffs, in *Lobato v. Taylor*, the legal right to real property profits and easements. One's initial reaction is to cheer the assigns of the settlers for their amazing victory! This elation, however, ignores the issue of title security and particularly of Torrens Title security. Land grant precedents of Colorado should be viewed in a different context, due to the striking decision of the court in *Lobato v. Taylor*, hereinafter simply "*Lobato*." After 21 years of litigation, easement rights, primarily profits a prendre, (i.e., easements coupled with rights to take something from the land) have been "vindicated" for in excess of one thousand persons, and perhaps as many as three thousand, when the final totals are determined. These persons are all allegedly heirs and assigns of the original, predominantly Mexican settlers of the Taylor Ranch, located in the Sangre de Cristo Mexican land grant. It is a huge and wildly beautiful 77,000-acre parcel, with six

* Associate Professor of Law, Pace University, Department of Legal Studies and Taxation, Juris Doctor, Brooklyn Law School,; A.B., University of Southern California.

¹ *Lobato v. Taylor*, 71 P.3drd 938, 956 (Colo. 2002), *cert. denied*,2002). *Taylor v. Lobato*, 540 U.S. 1073 (2003).

14,000-foot snow covered peaks, valuable timber, minerals, metals and other natural resources.

The court found the settlers' alleged heirs to be entitled to various easements and profits, but not to water, hunting and fishing rights.²

The Colorado Supreme Court also decided, on constitutional due process grounds, based on the alleged lack of proper service of process, that a federal, Torrens Title,³ acquired by Jack Taylor after an exhaustive, seven-year court proceeding and trial, was subject to the free access rights of all of the settlers' heirs and assigns. This holding was a body blow to

² The Center for Land Grant Studies, SouthwestBooks.org, Landmark Ruling on the Sangre de Cristo Grant: *Affirming the Rights of Access for Grazing, Firewood and Timber* (2003), <http://www.southwestbooks.org/sangredecristo.htm>. In 2002, the Colorado Supreme Court ruled the heirs and descendants of those persons who settled the Sangre de Cristo Land Grant in southern Colorado have the right to access the lands of the grant and possessed implied easements and profits thereon. *Id.* The three implied profits awarded by the court are by prescription, by prior use and by estoppel. *Id.* The rights to graze cattle, take timber and firewood were found by the court. *Id.* The court in its 2002 ruling denied water rights and the right to hunt and fish. *Id.* A pivotal writing called the Beaubien document neglected to affirm fishing and hunting rights and water rights come under a special legal category in Colorado. *Id.* The court retained jurisdiction and in an additional ruling directed the trial court to identify all landowners who have access rights to the Taylor Ranch, i.e., the Mountain Tract of the Sangre de Cristo land grant. *Id.* In a second additional ruling, in 2003, the court held that the plaintiff easement holders, to succeed on their claims, need only demonstrate that their property is "located within the boundaries of property owned or occupied by settlers during the time of Gilpin ownership, by a fair preponderance of the evidence." *Id.* All costs would also have to be paid by Taylor. *Id.* Actually, the property has changed hands several times and the Taylors no longer own it; Jack Taylor bought the land in 1960 for only \$500,000. DICK JOHNSTON, THE TAYLOR RANCH WAR, PROPERTY RIGHTS DIE 293 (2006). He died in 1988 and his heirs sold the ranch to an executive of Enron. *Id.* Two rich Texas couples together then bought the property. *Id.* In hearings in 2005, Judge Perricone expressed concern about ultimately including more than 3000 landowners in the process. *Id.*

³ Barry Goldener, *The Torrens System of Title Registration: A New Proposal For Effective Implementation*, 29 UCLA L. Rev. 661, 681, 692 (1982). Torrens Title in the United States is represented by a judgment of a court pursuant to a hearing and trial. *Id.* It is, in theory and in practice, almost without exception, irrefutable. *Id.*

the heretofore, strongly presumed security of a Torrens Title to real property, in Colorado.⁴

There is also the important secondary issue overlooked by the court of the significant threat to wild lands of claims caused by the holding. Torrens Title is an excellent way to protect wild lands from adverse possession claims and this decision compromises the security and reliability of this type of title. In part, this signifies resumption in the general trend of the United States law of real property for *productive use* of wild lands.⁵ U.S. law is sometimes criticized for having a bias in favor of “development.”⁶ Nevertheless, the decision is undoubtedly a happy one for those one thousand plus settlers, but continues the negative trend for protection of wild lands. This is the case, even though in the immediate sense, timber cutting may decrease temporarily. The decision is, paradoxically, a victory for potential adverse possessors, by weakening the assurances heretofore widely relied upon by holders of Torrens Title. The court’s ready reliance on various legal

⁴ Lobato v. Taylor, 71 P.3d 938, 944 (Colo. 2002). Of course no law can stand, if it is unconstitutional. But in Lobato, the court’s decision finding a lack of proper notice is highly suspect and appears to be primarily of a political, as opposed to a legal nature.

⁵ Todd Barnet, *The Uniform Registered State Land And Adverse Possession Reform Act, A Proposal For Reform Of The United States Real Property Law*, 12 BUFF. ENVTL. L. J. 1, 30 (2004). Alaska Nat’l Bank v. Linc, 559 P.2d 1049, 1054 (Alaska 1977) (referring to a productive use of the land as one of the motivating factors); Armstrong v. Cities Serv. Gas Co., 502 P.2d 672, 680 (Kan. 1972) (referring to a “beneficial and productive use” of the land).

⁶ John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 817-23 (1994). Sprankling comments the total land area privately owned in the United States of America is larger than the states of Rhode Island, Massachusetts and Connecticut, combined. *Id.* He cites the development model (which unfortunately stresses “development” of wild or undeveloped property) and the fiction of “constructive notice.” *Id.* This latter occurs when the court rules there was notice to the owner of a trespasser *constructively but not directly*. *Id.* (emphasis added). He notes that the development model, and not the legal fiction of constructive notice, upon which the limitations model relies, rationally explains “hundreds of other modern adverse possession decisions.” *Id.* at 816. The limitations model is the concept that the owner must act against the trespasser to evict him, within the statute of limitations applicable and required as per state law, for an adverse possession. *Id.* at 818-19. If the owner fails to so act, then he is “time-barred” from blocking the adverse possession. *Id.* To utilize a statute of limitations to permit a trespasser to take title to another’s land is a unique application. *Id.*

fictions for its decision is also unsettling. Legal fictions as a category pre-date the English and American common law. These so-called “white lies of the law” may sometimes have a positive effect, but far more often they are simply rationalizations that lead the court to false conclusions. The latter appears to be the case in *Lobato*.

To base such an important judgment on quite substantial legal fictions does little to bolster a property owner’s confidence in the courts or in the dependability of a Torrens Title! A careful reading of the decision and background materials concerning the instant case leads one to the inescapable conclusion that no matter how well intended, the court’s decision is fundamentally flawed. The decision ignores settled rules of real property law and relies, instead, on legal fictions to achieve its judgment.

A third, negative issue in the decision is that it compromises the doctrine of the finality of judgments.

THE HISTORY OF THE PROPERTY

A magnificent, mountain property called variously the “Taylor Ranch,” the “Mountain Tract” of the Taylor Ranch, or the Taylor Ranch lands of the Sangre de Cristo Mexican land grant, was purchased in 1960 by Jack Taylor, a rough and tumble, successful lumberman from North Carolina, who bought the so-called 77,000 acre “Taylor Ranch” for a mere \$500,000.⁷ This looked like one of the best buys he had ever made at the time, but the dispute over the alleged easements soon resulted in multiple lawsuits. There followed 21 years of litigation in various state and federal courts, including the United States Supreme Court. The legal bills that accrued, as the case wended its way through the courts, used up most of the operating profits. One commentator notes that Taylor probably should have realized legal trouble was on the way.⁸ Taylor, nevertheless, did sell out for a price of over \$23,000,000,⁹ before *Lobato* was finally decided and thereby achieved a very substantial profit! He did not live to see the Colorado Supreme Court’s 2002 decision granting the easements.

⁷ JOHNSTON, *supra* note 2, at 3.

⁸ *Id.*

⁹ *Id.*

THE AMERICAN LAW INSTITUTE REVISIONS

A contributing procedural factor to examine in the decision against Taylor's Torrens Title is a recent, major updating in the American Law Institute's heralded Restatement, Third, of the Law of Property, Servitudes. These substantial modifications, it seems, were ideally suited to validate the easements allegedly owned by the persons the court ultimately ruled are the heirs and assigns of the original 19th century settlers of the Sangre de Cristo grant.¹⁰ Prior, dauntingly complex rules in the 1944 Restatements of the laws of easements and profits a prendre existed. (The latter, "profits," are easements with rights to take something from the servient estate, such as timber). These rules were simplified in the ALI 2000 Restatement and the resulting greater fluidity and simplification was hailed by the Colorado Supreme Court as just what was needed ostensibly to render equity to the plaintiffs.¹¹ The 2000 Restatement creates an overarching category of "servitudes," and under this heading, easements and profits a prendre are both simply labeled "servitudes."¹² Under the Restatement, Third, a profit a prendre may be

¹⁰ *Id.* at 51. Sangre de Cristo translates to "blood of Christ," supposedly attributable to a beautiful sunset, immediately proceeded by a particularly bloody battle involving a revolt by Indian slaves at a mine. "An injured and dying Spaniard saw sunset on the mountains and muttered, "Sangre de Cristo." *Id.*

¹¹ RESTATEMENT (THIRD) OF PROP.: Third, Property, Servitudes, foreword (2000):

The large ideas in this Restatement are very different from those that governed its predecessor. Easements, profits, irrevocable licenses, real covenants, and equitable servitudes are here treated as integral parts of a single body of law, rather than as discrete doctrines governed by independent rules. The prior work was dubious, as was the common law, about mandatory collective arrangements and about restrictions on the fee-simple owner. ...Therefore this Restatement is enabling toward private governance, so long as there is full disclosure to prospective and current participants and so long as decisions are made according to established and fair procedures. ...This project is thus in the best tradition of the Institute's work, epitomizing the ALI's fundamental mandate to promote the clarification and simplification of the law and its better adaptation to social needs.

Id.

¹² *Id.*; *cf.* Restatement Of PROP.: Property, Servitudes, foreword (1944). Under the Restatement of 1944, easements and profits a prendre were not differentiated, except a profit a prendre would have to be expressly created, and could *not* be created by

orally granted, or implied, under certain circumstances, as was the case in *Lobato*. The Supreme Court of Colorado's decision for the settlers' heirs and assigns – hereinafter simply “settlers” – is based largely on the Restatement, a major treatise of the law chosen by the court to guide its procedures, in reliance on the research, careful thought, organization and conclusions of the scholars, academics, judges and other “learned persons,” who contributed thereto.

THE TREATY OF 1848

In 1848, the governments of Mexico and the United States signed a significant treaty. This treaty, called the Treaty of Guadalupe – Hidalgo, formally ended the Mexican- American War. In the Treaty, the United States promised all pre-existing rights of the predominantly Mexican settlers would be “inviolably respected.”¹³ For many years the courts of the United States did not significantly implement this treaty, but in the broad sense, this changed in 2002. The *Lobato* decision is clearly a remarkable victory for the assigns and heirs of the hundreds or thousands, more accurately, of largely poor settlers of Mexican and Spanish background. It is a misplaced confirmation of the spirit and substance of the 1848 treaty.¹⁴

implication. To the contrary, *Lobato v. Taylor*, concerning the Sangre de Cristo grant, held under the third Restatement that a profit a prendre could be created under an imperfect, written grant, such as the Beaubien document.

¹³ A question that arose in the subsequent litigation was precisely what rights of the settlers, if any, were actually enforceable under American law.

¹⁴ DICK JOHNSON, THE TAYLOR RANCH WAR, PROPERTY RIGHTS 92 (2006). A multi-year research project of 295 land grants showed little evidence of heirs of original settlers, with alleged easement rights, of obtaining any relief from the courts of the Southwest. *Id.* In 2004, one study commissioned by the United States General Accounting Office was completed. *Id.* This report also noted the United States acted, in all cases, within “the confines of the law” in denying the claimant’s heirs their rights. *Id.* This GAO report stated, “The principal difference between a community land grant and an individual land grant is that the common lands of a community grant were held in perpetuity and could not be sold.” (Except for the five hundred plus acre parcel in the village of San Luis, there was no land in the contested Sangre de Cristo property that was not bought and sold repeatedly.) *Id.* This seems to contradict the court’s findings that there existed communal easements on lands owned in common by the settlers. *Id.* The report discussed the Sangre de Cristo grant and defined it as an individual grant, now

THE COLORADO STATE SUPREME COURT DECISION

The decision is a paradoxical one in many ways that contains significant, negative aspects. If the Colorado court had recognized and accepted that the applicable Colorado Torrens statute permitted a suit for damages by the settlers as a way to grant the settlers' relief, but did not allow an invalidation of Torrens Title and permitted profits and easements, then that would have greatly reduced the damage to security of title that has occurred. However, in *Lobato*, in a highly unusual move, a Colorado Torrens Title, in this case acquired in federal district court in 1965 by then owner Jack Taylor, was subjected to various implied easements and profits a prendre on factually dubious, due process grounds.¹⁵ The Torrens Title

subject to alleged communal use claims that were unsupported by proper documents. Treaty of Guadalupe-Hidalgo: Findings and Possible Options Regarding Long Standing Community Land Grant Claims in New Mexico, Mexico. *Report to the New Mexico Congressional Delegation by the U.S. Government Accounting Office*. GAO-04-59 (Washington D.C. , (June, 2004).

¹⁵ *Lobato v. Taylor*, 71 P.3d 938, 956 (Colo. 2002), *cert. denied*, *Taylor v. Lobato*, 540 U.S. 1073 (2003). The due process violation here, however, was an alleged failure by *Lobato* to give adequate notice to all the settlers entitled to receive same, of his pending, federal Torrens action. *Id.* Other commentators have questioned the judgment of the court and have confirmed defendant attorney's exhaustive attempts to serve all plaintiffs, even those who had questionable rights. The plaintiffs repeatedly delayed answering the notices, and the federal judge granted several continuances giving the plaintiffs extra time to respond. *Id.* Justice Mullarkey, writing the majority opinion for the Supreme Court, in the matter of an issue of res judicata and those landowners who received personal service by name of Taylor's Torrens action. *Id.* Those persons are thereby barred from present day claims to the easements by res judicata. *Id.* The court based its opinion on the assumption that only seven persons were personally served and named in the Denver, Colorado, federal district court, Torrens action. *Id.* The federal district court found none of these seven had valid easements or profits. *Id.* The court notes the present landowners need not even prove a marketable chain of title. *Id.* n. 22. The best evidence, the court suggests, is the 1894 Costilla County survey -- a document well over 100 years old. *Id.* In this opinion, the words "trace title" are crossed out dozens of times and the words "settled at the time of Gilpin ownership," are substituted. *Id.* These changes are all made in red ink. In summary, the settlers need not even prove a chain of title. The court takes a further leap of imagination and states, "For practical purposes, landowners who are able to trace the settlement of their property (the words "their" title, crossed out, in

was acquired in federal district court, as per diversity of citizenship jurisdiction.¹⁶ The application was filed under Colorado state law, in federal district court in Denver in 1960.¹⁷ In fact, the Colorado Torrens Title Act, as amended in 2002, provides only for an indemnification suit for damages, or possible access to an assurance fund, in the *Lobato* situation for the aggrieved settlers and not “implied easements” - easements that were never contained or mentioned in Taylor’s Torrens title, as they would have to have been, by law. The court ruled it had the power to order the easements and profits, because a lack of proper notice to potential settlers allegedly violated the Fourteenth Amendment to the United States Constitution.¹⁸ The federal court, Justice Mullarkey ruled,

red ink), to at least the time of William Gilpin’s ownership of the Taylor Ranch shall be deemed successors in title to the original settlers of Beaubien’s grant.” *Id.*

¹⁶ *Id.* at n. note 22. COLO. REV. STAT. ANN. § 38-36-131 (2002): “A challenge must be initiated within 90 days of registration and successful claimants may recover only money damages, not property rights.” DICK JOHNSTON, *THE TAYLOR RANCH WAR, PROPERTY RIGHTS DIE* 213, 275 (2006). September 1, 1960, was the day Jack Taylor made application to the federal district court in Denver, Colorado, to quiet title to the Mountain Tract, the Hispanics call “La Sierra.” *Id.* It was filed under Colorado’s Torrens Title Registration Act, in federal court in Colorado. *Id.* The case took seven years to complete and in the end, Torrens title was granted. *Id.* Jack’s son, Zachary, inherited the property. *Id.* He noted to Dick Johnson that he was angered and dismayed that the federal court decisions had allowed the Colorado state courts to move ahead with the case, even though the law stated the Colorado Torrens Registration Act had a maximum time of 90 days for objections, following the registration of title. *Id.* Taylor’s Torrens title was registered in 1967. *Id.* The challenge to his Torrens Title was made in 2001. *Id.* Four years is substantially more than 90 days. *Id.* The court cites *Rael v. Taylor*, a case prior to *Lobato*, for the proposition that landowners not named and personally served in the Torrens action may still bring present day claims. *See Rael*, 876 P. 2d at 1225 (Colo. 1994).

¹⁷ The Torrens action was listed in Federal court as Civil Case # 6904, In The Matter of the Application of J.T. Taylor Jr. v. Pablita Jaquez et al. The petition mentioned the Beaubien document and stated the Beaubien document referred to the Rito Seco and stated nothing about the Mountain Tract. This is correct. The jurisdictional minimum to bring a diversity suit in federal district court has since been amended to \$ 75,000. The parties were from different states, i.e., diversity of citizenship and the amount in controversy was over \$10,000., the required, jurisdictional minimum at that time.

¹⁸ Certiorari to the Colorado Court of Appeals, Case No. 98CA1442 Jmt. Rev. (2003). This theory is contained in the majority opinion, as per Justice Mullarkey. *Cf.* note 16, at 213 to 220.

writing for 3 of the 5 member majority, “misinterprets the law of the state of Colorado.”

COMMON LAW AND LEGAL FICTIONS CO-EXIST

The common law of England and the United States has historically always been and continues to be heavily influenced by various legal fictions. This is part of the workings of our system of law. An analysis of the components and roles of legal fictions will help analyze what the *Lobato* decision accomplished. Was the court’s decision based on the evidence or upon what the court surmised was the *right, or politically most feasible thing to do*? This may never be determined, but the “logic” of the decision is quite strained and difficult if not impossible to reconcile with the facts in the case. Instead, legal fictions provide the rationale for the court’s decision in favor of the settlers.

Legal fiction analysis promotes accurate assessment of the facts and seeks to avoid obfuscation. This paradigm will, it is believed, promote accuracy and reduce the confusion otherwise caused by the court’s creation of legal fictions. This fiction analysis may also yield some predictive value as to how future land grant cases in Colorado and the Southwest are possibly going to be decided.¹⁹ Of course, the *Lobato* decision is binding precedent only in Colorado, but its influence may extend well beyond that. A noteworthy challenge to the dependability of Torrens Title has come to light and the court is totally unconcerned about the possible influence of this attack. It should prove instructive to expose the court’s lack of concern and broad-brush methods to the bright light of day.

¹⁹As precedent, it would seem that if the settlement in another case commenced after 1848, the date of the Treaty of Guadalupe–Hidalgo, then the court could say that the settlement comes under American law. This is what *Lobato* decided. This would mean common law could again be applied to find implied easements such as were found in *Lobato*. Alternatively, another court could hold Mexican law applies anyway, as the initial grant occurred prior to 1848. Assuming the *Tameling* decision is not overruled, this would mean the Mexican settlers would be denied all rights. One must however weigh the argument that the court’s theory about Mexican law not applying, and not being applied by the court, is simply another legal fiction in a decision with many legal fictions.

One should also be cognizant that in time, social policies and politics change. One day it may be, for example, that the court will begin to create and apply new legal fictions to protect a landowner from a trespasser.²⁰ Of course, new disputes may also begin in another southwest state on similar issues. There are many decisions flowing from American seizures of Mexican land, following the end of the Mexican-American War. These are almost uniformly against Mexican settlers and their heirs, but the *Lobato* decision changes the ground rules.

LEGAL FICTIONS IN CONTEXT

So just what are *legal fictions*, and why should a judge analyzing decisions care about them? The answer lies in their history, number and continuing profound effect on the decisions of our American courts, both state and federal. A legal fiction is a false statement made to achieve a temporary, lawful result. Preferably, the falsity of the statement is revealed in the statement. This causes the fiction to be more transparent and hence less misleading.

²⁰ *Id.*, note 16, at 299-300. In 2004, hundreds of claimants were approved by the court and it was hoped by the court that all claimants would be approved and given access by 2006. The Colorado trial court, in its supplemental rulings, has now given permission to over 1200 settlers to access the land, and to take timber for houses as well as for firewood. When Jack Taylor acquired the 77,000 acres in 1960, he quickly began to fence it, exclude all settlers and cut down timber. Tremendous rancor has built up between the Taylor's descendants and the owners and subsequent owners of the property. It is interesting to try to speculate on what the courts might find in the future. If environmental damage ensues, the court could rule in a later case, that the ALI 2000 Restatement again, applies. This time, the abuse could be attributed to the settlers. As the foreword states in the 2000 Restatement, "The new work is also attentive to our growing interest in conserving and preserving our natural, historical, and cultural resources and to the increasing use of conservation and preservation servitudes as an important means to that end." Misuse of the servitudes may lead to curtailment, particularly if the Colorado Supreme Court continues to retain jurisdiction of the case. If, for example, one speculates that a settler or other easement holder, might cause environmental damage servient land, this could cause a court in Colorado to re-evaluate or distinguish the Colorado Supreme Court's decision in *Lobato*. One should also be aware that in time, social policies and politics always change. *Lobato* is such a politically charged case that a change in political climate may have a greater than usual effect on any new cases.

Political and related considerations may have played a role in the court's decision. Pro bono attorneys, for example, had been suing Taylor on behalf of the plaintiffs for over two decades, while Taylor and his assigns were compelled to pay hefty legal fees to private attorneys. This gave the settlers free legal services and enabled them to continue for decades to promote their cause to the government. Costs began to drain current profits accruing from the ranch activities, such as timber cutting and private, licensed big game hunting, the latter primarily for elk.

From a dollars and cents point of view, many more local settlers had to go on welfare once Taylor closed off the land. There was pressure on the government to do something about this situation. In addition, the dire financial situation the settlers existed in, in that part of Colorado, was costing the local government and welfare office a great deal of its tax receipts money.²¹ These factors, as well as the sympathies of the court for the settlers made evident by the court's tortured reasoning, appear to have influenced the final decision.

If we analyze any specific legal fiction, we will realize each has a provenance and applicability of its own. Legal precedent as well as the current political and social environment influences it. It is ultimately employed or created by the court hearing the case. A legal fiction is not a "true statement," although the court may telegraph and reveal "untruth" in its opinion. Some legal fictions are products of the legislature; the judiciary produces others.

Certain wording in the *Lobato* decision partly reveals the court's legal fiction, about the character of a key writing in the case, namely the "Beaubien document."²² Legal fictions in *Lobato* are primarily creations of common law.²³

²¹ *Lobato*, *supra* note 16, at 15-19. (Including social services aid)

²² *Id.* at note 18. The original grantee of the Mexican Land Grant was Charles Beaubien.

²³ 18 U.S.C. §7(6)(2001), *Crimes and Criminal Procedure; Special Maritime and Territorial Jurisdiction of the United States defined*. The United States has already extended its jurisdiction over space vehicles used in flight "from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation." This law extends U.S. forfeiture laws to outer space. These laws include the central, in rem forfeiture legal fiction of the ship, or in this statute the space ship, possessing guilty intent that may be placed on trial, as if it were a living person. Forfeiture could be the legal outcome.

The court of highest appeal in Colorado retained continuing jurisdiction to determine the settler's *significant* easement rights. Significant rights are now subject to the court's orders concerning the Mountain Tract. The trial court was ordered by the Colorado Supreme Court, via the intermediate appellate court, to determine who the settlers' heirs and assigns are, and by what measures and procedures the court will restrict them as they access the land by the authority of so ordered easements and profits.²⁴

This landmark case was decided in favor of the settlers in 2002 and on April 28, 2003 the Supreme Court opted to retain jurisdiction and hence ordered the trial court to identify all landowners who have access and profit rights. The trial court has already issued, and continues to issue, "appropriate orders" to protect and give force to these easements.

On June 16, 2003, a second, amended order was granted, that stated "plaintiffs need only prove by a *preponderance of the evidence* that their property is included within the boundaries of property owned or occupied by settlers during the time of Gilpin ownership to be a lawful easement holder, and that the costs of determining this must be borne by Taylor."²⁵ The court will determine who the easement holders are, and the court will then award each settler an appropriate judgment, at Taylor's expense!

In *Lobato*,² the court makes much of its "assumption," the first legal fiction, that the court may treat a document called the "Beaubien document," authored by Charles Beaubien, as a deed – a conclusion based on reasoning that strains credulity! It would seem another court may *not* view the Beaubien document as a deed! Other knowledgeable academics, attorneys and judges may see it as merely containing a list of rules for the care of the property and not as a title conveyance! There are, for example,

²⁴ *Lobato v. Taylor*, 71 P. 3d 938 (Colo. 2002). E.g., note 16, at 293. The trial court held additional hearings in 2005 and Judge Perricone expressed his trepidation at including eventually over 3000 "settlers" in this process.

²⁵ *Lobato v. Taylor*, 70 P.3d 1152, 1159 (Colo. 2003) (en banc) (second amended order). See, e.g., The Center for Land Grant Studies, *supra* note 2. *Lobato*, *supra* note 1. e.g., The court stresses the importance of the Beaubien document in this regard, as well as the 1894 Costilla County survey. *Id.* The additional ruling is the order by the Colorado Supreme Court that the trial court rule on who the entire settlers' assigns are and then issue appropriate orders to enforce their servitudes. *Id.*

no specific property descriptions of any lands in the Beaubien document, it has no words of conveyance, and it does not include the Taylor Ranch!

Lobato v Taylor,²⁶ a 2002 Colorado Supreme Court land grant decision, has been discussed in the recent literature.²⁷ Commentary has been mixed in response to the court's decision.²⁸ However, the role played by the reversal of the Mexican settlers' fortunes in this Colorado Supreme Court decision is dramatic.²⁹

The court opines that American common law is "flexible enough" to acknowledge and evaluate Spanish and Mexican law and culture *as evidence of the intent of the parties*. These Mexican cultural values may be weighed, within the common law, to elucidate the intent and expectations of the original settlers who claimed usufructuary rights³⁰ in the Colorado, Sangre de Cristo land grant.³¹ At the same time, in a sleight of hand by the

²⁶ *Lobato v. Taylor*, 71 P.3d 938, 956 (Colo. 2002), *cert. denied*, *Taylor v. Lobato*, 540 U.S. 1073 (2003).²⁶

²⁷ Ryan Golten, *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*, 45 NAT. RESOURCES J. 457(2005).

²⁸ DICK JOHNSTON, THE TAYLOR RANCH WAR, PROPERTY RIGHTS DIE 281 (2006). In 2002, four of the court's seven justices granted "access rights" for "reasonable" grazing of cattle, gathering firewood and cutting of timber on the Taylor Ranch. *Id.* The decision has been labeled as one of the most "aggressive" of its kind and a powerful attack upon traditional real property concepts ingrained in American law. *Id.* "In effect it viewed property rights as a bundle of rights from which courts and governments can take away pieces with or without compensation." *Id.*

²⁹ Golten, *supra* note 27. Ryan Golten calls the decision a "stunning slap in the face" to the Southwest courts' prior decisions. *Id.* Similar fact patterns involving land grant cases previously held all "common" lands of private or community grants, passed to the U.S., by virtue of the Treaty of Guadalupe – Hidalgo. *Id.* Congress itself, not the courts, would have to create some method of reviewing its own acts. See, e.g., *Catron v. Laughlin*, 72 P. 26 (1903); *Chavez v. Chavez de Sanchez*, 32 P. 137 (1893); *Tameling v. U.S. United States Freehold & Emigration Co.*, 93 U.S. 644 (1876).

³⁰ Usufruct rights are similar to a *profit a prendre*, i.e., the right in this case to graze on the land, and remove firewood and timber. The court relied heavily on ALI and all easement rights are simply classed as "servitudes." *Lobato*, 71 P.3d at 950-51.

³¹ The *Lobato* decision supposedly did not overrule the *Tameling* case, which held that Mexican law could not be enforced in the courts of the United States. See generally *Tameling*, 93 U.S. at 644. Instead, *Lobato* states Mexican law and culture are to be examined and recognized by the court. *Lobato*, 71 P.3d 938, 946. This examination will

court, in regard to the issues in question, the same court allegedly does not apply Mexican law itself, and therefore American precedent is supposedly not contradicted!³² This is the second legal fiction the court applies. The Restatement provided justification for the court to validate theories of the Mexican's alleged easement rights to La Sierra, of the Sangre de Cristo, property grant. This decision represents a huge departure from the prior land grant decisions.³³ The Colorado court ruled for the "reasonable expectations, and intent," of the settlers and their successors in interest.³⁴ Risk of title being successfully disputed, particularly in similar land grant disputes, may hereafter exist, even if there is a Torrens, government certified, registered title.³⁵ This is a remarkable change in and of itself. The court has changed the ground rules in a bold yet seemingly inattentive manner, and all landowners, particularly owners of environmentally sensitive, wild lands, may suffer. It may be helpful to expose the court's legal fictions, as they were herein employed in *Lobato*. The court used these fictions to achieve the principle rational for the pro-settler decision the court apparently envisioned. One of the court's conclusions, *that all residents of Costilla County*, within which is located the subject property, should have been personally served in the Torrens

be to interpret the intent, and more importantly the reasonable expectations of those parties to the original agreement, rather than to directly enforce Mexican law.

³² See *Tameling*, 93 U.S. at 644.

³³ *But see* United States v. Maxwell Land-Grant Co., 122 U.S. 365 (1887); Bond v. Unknown Heirs of Barela, 229 U.S. 488 (1913); and Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80 (1893).

³⁴ *Lobato*, 71 P.3d at 951. *Contra* Martinez v. Mundy, 295 P.2d 209 (N.M. 1956) *and*; H.N.D. Land Co. v. Suazo,, 105 P.2d 744 (1940).844. As an example, the unyielding formality of the numerous and narrow definitions of the various easements, profits, access rights and use rights meant any specific right had to be "crammed" into one category or the other, despite the lack of any fluid, equitable, or just way of accomplishing this task.

³⁵ A so-called Torrens Title is generally deemed to be one of the most invulnerable and secure of all forms of title to real property! Originally created by Sir Richard Torrens for the registration of ships, its use has been widely adopted by the international, real estate community. See generally Goldener, *supra* note 3; Barnet, *supra* note 5, at 50-52. It gives the owner a title registered and issued by the government and invalidates most other overlapping titles and claims of virtually every sort to the property, including but not limited to prior and subsequent claims of adverse possession and prescriptive easements. See generally Goldener, *supra* note 3; Barnet, *supra* note 5, at 50-52.

Title action, is a third legal fiction. All persons who had any lien on file in the county real property records were duly served by personal service or by court ordered publication. These current residents, each and every one, have the required, prima facie nexus to the easements. Justice Mullarkey, of the Supreme Court, stated in note 23, “We recognize that this standard may be over-inclusive, but considering the grave deprivation of rights suffered by the landowners over the past 40 years, we are unwilling to create a standard which may again unlawfully deny some landowners their granted access rights.” The court appears to admit proximate cause may not extend to all of these persons, with no liens on file, but so orders it anyway. This is judgment by legal fiction but not for a “lawful result.” The easements are not lawfully granted, for this reason, under traditional, legal fiction analysis.

LEGAL FICTION AND TORRENS TITLE

What do wild lands, Torrens Title and adverse possession have in common? In *Lobato*,³⁶ a Torrens registered title, awarded to Jack Taylor in 1967, was found to be subject to the substantial claims of hundreds, if not thousands, of settlers’ easements, by the Colorado Supreme Court, following 21 years of litigation.³⁶

What does this portend for title security and finality of judgments? Of course, property owners desire the most secure title possible, particularly in regard to hard to patrol, immense, wild tracts of land.³⁷ Many of these

³⁶ *Lobato*, 71 P.3d 938. The 40-year dispute and 21 year litigation in state and federal courts in Colorado, ending in a denial of certiorari by the United States Supreme Court, involved communal rights to grazing, timber, firewood and water located in over one million acres of land in what is now south-central Colorado. *Id.* A congressional, land “patent,” a type of federal, quitclaim deed, which had been granted by Congress in 1860, was also qualified. *Id.* In *Lobato*, Justice Mullarkey wrote the majority decision, stating the standard that all residents of Costilla County should have been served in the Torrens action, may have been “over inclusive.” *Lobato v. Taylor*, 70 P.3d 1152, 1159 n. 7 (Colo. 2003).

³⁷ One advantage of the Torrens Title is that it is supposed to eliminate all adverse possession claims, including both prior and subsequent adverse possession claims. According to the Massachusetts real property clerk, those people who won title by adverse possession, i.e., long-term trespassers made up the majority of those who were happy to spend the time and money necessary to gain a Torrens Title. This was because,

tracts are so large that constant surveillance to watch for potential adverse possessors may be quite costly. Adverse possession is especially easy to achieve on wild lands, as we shall see. Torrens Title, on the other hand, protects against adverse possessors. This theme resonates throughout the striking *Lobato* decision. It was why Taylor fought for the Torrens application as hard as he did! The court's dramatic undercutting of a Torrens Title has not added to title security in Colorado. The court has actually opened up the property not only to persons with "legal" easements, but also to innumerable trespassers and adverse possessors.³⁸ A national trend in this direction would be extremely damaging to the entire real estate sector and to wild lands in particular. This denial of, heretofore, "settled," real property rights substantially reduces the social value and public policy value of the court's final decision. The erroneous reasoning applied by the court minimizes any positive impact of the decision. In the decision, the Beaubien document, written by the original, Mexican property owner, Charles Beaubien in 1863, was interpreted as if it were a "deed," containing some intent to create implied easements, thereby in part permitting a Torrens Title to be substantially invalidated.³⁹ This once again involves the court's first substantial, legal fiction. As a rationalization, the court held the Beaubien document indirectly referred to the Mountain Tract of the Sangre de Cristo land grant. The court said that because one part of the document referred to settlers gathering wood, then *it had to refer to the Mountain Tract*. This is also strained as the only land specifically named in the document, namely the Rito Seco, irrigated pasture lands, may have also contained some timber and firewood, especially in the 1860's.

she mentioned, they realized how easy it was to lose title to an adverse possessor! The trespassers in Massachusetts have a good grasp of the immediacy of the threat. They likely are quite pleased with the *Lobato* decision.

³⁸ JOHNSTON, *supra* note 2, at 283. How does one check the easement rights, or lack thereof, of thousands of "settlers?" The 1863 Beaubien document did not provide a community grant (of use rights) to the pioneer inhabitants of the San Luis area, and it had no legal effect under Colorado territorial law at that time. *Id.* The document is not ambiguous. It simply does not apply to the Taylor Ranch and cannot "imply" rights to use the Ranch ..." *Id.*

³⁹ *Lobato*, 71 P.3d at 947. The court held Jack Taylor and his assigns still owned the property, but were now owners of land servient to the settler's servitudes. *Id.* at 956. Settlers approved by the trial court number in the thousands. JOHNSTON, *supra* note 2.

In sum, knowledgeable owners of wild lands may well prefer the more reliable Torrens Title. This gives greater protection on large, wild land tracts against adverse possessors. This heretofore widely accepted Torrens Title security has been compromised by the court's decision in *Lobato*.

There follow four main sections, each containing an appraisal of these factual and legal issues and the role of legal fictions in the court's analysis.

PARTS I-IV

In Part I, the history of the La Sierra land grant is documented. This includes the influence of the Native Americans, Spaniards and Mexicans. The Treaty of Guadalupe – Hidalgo, as well as the Beaubien document and the ALI Restatement of Real Property, Third, Servitudes.

In Part II, the history of legal fiction and its attributes in general are explored. Its central role in the early common law is revealed. We see legal fictions are within the norm wherever common law is applied. A legal fiction is generally “legal,” at least until it is discarded. The importance and pervasiveness of legal fictions is an issue largely ignored by academia and apparently the courts as well, despite its importance in American law in general and in the stunning *Lobato v. Taylor* decision.

In Part III, specific legal fictions are documented and their role examined in the *Lobato v. Taylor* case. The court discarded some fairly minor, long-standing legal fictions in the case but also created new, and far more explicit ones. The holding is a great source of legal fiction analysis, for this very reason, and reveals issues concerning the court's reasoning. *It seems that without the court's creation of certain legal fictions, the settlers would have lost the case.*

In Part IV, Torrens Title, a government certified title, is evaluated and its use all over the world is documented. The creation of a monetary, court compensation fund, in lieu of declaring easements and undoing Torrens Title, is encouraged. The current Colorado Torrens Title Act does provide remedies in such a case, but not for the invasion of title imposed by the court's ruling!

The American “one-step,” Torrens Title procedure, that always requires a trial, is compared to the English, “two-step” method, which issues title in two principle stages, and usually requires no trial. It is rare indeed that either “brand” of Torrens Title is “penetrated.” The concept of

the aforementioned, government assurance fund to back up a virtually irreversible presumption of an inviolable Torrens Title is examined. The Colorado fund might have had to pay out a substantial amount of money to the settlers. Its depletion would have been expensive, but far less costly in the long run, in terms of the social, legal and economic damage that was caused by the court's choice to severely qualify Taylor's Torrens Title. The Colorado statute *does permit a settler's damage suit, indemnification or access to an assurance fund* in precisely the instant fact pattern. Nowhere can this writer find in the court's decision where it states or implies why one of these remedies was not selected, as per the clear directive of the statute.

The settlers' triumph is in some ways, emotionally satisfying, but the damage to Torrens Title security is indeed a very high price to pay.

PART I

THE HISTORY OF THE SANGRE DE CRISTO LAND GRANT

Cultural and recorded history begins with the Native Americans, then Spain, followed by the Mexicans and finally with ownership in American hands, supposedly subject to Mexican settlers' easements over 100 years old, as per the Treaty of Guadalupe -Hidalgo. Centuries before, Spain had established a not dissimilar land grant procedure in 1511 under King Ferdinand II. Three hundred years later, Mexico founded its own system of land grants, borrowing from the Spanish model. In 1821 the Republic of Mexico was established and whereas Spain had avoided trade with America, Mexico encouraged it. Mexico soon realized that the Anglos were not only interested in trade with Mexico, but also wanted to seize Mexican land by force of arms. As Spain had done in the past, to hinder the Mexicans, Mexico authorized a flood of land grants to try to stem the tide of American settlers surging onto Mexican land. Mexico adopted its own constitution in 1824 and hurriedly commenced the land grants thereafter.⁴⁰ It was in this period that the forebears of the plaintiffs

⁴⁰ JOHNSTON, *supra* note 2, at 54. Mexico's guidelines, called "General Rules and Regulations," became binding law in 1828. *Id.* Governors of Mexican provinces could issue grants for unimproved lands, if a petition in proper form was submitted. *Id.* A time

(the original settlers) traveled long distances from New Mexico to the Sangre de Cristo land grant site that is located in south-central Colorado. They were relying on the promises of Charles Beaubien, that small plots of land to build a house on and farm, as well as communal rights in the mountain tract, awaited them.⁴¹ Charles Beaubien⁴² had acquired the original, one million plus acre land grant from the government of Mexico in 1844.⁴³

In 1848, the United States became the official owner of property formerly belonging to Mexico, called the Sangre de Cristo Land Grant. This was after the Mexican--American War, which lasted from August 18, 1846, when the commander of the U.S. Army took over Santa Fe without a shot being fired, until February 2, 1848, the year the war officially ended, with the Treaty of Guadalupe – Hidalgo, a treaty, that in addition to the Beaubien document, underlies the entire *Lobato* decision. The disputes, range wars, lawsuits, shootings and beatings that followed, have a long history, involving this exquisite land grant containing six 14,000-foot, snow- capped mountains!⁴⁴ As the Mexican government grew increasingly weak, following the beginning of the Mexican – American War in 1846, the Mexican land grants program rapidly accelerated in response to the growing American incursion, and Charles Beaubien seized his opportunity! Beaubien’s petition for the Sangre de Cristo grant of

span for colonization of each grant would be specified and the grant was supposed to be voided if settlement did not occur as per schedule. *Id.* This voiding of a grant for failure to meet the timelines was, however, rarely imposed. *Id.* A significant issue in the *Lobato v. Taylor* litigation, was whether or not Mexican law required that “commons,” i.e., communal land, was to be used cooperatively by groups of settlers, or only individually, in the Mexican land grants. *Id.* The answer appears to be the latter.

⁴¹ This reliance on Beaubien’s promises to the settlers became an important factor in the court’s finding that the heirs and assigns of the settlers should be declared owners of implied easements by estoppel.

⁴² JOHNSTON, *supra* note 2, at 49. His full name was Charles Hipolyte Trotier, Sieur de Beaubien, also known simply as “Carlos Beaubien.” *Id.*

⁴³ JOHNSTON, *supra* note 2, at 57-62. On December 27, 1843, Taylor had submitted his petition for title to the entire Sangre de Cristo land grant to Governor Armijo. *Id.* Boundaries were established by rather general landmarks at the time. *Id.* The U.S. Government survey made in 1870 revealed the actual extent of the original grant as 1,017,000 acres! *Id.*

⁴⁴ JOHNSTON, *supra* note 2, at 3.

October 11, 1855, stated he wished to be the fee owner, but he had no map or precise knowledge of the number of acres involved. He successfully acquired the grant anyway, as Mexican real property law at the time did not require precise surveys. Some years later, in a law passed by the Congress of the United States on June 21, 1860, a federal patent, or quit claim deed, was issued for the Sangre de Cristo grant, as well as a second grant that Beaubien had also applied for to gain a patent on the B&M grant.⁴⁵ His Torrens Title for the Taylor Ranch was applied for in the same year and was granted in 1865, and affirmed by the appellate court of Colorado in 1867. The Colorado Supreme Court fundamentally qualified this Torrens Title in 2002.

At the height of his real estate holdings, Mr. Beaubien personally and with a few, close associates, held title to about 2.7 million acres, from the two separate grants. This included stunning mountains, desert and literally *hundreds of miles* of rivers and prairie. The condition was that he must induce settlers to move there permanently and institute a vast, subsistence "farm." The instant, *private grant* only contained provision for a modest quantity of communally owned land in the valley at the foot of the Mountain Tract, not on the Taylor Ranch lands. Beaubien assured the settlers they would be given, or sold, small tracts of land for grazing cattle, farming and home sites. In time, the wilderness tract, lying at the base of the Sangre de Cristo Mountains of what is now southern Colorado, was ultimately settled by many *hundreds* of Mexicans. The families thereafter partly depended on this land for activities such as hunting, fishing, firewood and grazing of their livestock.

After losing the disastrous Mexican-American War, as per the Treaty of Guadalupe - Hidalgo, Mexico was forced to cede to the United States Arizona, Nevada, California, the western half of Utah, the southern third

⁴⁵ JOHNSTON, *supra* note 2, at 69. Patents, or a type of quit claim deed issued by congressional decree, at the time did not formally acknowledge or deny any claims on the land, except for those the government possesses. *Id.* The easements existing prior to Treaty of Guadalupe- Hidalgo were, nevertheless, almost always denied anyway. *Id.* In 1862, Congress passed laws authorizing professional surveys. *Id.* It was implicit in the 1860 patents that Congress would later issue "final patents," based on thorough government surveys. *Id.* The Sangre de Cristo surveys began in 1875 and by December 20, 1880, the final U.S. patent was issued, for the million acre Sangre de Cristo grant. *Id.*

of Colorado and all of New Mexico.⁴⁶ The conclusion of the war drastically increased the American land holdings. This constitutes a major new phase in Mexican as well as American history. The signing of the treaty between Mexico and the United States guaranteed to Mexico that all communal rights, settlement rights and easements in these lands, then in effect under Mexican law, would remain valid and would be honored by the Americans. The treaty unambiguously stated that these rights, some apparently informally exercised for over 100 years, would not be altered or diminished by the transfer of title of vast, Mexican lands to the United States.⁴⁷ All was not well for the rights of the Mexican, however, and in subsequent acts of Congress, so-called “patents,” or quit claim deeds, granted by Act of Congress, were made to private, American purchasers.⁴⁸ These patents, not surprisingly, routinely ignored the Mexican easement rights and profits a prendre.⁴⁹ Therefore, the fact they were labeled “quit claim deeds,” did not have any appreciable affect on title received. It was absolute in practice, with few exceptions. The procedure was quite simple. Courts deciding cases in the U.S. ruled that even though the Treaty of Guadalupe-Hidalgo “guaranteed” recognition and application of Mexican

⁴⁶ MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 28-37 (1994). Ebright argues that Mexico had little choice in “negotiating” the terms of the Treaty of Guadalupe - Hidalgo. *Id.* Mexico was paid approximately \$29 million in consideration thereof. *Id.*

⁴⁷ Golten, *supra* note 27, at 459 n. 5-15. By the terms of the treaty, Mexico ceded to the United States southern Colorado and what is now New Mexico. *Id.* The United States absolutely assured Mexico that the United States would completely and “inviolably respect” existing, Mexican property rights. *Id.* This language replaced earlier language in the Treaty that had more clearly stated that “all land grants would be presumed valid under American law to the same extent as they had been under Mexican law.” *Id.*

⁴⁸ A patent, or federal, quit claim deed, was issued to Beaubien in regard to the Mountain Tract property, as well. The “Mountain Tract,” and the “Taylor Ranch” are analogous terms. This is a “small,” 77,000-acre part of the original, million plus acre, Sangre de Cristo land grant! JOHNSTON, *supra* note 2.

⁴⁹ A “profit a prendre” is really two rights. *Lobato v. Taylor*, 71 P.3d 938, 945 (Colo. 2002). First the right to access the land of another, and second the right to take something from the land of the servient estate. *Id.* In *Lobato*, this was alleged to be the right to hunt and take game, as well as remove timber for home – building and repair, as well as firewood. *Id.* The Third Restatement simply uses the term “profit.” RESTATEMENT (THIRD) OF PROP.: SERVIDITUDES § 1.2(2) (1998). All profits are simply easements therein and are all simply in the class of “servitudes.” *Id.*

law and rights, the patents, such as the 1860 patent that confirmed the Sangre de Cristo land grant in addition to Taylor's Torrens Title, could not be successfully challenged. Individual deeds, other legal documents and the historical context and culture could not be recognized or applied, because the patents were Acts of Congress and, therefore, binding federal legislation. The courts asserted they were lacking in authority to challenge these Acts of Congress, i.e., the patents.⁵⁰ This approach by the courts has been widely applied since the mid 1900s in the Southwest land grant cases.⁵¹ Additionally, the Mexican "easements" were too vaguely described to be enforced in American common law as heretofore interpreted.

⁵⁰ See *H.N.D. Land Co. v. Suazo* 105 P.2d 744, 745 (N.M. 1940). This involved easements to a grant of 594,515 acres, part of which is in present day Colorado. *Id.* Congress approved and confirmed the grant to Francisco Martinez, heir of the original grantee. 12 Stat. 71, June 21, 1860. The grant was surveyed in 1876 and a patent issued to Martinez in 1881. *Id.* As per the usual form of these patents, it stated, "This patent shall be construed as a quit claim or relinquishment upon the part of the United States and shall not affect the adverse rights of any person or persons whosoever." *Id.* The HND case, however, notes that the courts cannot "second guess" Congress, and that in any event, if anyone has a right of adverse possession, it is HND as per its long occupation of the property! *Id.* at 747, 749. Title was frequently granted for more land than was deeded in the original grant! *Id.* at 749. The United States federal courts were "flexing their muscles."

⁵¹ *United States v. Maxwell Land-Grant Co.*, 122 U.S. 365 (1887); *Bond v. Unknown Heirs of Barela*, 229 U.S. 488 (1913); *Astiazaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80 (1893).

⁵¹ Other factors were involved as well. The Beaubien document, according to the lower courts of Colorado, lacked specific words of conveyance, and had ambiguous descriptions of the common lands. *Lobato v. Taylor*, 13 P.3d 821, 831 (Colo. Ct. App. 2000). The Colorado Supreme Court noted that the document does not refer to the land in question at all! *Lobato v. Taylor*, 71 P.3d 938, 962-63 (Colo. 2002) (Kourlis, J., dissenting). Kourlis). It simply refers to timber cutting and firewood gathering and is therefore presumed by the court to be referring to La Sierra, the Mountain Tract. *Id.* at 948-50. There is, of course, other timber and firewood, albeit less, in the locales actually mentioned in the document. The court's finding, on very skimpy evidence at best, constitutes a legal fiction, at the very heart of the court's decision. This document also is a statement of rules regarding the permissible uses of other properties and its fanciful evaluation by the court is indeed a quite significant legal fiction.

THE TAMELING DECISION

In a well-known case, *Tameling v. United States Freehold & Emigration Co.*, the *Tameling* decision involved a disgruntled pioneer's gunpoint seizure of land on the Sangre de Cristo land grant by Mr. Tameling. This in regard to Mr. Tameling's assertion that Mexican law did not permit land grants of the immense size granted to Monsieur Charles Beaubien. Tameling therefore seized 160 acres on the Culebra River in 1872.⁵² He lost his case and the subsequent holding finds the courts in the United States are prohibited from specifically enforcing Mexican law in the land grant cases.⁵³ As the *Lobato* court refined its reasoning, it decided a state court might "recognize," but not directly apply, Mexican rights and law. *Lobato* specifically avoids overruling the *Tameling*⁵⁴ precedent, by simply stating that common law can take cognizance of foreign law and culture but may not specifically apply Mexican or Spanish law.⁵⁵ The Colorado State Supreme Court arrived at

⁵² JOHNSTON, *supra* note 2, at 87-88. Mr. Tameling's primary argument was "that Congress had chopped down the four-million-acre Las Animas grant down to 97,425 acres because it was excessive under the 1820s Mexican laws and regulations." *Id.* Mr. Tameling theorized the same limitations should have been applied to the Mountain Tract portion of the Sangre de Cristo grant. *Id.* The United States Supreme Court ruled in 1876 against Tameling. *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1876). The opinion stated that the patent granted by Congress in 1860 confirmed all of the land boundaries of the land grant as acquired by Charles Beaubien. *Id.* at 661, 663.

"Final action on the subject is reserved to Congress. Such action is of course conclusive and, therefore, not subject to review by this or any other forum. ...The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire grant.

Id. at 662-63."

⁵³ Golten, *supra* note 27, at 471-472. See also MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 28-29 (University of New Mexico Press (1994) (thorough explanation of how the early settlers from Mexico lost their rights).rights.

⁵⁴ In *United States v. Tameling*, the Court held that Congress could confirm ownership of more land than was actually contained in the grant;grant, even though the U.S. obligated itself to recognize Mexican rights in the Treaty of Guadalupe-Hidalgo. *United States v. Tameling*, 93 U.S. 644, 663 (1876). The Supreme Court also held that the Sangre de Cristo Patent is a de nova grant and is irrebutably presumed to be valid. *Id.* at 661-63.

⁵⁵ The Court in *Lobato* also held that the Mexican settlers' implied easement rights, by estoppel, prescription and prior use, accrued while American law was in full force and effect, because the actual settlement of the land occurred after title had passed to the

this reasoning on the theory that since the first Mexican settlers allegedly arrived on the grant *after* 1848, the year title passed to the United States, Mexican law did not apply.⁵⁶ In this way, the courts enforced the Mexican's easements in *Lobato*, without actually *applying* Mexican law.

The Colorado Supreme Court decision in *Lobato*, predicated on an alleged lack of proper notice, appears to be flawed.⁵⁷ The damage has substantially reduced the present, monetary value of the property.⁵⁸ The court found there were implied easements and profits that commence and

United States. *Lobato*, 71 P.3d at 946. The court also takes the position that Mexican law will not be directly applied, except to recognize the intent of the settlers, and recognize foreign law. *Id.* at 950. This might be called both "having your cake and eating it!"

⁵⁶ *Id.* at 946. The court's reasoning is an interesting legal fiction itself. All of the legal agreements and the grant itself were made to the flamboyant Charles Beaubien, *long before* 1848. Why would the fact the settlers happened to move onto the land after American law was in effect, mean solely American law would apply? All of the applications and negotiations with the Governor for Mexico for that locale were made *while Mexican law was still in full force and effect. The court never offers or discusses its rationale for its point of view in this regard.* Under the terms of the grant, the settlers' move onto the land was a condition of the grant. *Id.* at 949. The Mexican government was notoriously lax in terms of giving extensions of time for the settlers to arrive. Therefore, the point in time when the settlers moved onto the communally owned land in the mountain valley is relatively unimportant under Mexican law.

⁵⁷ The *Lobato* court pointed to a constitutional lack of proper notice and due process in declining to enforce the Torrens Title. *Lobato*, 71 P.3d at 954. Little mention was made of Taylor's Herculean efforts to serve all of the settlers' heirs and assigns, nor of the dilatory nature of the alleged settlers in failing to timely respond. JOHNSTON, *supra* note 2, at 216, 218. In 1960 Attorney Woodard shipped 400 mimeographed copies of the summonses to the U.S. Marshall's office in Denver to be served on defendants. *Id.* Each was accompanied by a 12-page description of the Taylor Ranch. *Id.* By 1961, it was clear residents had been receiving summonses from Deputy U.S. Marshals. *Id.* On January 15, the deputy U.S. Marshall submitted a 15-page affidavit of service on the court. *Id.* An example of the dilatory nature of the settler's response is the fact it was 15 months after the commencement of the action, that one Donald G. Smith finally informed the court he was the attorney for the Costilla County Board, whose members should be served. *Id.* Then, 6 weeks later, he filed an answer to the summonses served on the board members. *Id.* This is but one of many examples.

⁵⁸ JOHNSTON, *supra* note 2, at 278. The Taylors sold the land to Lou. L. Pai for \$23 million. *Id.* Pai sold it to two Texas couples in 2004. *Id.* They were Bobbie and Dottie Hill and Richard and Kelly Welsh and it is believed he sold it to them at a loss. *Id.* The ranch was proving itself as a magnet for contentious litigation and property value was on the decline. *Id.*

are based on the Beaubien document of 1863,⁵⁹ the facts in evidence, and the deeds to the subsequent purchasers of the land.⁶⁰ Every prior decision of the county court and the intermediate court of appeals for Colorado had held the Beaubien document was vague and did *not* expressly state it referred to the 77,000 acres in issue! In 2002, these lower court findings, the Congressional 1860 patent and Taylor's Torrens Title of 1867 were all severely qualified by the Supreme Court of Colorado's unexpected decision. The court had reversed the inferior court's decisions that the heirs of the original settlers had no easement rights of any kind. This state of the law in regard to the settlers' rights had persisted throughout 21 years of litigation.⁶¹ At the same time, security of title had been damaged and the court's interpretation of the 1863 Beaubien document *represents a legal fiction*.⁶² A second legal fiction is the court's position that it is, in effect, both applying and not applying Mexican law. A third legal fiction is the court's ruling that all Costilla County residents who can show by a fair preponderance of the evidence that their land was settled at the time of Gilpin's ownership have valid easements. And that proof of said settlement is also proof of chain of title to Beaubien's time for the current landowners! William Gilpin, the first governor of Colorado, bought the land from Beaubien before Beaubien died in 1865.

⁵⁹ *Id.* at 56.

⁶⁰ Overturning a Torrens Title is, however, a rarity, and one that seriously undermines the security of title. A Torrens Title is the most secure title of all and is especially necessary on wild lands and is for this reason preferred by those who wish to purchase these pristine lands. Adverse possession is in its most threatening incarnation in regard to wild lands. This is because the actions the adverse possessor must take are calibrated to the uses to which the land may be put. The actions required are at a minimum in regard to wild lands. See generally RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

⁶¹ See generally *Lobato*, 71 P.3d 938. ⁶¹ See The current case began in 1981, but earlier litigation predated this case. *Id.* at 943-44. Taylor, to his great chagrin, began the "lawsuit diplomacy" with an action against trespassers many years earlier. *Id.* He also commenced his Torrens Title action in 1960. *Id.* at 943. He may have been clairvoyant to have realized the jeopardy his Mountain Tract title was in!

⁶² JOHNSTON, *supra* note 16, at 65. The Beaubien document was written in Spanish and dated May 11, 1863. *Id.* Throughout the litigation, it was argued by the settlers that it was a deed, whereas Taylor's attorneys argued it was only a set of regulations for the use of the land of the Sangre de Cristo grant. *Id.* Certainly, under American real property precedents, it resembles a set of rules for the care of the land and its profits, far more than a "deed!" *Id.*

THE BEAUBIEN DOCUMENT VERSUS AMERICAN COMMON LAW

The court's evaluation of the "Beaubien document" results in a legal fiction. It may also be that the U.S. *never expected* in any scenario, despite the treaty of Guadalupe - Hidalgo, to find valid easement rights against private, American owners. In *Lobato*, at best, these "rights" were, to state it generously, quite *vaguely alluded to* in the Beaubien document.⁶³ This issue of what the Beaubien document qualified as under American law and equity turned out to be a centerpiece of arguments and lawsuits for many decades - up to and including the Colorado Supreme Court decision of 2002-2003.⁶⁴

Another issue was the fact that the American common law theory of real property ownership has always involved specific, defined property boundaries. Clear statements accompany these surveys and the deeds containing them that title and easement rights are conveyed to named persons and their "heirs and assigns."

The Mexican real property concept neglected clear boundaries and sometimes stressed informal communal, not necessarily individual, rights of ownership. Property lines at that time in Mexico were so vague as to be almost non-existent. The words and important concept, "heirs and assigns," a necessity at common law, were always required prior to *Lobato*, and the phrase is not found in the Beaubien document. This sets a

⁶³ *Lobato*, 71 P.3d at 943, 948. ⁶³ The Beaubien document refers to cutting timber and gathering firewood, and this, the Colorado Supreme Court held, could "only be" reasonably refer to the Mountain Tract of the Jack Taylor Ranch, or so the Colorado court rationalized in its decision. *Id.* Apparently, in the eyes of the court, the other 900,000 plus acres of the Sangre de Cristo had no firewood or timber at all! Also, the document refers only to lands to the north of Taylor's property.

⁶⁴ JOHNSTON, *supra* note 2, at 66:

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 within one league of said land, 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.

Id.

detrimental precedent, as in *Lobato*, specifics always required in common law are suddenly considered to be virtually irrelevant by the court.

We have mentioned that the description of the land at issue in the Beaubien document does not refer in any way to the 77,000 acres comprising the Taylor Ranch! It refers to lands to the north.⁶⁵ A paragraph in the document, nevertheless, refers to the settlers' right "to gather firewood" and since the Mountain Tract (a part of the Sangre de Cristo grant) has considerable firewood, the court makes the fictional ruling that the document refers to the Mountain Tract! In the translation relied on by plaintiffs, the document states in pertinent part as follows :

Plaza of San Luis de la Culebra, May 11, 1863.

It has been decided that the lands of the Rito Seco remain uncultivated for the benefit of the community members (*gente*) of the plazas of San Luis, San Pablo and Los Ballejos and for the other inhabitants of these plazas for pasturing cattle by the payment of a fee per head, etc. and that the water of the said Rito remains partitioned among the inhabitants of the same plaza of San Luis and those from the other side of the vega who hold lands almost adjacent to it as their own lands, that are not irrigated with the waters of the

⁶⁵ See *Lobato v. Taylor*, 71 P.3d 938, 947 (Colo. 2002).

The landowners (settlers) assert that this document evidences an express grant of settlement rights to the Taylor Ranch. The trial court concluded that the Beaubien document did not vest any rights in the Taylor Ranch. The court noted that although the document lists rights of pasture, water, firewood, and timber, the only locations specified for access are the Rito Seco and the Vega; two areas that the parties agree *are not part of* the Taylor Ranch. ...The appeals court agreed that the Beaubien document was ultimately *unambiguous* (and did *not* refer to the location, the Taylor Ranch).

Id. The Colorado Supreme Court then concludes, "We agree that the Beaubien Document does not meet the formal requirements for an express grant of rights. However, we 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....Extrinsic evidence is relevant in interpreting the Beaubien Document."

Id. This is the legal fiction in the court's interpretation of the Beaubien document. It is not "a grant of rights" in some mysterious way.

Rio Culebra. The vega...will remain for the benefit of the inhabitants of this plaza and those of the Culebra as far as the plaza of Los Ballejos....Those below the road as far as the narrows will have the right to enjoy the same benefit...(No one may) place any obstacle or obstruction to anyone in the enjoyment of his legitimate rights....Likewise, each one should take scrupulous care in the use of water without causing damage with it to his neighbors nor to anyone. According to the corresponding rule, all the inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure the other....⁶⁶

The document continues to state careful limits in the creation and care of the road system, where mills and other structures should be placed, including grazing rights. In sum, it is a clarification of rules about the use and preservation of the property, not a "deed." It was signed by Beaubien and two witnesses.

Beaubien died in 1865, a little over one year after he drafted the document and his heirs sold the vast, million acre property to William Gilpin, the first Governor of Colorado, as per Beaubien's living wishes. Gilpin permitted the settlers to continue accessing his land and these rights were as well mentioned in the Gilpin deed and continued to be vaguely recognized in writing, in some fashion, in each subsequent conveyance of the property.⁶⁷ Nevertheless, the easement rights ultimately enforced in *Lobato* are all allegedly based on the Beaubien document, a document that fails to directly, or indirectly, refer to or implicate the Mountain Tract. The vague references in the deeds that followed are all based on the misconception that there is some group of settlers, commencing with the Beaubien document, or "local people," as the deed to Taylor characterizes them, who have specific, ascertainable rights to profits in regard to the Taylor Ranch. It simply is not so.

The heirs of the settlers enjoyed their "rights" in the property until 1960. This state of affairs came to a sudden halt at that time, when Jack Taylor, a logger, bought the 77 thousand plus acres of the tract that

⁶⁶ *Id.* at 947-48.

⁶⁷ *Id.* at 943-953.

included La Sierra, the Mountain Tract. He wanted to cut down some of the timber and he began to extensively fence and clear-cut limited parcels of the land. He also blocked the settlers from the property and from exercising their historical rights.⁶⁸ His brusque manner was perceived as unreasonable by the settlers and trouble soon developed. At one point, while sleeping in his mountain cabin, Jack Taylor was shot through his ankle by a high powered rifle bullet that penetrated his window!⁶⁹

The successors to the settlers sued Taylor, commencing in 1981, to compel the courts to acknowledge their alleged legal rights to timber, to graze their cattle and to assert fishing and hunting rights.⁷⁰ Their legal theories relied significantly on the Beaubien document. The United States had already agreed to respect Mexican Law under the aforementioned Treaty of Guadalupe-Hidalgo and this promise was cited by the plaintiffs.⁷¹ It was also argued that American common law should apply to grant the settlers rights by prescription.⁷² Mexican law could not legally be applied, as the United States Supreme Court's *Tameling* precedent would not directly permit the application of Mexican law in *Lobato*, but the

⁶⁸ Golten, *supra* note 27, at 463. Taylor was granted a Torrens Title to the land, by the Colorado federal district court and he then began to clear cut small portions of the forest, while employing a work force to exclude the settlers from the property. *Id.* He had hoped to build a saw – mill and employ local Mexican labor in this endeavor. *Id.* See, e.g., E.g., Calvin Trillin, *Costilla County, Colorado: A Little Cloud on Title*, 52 NEW YORKER 122 (1976).

⁶⁹ JOHNSTON, *supra* note 16, at 3, 129.

⁷⁰ The final decision by the Supreme Court of Colorado did not grant, or acknowledge, any fishing or hunting rights. This may have been in part because these hunting and fishing “rights” did not appear in the Beaubien document. *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003).

⁷¹ *Lobato v. Taylor*, 71 P.3d 938, 947 (Colo. 2002), “The landowners further point out that in the Treaty of Guadalupe Hidalgo, the United States government agreed that the land rights of the residents of the ceded territories would be ‘inviolably respected.’ Under the landowners theory, the treaty dictates that the court apply Mexican law to the Taylor Ranch, and accordingly recognize the settlement rights.” *Id.* The latter issue the court neatly side-stepped, by holding American law could take cognizance of Mexican law, without actually applying Mexican law. This is a convoluted theory.

⁷² Golten, *supra* nota 27, at 14. *Contra*, Rael v. Taylor, 832 P.2d 1011, 1013 (1991). The inferior courts of Colorado ignored plaintiff's claims for 20 years, bolstered by the *Tameling* decision, that held American courts could not directly apply Spanish or Mexican law.

Colorado court could use it as *evidence of intent*, an important finding in favor of the settlers' cause. The court ruled the "usufructuary" rights were enforceable, under American common law, *as implied profits* and specifically under the broad heading of "servitudes," as per the RESTATEMENT, THIRD, OF PROPERTY "considering evidence of Mexican law and culture to inform these common law rights."⁷³ This was a clever approach by the court that permitted the court to recognize Mexican law, without overtly applying Mexican laws, as the latter would have violated American legal precedent.

The question arises, how can Mexican law both be and not be applied by the court? "Intent," it is widely accepted, is but one facet of the law. This is the court's second, major legal fiction. Mexican law is either applied, or not applied. Logically, the court is trying to have it both ways!

PART II

THE INFLUENCE OF LEGAL FICTION IN ENGLISH AND AMERICAN COMMON LAW

It may surprise one to learn that the Roman and German use of legal fictions pre-dates English common law and also plays a substantial role *in the formation of the common law*. In other words, legal fictions are simply one part of common law! Oliver Wendall Holmes published his series of essays, *The Common Law*, in 1881. This late 19th century acknowledged masterwork, was presented (although in a shortened version) by the future United States Supreme Court Justice in a series of lectures at the Lowell Institute in Boston in 1880.⁷⁴ In virtually the entirety of chapter one, the renowned jurist and scholar stresses the all-important role he ascribes to

⁷³ See Golten, *supra* note 27 at 463. See also *Lobato v. Taylor*, 71 P.3d 938, 3rd at 945 (Colo. 2002); BLACK'S LAW DICTIONARY 215 (8th ed. 2004)(1996). An easement is defined as a sub-category of servitude, freely placed on one's property and intended to apply to present and future owners of the land).

⁷⁴ Thomas A. Schweich, *Introduction* to OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* xvii (1881). ("Like so many great contributions to learning-- from Darwin's *The Origin of Species* to Einstein's Special Theory of Relativity - people knew immediately that new ground was being broken, and they wanted to be part of it.")

legal fictions in the formation of American common law.⁷⁵ Legal fictions date to *before the birth of Christ*, and originally flowed out of a desire for revenge. These fictions are especially substantial and numerous in tort and criminal law but all common law is imbued with these fictions. History, Holmes theorizes, is the first of two guides; the second is the equally important study of legislation.⁷⁶ The Roman law and the German law begin with the blood feud.⁷⁷ We also may recall the famous passage in Exodus, “If an ox gore a man or a woman that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.”(i.e., relieved of any further liability).⁷⁸ These rules extended to inanimate objects, such as a tree that falls on someone. In that situation, if the victim is killed or injured, the tree is deodand, i.e., given up to the victim or his family and the tree is cut down and made into wood chips.⁷⁹ The concept of a wish for revenge also is found in the Roman law and explains our intense anger with even inanimate objects that cause us pain. The example of a “civilized man” kicking a door if it has pinched his hand is one easy to comprehend.⁸⁰ Expiation of guilt of the owner is eased by the concept of a *personification* of the inanimate object. The thing was treated as if it was a person, and in this way, the destruction of the object, or tree, or animal, expiated the guilt of the owner of the object. A desire for vengeance formed the early law. These early rules are a building block

⁷⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-26 (1881). Justice Holmes seems to rank legal fictions as the foundation stone and ultimate starting point of the common law as we know it today. *Id.* He takes the position that the human drive for revenge gave birth to legal fictions and common law. *Id.*

⁷⁶ *Id.* at 1 (1881). (“The law embodies the story of a nation’s development through many centuries,In order to know what it is, we must know what it has been, and what it tends to become.”).

⁷⁷ *See id.* at 2-3.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 8. *See also* 1 EDWARD B. TYLOR, LL.D., F.R.S., *PRIMITIVE CULTURE* 285 (1874) (discussing the origins of the personification of nature); ALEXANDER BAIN, M.A., *MENTAL AND MORAL SCIENCE* 261 (1868) (discussing theory that the “effect of an injury is to rouse use to resist it”). *Id.* at 8. See Deodand seems to be an early precursor of our present forfeiture laws, i.e., those involving seized contraband or evidence of a crime. *Id.* at 7-8.

⁸⁰ HOLMES, *supra* note 75, at 8. The concept is found in the *noxoe deditio*, in the Roman law. *Id.*

of the common law.⁸¹ Legal fictions are simply integral to the common law.

Legal philosophers have evaluated the utility of legal fictions, while acknowledging their pervasiveness and ancient history. Not many evaluations have been positive. In regard specifically to legal fictions, for example, Jeremy Bentham acknowledged “the pestilential breath of legal fiction,” while then quickly adding that “with respect to...fictions, there once was a time, perhaps, when they had their use.”⁸²

In *The Palmyra*, in 1827, the United States Supreme Court endorsed the judicially-created in rem personification fiction of the “guilty object.”⁸³ Writing for the Court, “Justice Joseph Story held that a pirate-ship could be put on trial for a crime, stating that the personification fiction was a settled principal in the law of admiralty.”⁸⁴ The pirate ship *was put on trial, was convicted, declared forfeit and sold.*⁸⁵ There is no specific in rem legal fiction in *Lobato*, but Taylor and his assigns have, nevertheless, suffered a forfeiture of their property rights. The property at issue is now substantially reduced in value. The *in rem* provisions imbedded in American law have opened the door to and set the stage for numerous other legal fictions. There is a climate of acceptance for legal fictions in American common law. This is apparent in the *Lobato* decision.

The United States Supreme Court in 2004 declined to hear Mr. Taylor’s appeal, thereby leaving intact the judgment of the Colorado Supreme Court. The court’s reaffirmation of the easements, including profits *prendre* to timber and firewood, remained in full force.

LEGAL NIHILISM

⁸¹ *Id.* at 2-3.

⁸² LON L. FULLER, LEGAL FICTIONS 2-3 (1967). “Legal philosophy has tended to disregard the institutional processes . . . legal scholars have talked about the rules . . . rather than about the ‘the law’ itself A general antipathy to metaphysics has barred any inquiry into the nature of ‘reality.’” *Id.* at xi.

⁸³ 25 U.S. (12 Wheat,) 1, 14-15 (1827). OR 25 U.S. 1, 14-15 (1827).

⁸⁴ Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77 (2003).

⁸⁵ *The Palmyra*, 25 U.S. at 14-15.

A somewhat nihilistic rationalization for legal fictions suggests that they are permitted because many jurists, lawyers and others concur that the “legal rules” are to be preferred to, and are, superior to reality.⁸⁶ The court has taken this approach in *Lobato* by in effect rewriting the facts to fit into the more flexible rules contained in the Restatement Third.⁸⁷

HISTORICAL DEFINITIONS OF A LEGAL FICTION

Historically, the term “legal fiction” may be defined with reference to the accurate and viable example of the so-called “civilian legal fiction,” dating from the fourteenth century. The “civilians” were period “lawyers” and scholars involved in research in this discipline.

Recently, for example, Professor P.J.J. Olivier, examining the civilian definition of legal fiction, observed:

A legal fiction is “an assumption of fact deliberately, lawfully and irrebutably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, (the) assumption being permitted by law or employed in legal science.”⁸⁸

The legal rules brought into operation in *Lobato* do not fit this definition, as they are not permitted by law, or “employed in legal science.”

One is able to trace the history of legal fictions through various stages of the Greek, Roman, Civilian and current, American fictions. *Legal fictions are our oldest American and English rules and predate the common law.* The Romans also extensively employed legal fictions, even *before the birth of Christ*, but they did not do so in a systematic or organized way, nor did they define the term deliberately.⁸⁹ In spite of this, Roman law has

⁸⁶ JEREMY BENTHAM, 1 WORKS 268 (John Bowring ed., 1843). The point is made that the rules have taken on a superior reality to the actual facts at issue.

⁸⁷ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000) (This rigid method was not ameliorated by the predecessor to Colorado’s Restatement Third of Servitudes; nServitudes.amely, the more narrowly drawn definitions of easements contained in the first Restatement (1944)).

⁸⁸ PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE 81 (1975).

⁸⁹ *Id.* at 5, 12.

been a catalyst and basis for more contemporary discussions about legal fiction.⁹⁰

COMMENTATORS ON LEGAL FICTIONS

In the aforementioned illustrious Holmes book, *The Common Law*, the first chapter discusses "Early Forms of Liability," and is devoted almost exclusively to 26 pages of the content and history of legal fiction.⁹¹ Six centuries before, the "civilians," medieval scholars and lawyers in the thirteenth century and before took considerable pains to define what a "legal fiction" was. They also were clearly cognizant of the capacity for either good or evil in the use of the fictions. They understood the power of these fictitious creations. The civilians employed Roman law concerning legal fictions in creating their own positive law.⁹² In the 1300s a civilian scholar Cinus de Pistoia had studied and improved upon the definition of a legal fiction, stating "fictio est in re certa contraria veritati pro veritate" - an assumption deliberately and consciously made, contrary to the facts and irrefutable. Next in the line of descent was Bartolo de Saxoferrato, a "post civilian," who further refined the definition. He stated a legal fiction would only include a false assumption that "is lawful or has a lawful effect."⁹³ Bartolus applied the fiction to the theory of a legal person. He rejected the acceptance, which was common at that time, of the legal personality of a university and stated instead that this concept was simply a legal fiction.⁹⁴ This fiction, however, does not seem troubling, or particularly significant for our purposes. It may be interesting to note that the Colorado Supreme Court's decision in *Lobato* takes legal fiction to the very border of outright dissembling. The court's ruling also seems to directly attack settled principles of American real property law.

⁹⁰ PIERRE J.J. OLIVIER, *LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE* 5 (Rotterdam University Press, (1975). The Romans took the position legal fictions were to be used only occasionally and only if a just and equitable result would follow. *Id.* at 10.

⁹¹ OLIVER WENDALL HOLMES, JR., *THE COMMON LAW* 2 (1881).

⁹² PIERRE J.J. OLIVIER, *supra* note 88, at 6.

⁹³ *Id.* at 16.

⁹⁴ *Lobato v. Taylor*, 71 P.3d 938, 972 n.12 (Colo. 2002). One aspect of the legal fiction of the "corporate person" that one may find troubling is the broad grant of constitutional rights to the corporations.

Heretofore, specific and complete conveyances, with clear property descriptions, were required to transfer an interest in land.

PART III

THE LEGAL FICTIONS IN LOBATO

The first legal fiction is the misinterpretation and misapplication of the Beaubien document. The second is the court's ruling that Mexican law both does and does not apply to the issues in the case. The third legal fiction is the court's ruling that all persons who own land in Costilla County, that was settled at the time of Gilpin's ownership, should have been personally served in the Torrens action and have easement rights to the Taylor Ranch, these rights to be demonstrated by a fair preponderance of the evidence. The court also held evidence of historical settlement is proof of chain of title back to the 1800s!

The Colorado Supreme Court's decision extends easements to potentially over two thousand, and perhaps as many as three thousand settlers. One can foresee there may be some negative and some positive financial *and environmental effects to the specific property*. Timber cutting will slow down for a time, but this will increase forest fire risk, if it is reduced excessively. But this misses the point. Far more serious and potentially farther reaching in the long run is the damage to title security, specifically Torrens Title, which has now been put in motion. This is a very important issue in the lengthy litigation. The United States Government, in the Treaty of Guadalupe-Hidalgo, acknowledged that the courts in the United States would enforce Mexican rights.⁹⁵ In practice, the courts of the Southwest have been unable to apply these rights, within the confines of the American common law. One issue within the treaty is that

⁹⁵ This approach brings into question the Treaty of Guadalupe – Hidalgo in its entirety. Perhaps it was the intent of the American signatories to the Treaty that in practice it could not be enforced. That it was simply a legal fiction and no more than that. There are, for example, typically few specific statements in the Mexican context as to land descriptions or specific, individual easement rights. See Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, <http://academic.udayton.edu/race/02rights/guadalu.htm#Original%20ARTICLE%20X> (last visited Feb. 6, 2008).

the vague descriptions of property under Mexican law make it legally untenable, courts have held as a general rule, pre-*Lobato*, to enforce these amorphous cite descriptions under American law. There is also the fact the settlers are not even named by name, or as part of any discernable class or entity in the treaty, or any of the other writings extant in the case. Then in *Lobato*, the highest appeals court in Colorado ruled that American common law permitted the court to examine and to *indirectly recognize and employ as a guide*, the intent and expectations raised and confirmed, under Mexican law, while supposedly not directly enforcing foreign law, or causing a direct contradiction of another precedent involving the Sangre de Cristo grant, the earlier mentioned *Tameling v. United States Freehold & Emigration Co.*⁹⁶ This represents the aforementioned, second legal fiction. *Lobato* achieved a decision whereby Mexican law and culture were taken cognizance of by the Colorado Supreme Court, by employing a sweeping rationalization. By repeating in a generalized manner, in the deed to Gilpin and in the deed to Taylor, statements of unnamed easement beneficiaries, the respective drafters of the two deeds gave the court ammunition to rationalize "settlers' rights." To explain its decision, the court in *Lobato* reasoned that since the first wave of settlers occupied the land *after* ownership had passed to the United States in 1848, only American law should apply to all matters in regard to the disputed Taylor Ranch easements. This approach, however, ignores the fact the various Mexican laws permitting the grant and the grant itself, *were made prior to 1848*, while the land was still fully under Mexican law. Consequently, in *Lobato*, it is hard to understand the logic in the court's opinion that foreign law (Mexican) is not being applied, or that evaluating Mexican law to determine Mexican intent is not, at least indirectly, applying Mexican law. For one thing, intent is one of the most important aspects in determining the application of law. One may hardly discount the important role of

⁹⁶ *Tameling v. U.S. United States Freehold & Emigration Co.*, 93 U.S. 644, 662-63 (1876) (bars claimants from seeking to dispute an act of Congress that confirmed a land grant that ignored and denied pre-existing rights under Mexican and/or Spanish law). One key argument made by petitioner *Tameling* was that Congress could not validly have adopted a grant in excess of that permitted by Mexican law. *Id.* Law that the United States was compelled to adhere to via the Treaty of Guadalupe - Hidalgo. *Id.* The U.S. Supreme Court did not agree and ruled the patent must be construed as a "de novo," and hence inherently legal grant." *Id.*

intent in contract law, the law of gifts and real property sales and conveyances. If American common law cannot legally apply, Mexican law and the intent of the grantor of the alleged easements under Mexican law is applied, as was the intent of the Mexican law. The court's position it appears is part of this second legal fiction, employed to justify the desired result. At the same time, the court's findings in many ways represent a sea change for not only *Lobato* but also for other, future, southwest, land grant cases.⁹⁷

In numerous, prior southwest, land grant cases, the courts applied common law, real property laws and rules in regard to easements, in a more circumscribed and reasoned fashion. It is unfortunate that the first application of the common law's new interpretive powers in this regard, via the ALI's Restatement Third, took place in the context of highly suspect, apparently fictional orders as to settlers' "rights." A streamlined procedure in the first, new Restatement of the Law of Servitudes since 1944 was completed in 1998 and published in 2000. This "improved," Restatement of the Law, Third, Property, Servitudes, ALI, Volumes 1 and 2 (2002), was a significant factor in permitting the court to develop new fictions, while it discarded some of the old. The new law aided greatly in permitting the court's application of supposed, "equitable principles." In short, the definition of terms was simplified and the number reduced and thus inured to the benefit of a slightly altered perspective as to real property rights, including those existing in America in cooperative, communal, or housing communities.⁹⁸ The Sangre de Cristo grant was private, with a minor communal aspect, in regard to certain, centrally located lands in the valley portion of the tract.⁹⁹ The ALI's new

⁹⁷ Of course this changes everything in regard to how an American seeking title in fee simple must view a Southwest land grant title. *Lobato* creates a precedent in Colorado and other states are free to adopt the court's strained reasoning.

⁹⁸ There has always been a world of difference between Mexican and Anglo-American philosophies of law. The Mexican is far more communally oriented, the American stresses private, specific ownership rights. The ALI Restatement (Third), contains just three categories: profits, easements and covenants; any or all of these may be enforced in law or equity. The Restatement's treatment of cooperative and other communal rights, however, brings the philosophies of the two countries closer together. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2002).

⁹⁹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES Vols. 1,2 (2000) ("This authoritative Restatement, which supercedes the original Restatement on this subject published in

terminology and procedure very much accrued to the benefit of permitting the court to proclaim sweeping findings concerning a broad array of easements, that the ALI labels “servitudes.” One article theorizes that the prior, outdated 1944 restatement was so convoluted that courts previously felt a need to apply numerous legal fictions, simply to “cram” the extant fact patterns into the then available terminology of the old, 1944 Restatement.¹⁰⁰ Each type of easement or other property right in the 1944 restatement existed in a separate and distinct fashion, with separate rules and legal consequences.¹⁰¹ This made for an exceedingly complex evaluation of issues in each case. This apparently prevented prior decisions from recognizing various servitudes, even if the courts had an inclination to do so. The surge in communal type living arrangements and gated communities in the U.S. contributed considerably to the new, unified, simplified procedures in the Restatement, Third. Mexican real property law has traditionally been, of a more communal focus than U.S. law. The new living arrangements in the United States permitted U.S. laws to become more compatible to the joint living style. Under the ALI guidelines, the American law of servitudes has moved a little closer to Mexico’s. There followed the creation of certain legal fictions and the elimination of other, more minor ones.

The court in *Lobato* gives a misleading impression, or perhaps a hint, of the court’s orders to come, when it notes,

We are 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

1944, replaces one of the most complex and archaic bodies of 20th century American law with a clear, comprehensive, rational body of law ideally suited for land use and development in the 21st century. Simplifying, clarifying, and modernizing the law of covenants, easements, and profits, this long awaited work provides that servitudes should be interpreted to carry out the intent of the parties...”).

¹⁰⁰ Golten, *supra* note 27, at 466-67.

¹⁰¹ To obtain an easement by prescription for example, the use must be actually adverse to the fee owner, as per the 1944 restatement. RESTATEMENT OF PROP.: SERVITUDES § 2.17 (1944). In the 2002 Restatement, conversely, it could also be found if there is an imperfect, express grant, such as allegedly occurred via the Beaubien document in regard to the Taylor ranch. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16.

law and perfected it under American law. Beaubien wrote this document in 1863 in an apparent desire to put in writing the promises 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.'¹⁰²

Here, the court has tried to take the moral high ground and implies that it will not willingly enter into a legal fiction.¹⁰³ It is as if the court is telling us, "we know this is a tough case to do the right thing in, but we are not going to use legal fiction, even to accomplish a "fair" (read, politically correct) result!" Soon, the court does, however, establish its first, central legal fiction that the Beaubien document effectively functions as if it were a deed! This first fiction is the most important for the court to achieve its objective of finding for the easement holders!¹⁰⁴ Justice Mullarkey, writing the majority opinion for the court in 2003, concerning some peripheral, collateral estoppel issues that arose in the original case, makes the following statement. That all residents of Costilla County, whose property was settled at the time of Gilpin ownership, have claims to settlement rights on the Taylor Ranch, and should all have been personally served by name. She states as follow:

We recognize that this standard may be over-inclusive, but considering the grave deprivation of rights suffered by the landowners (settlers) over the past 40 years, we are unwilling

¹⁰² *Lobato v. Taylor*, 71 P.3drd 938, 947(2002). The court herein is actually preparing us for various legal fictions of its own creation. One of these is the court's novel theory about contemporaneously applying and not applying Mexican law.

¹⁰³ It is interesting that the court first denigrates and ridicules the use of legal fictions in its decisions generally, by taking herein the moral high ground and then creates a major legal fiction of its own! (That the Beaubien document refers to the Taylor Ranch and creates easement rights by implication for the settlers of the Sangre de Cristo grant). The first legal fiction utilized by the court in *Lobato*.

¹⁰⁴ JOHNSTON, *supra*, note 2, at 203-283. The Beaubien document appears to grant no rights to the settlers. *Lobato v. Taylor* it may be argued, was in part, a political decision and as such it is not uncommon for a court to determine the outcome it wishes to have and then find a rationale to arrive at that outcome.

to create a standard which may again unlawfully deny some landowners their granted access rights.

This is the third legal fiction in *Lobato*.

Here, the judge is revealing in her order, the “over-inclusiveness” of that order. This is an extraordinary and, partly to its credit, openly fictional position and order of the court, to achieve the result of a broad inclusion of those who will receive settlement rights. It reveals the fiction in the statement.¹⁰⁵

This broad-based inclusion is quite different from the judicious application of the law in another case, *Rael*.¹⁰⁶ There is no nexus in *Lobato* between all of these persons and who the settlers actually are. There is similarly no proof that over the last 150 years, each of these parties had received and/or exercised any easement rights whatsoever. There is simply no proof of an easement in each, individual case in the Beaubien document, as is required by the common law.

The court also partially rationalized its decision in favor of implied easements, by reference to the ALI Restatement, Third, and comparison to the First Restatement of Property of 1944 and the latter’s artificial

¹⁰⁵ Certiorari to the Colorado Court of Appeals. Case no. 98CA1442, and case no. 00SC527 investigates Justice Mullarkey’s statement that “this standard may be over inclusive.” This is a specific type of legal fiction that reveals the “untruth” in the statement itself. This reduces the fiction to a procedure less onerous than it would have been, had the fiction been hidden. This places the fiction in a little more hopeful light. Another legal fiction, the one that adjudges the Beaubien document is really a deed, states itself as a true fact and to some degree hides the fact it is purely a fiction. This legal fiction is therefore more repellant and more of a “loose cannon,” in terms of its potential, negative effects in future cases. It is not just “a white lie.”

¹⁰⁶ *Rael v. Taylor*, 876 P.2d 1210, 1225 (Colo. 1994); *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003) (Kourlis, J., dissenting). Justice Kourlis, writing for the dissent, notes an inconsistency with *Rael*. *Lobato*, 70 P.3d 1152. The third legal fiction occurs when the majority in *Lobato* rules that all landowners in Costilla County, whose property was settled in part at the time of Gilpin ownership, had easements and were entitled to notice of the Torrens action. See generally *Lobato*, 70 P.3d 1152. In *Rael*, the court held otherwise and “rather carved out a question of fact...” See *Rael*, 876 P.2d at 1225. The method was far more judicious in *Rael*, it is posited. The *Lobato* Court also states that the Taylor Ranch was “not coextensive” with the description in the Beaubien document. See *Lobato*, 70 P.3d at 1162.

distinctions among the various forms of servitudes.¹⁰⁷ One negative of this prior, overly complicated statute, the court points out, was the need to previously employ legal fictions in fitting the individual fact pattern of each case into the numerous easement rights, as they were respectively defined in the First Restatement. We see the *Lobato* court discarding all of these individual, little legal fictions, only to replace them with the considerably more substantial fictions in our discussion, that bare no semblance to American real property, common law. *Lobato* ultimately found in 2002 that the “rights” set forth in the Beaubien document of 1863 were “implied by prescription, estoppel and prior use.” The court argued that even though the Beaubien document’s property described was “not coextensive” with the Taylor Ranch, (a stunning admission by the majority court and a second element of the court’s primary fiction), the implied easements nevertheless existed. The court alluded to the statements in the deed to Gilpin and the deed to Taylor to help reach this conclusion. Here is what the three documents that the majority cites, state. First, an excerpt of the relevant section of the Beaubien document:

“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. 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.”

(The Rito Seco begins about 5 miles to the north of the Taylor Ranch, and as Justice Mullarkey points out, the two properties are “not co-extensive!”). In other words, to the court, the Beaubien document is the corner stone for any rights the settlers may have, and the Beaubien document does not even refer to the Taylor Ranch lands.

¹⁰⁷ Any description of these “servitudes” in the Beaubien document is as part of a set of settler’s rules of conduct, in reference to lands to the north of the Taylor Ranch. See *Lobato*, 70 P.3d at 1158.

The deed to Gilpin from the heirs of Beaubien states:

...Certain settlement rights before then conceded by said (Carlos) Beaubien to residents of the settlement of Costilla, Culebra & Trinchera, shall be confirmed by said William Gilpin." The court cites this language, the Beaubien document and the deeds for the conclusion that it places the average reader on notice that all landowners in Costilla County "might credibly claim access rights to the Taylor Ranch."¹⁰⁸

The Beaubien document actually did not convey any rights to the settlers and hence the deed to Gilpin conveys no "settlement rights."

Finally, Taylor's deed says as follows: "All of the land hereby conveyed...being subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements (sic) rights in, to and upon said land." It is important to note that all settlers who had easements on file in the real property clerk's office were served with a summons in Taylor's Torrens action. It is also nowhere stated or defined who these "local people" are. Therefore, Taylor's scouring of all of the real property records should be more than adequate.

The court then states, "with these three documents at his disposal, it is clear that Taylor was 'on notice that (all) landowners in Costilla County might have an interest in the Taylor Ranch.'"¹⁰⁹ This is supposedly justified because the court alleges the settlers were unfairly treated in the past, and might be so treated again in the future. Now, real property easement law flows from Colorado's highest court, based on a perceived, possible future injustice. The court concludes its findings and states that access rights shall be available for existing landowners who can prove their lands were settled when Gilpin owned the Taylor Ranch. This, the court rules, denotes the last point in time in which the rights conveyed and

¹⁰⁸ *Id.* at 1162 ("Although we recognize that the land referenced in the Beaubien document is not coextensive with the boundaries of Costilla County....").

¹⁰⁹ *Id.* at 1162. Again, any settler's rights are still only on proof to the court. Specificity is required in the common law to convey real property rights. The court placed the burden on Jack Taylor to pay all of the costs of the court's determination of which settlers have the easements.

the intent expressed in the Beaubien document still apply. It is interesting to note that in this context, the court states intent *is* part of the law. But not when it is Mexican law and Mexican intent, as to what the law means. This latter theory was the court's way to circumvent the *Tameling* decision.

To recapitulate, a legal fiction was created, that the Beaubien document, from which the settlers' rights, if any, originally flowed, was a deed equivalent and transmitted rights to easements to the settlers.¹¹⁰ In terms of geographical connection, or the absence thereof, initially the court states the Beaubien document does not expressly refer to the Taylor Ranch. The court is quite clear about this. Then, a few lines later, the same court states as follows:

"We conclude that the location for the settlement rights referenced in the Beaubien Document, is the Taylor Ranch." This exemplifies a classic legal fiction. What is most interesting about it is it reveals the legal fiction in its

¹¹⁰ Lobato v. Taylor, 71 P.3d 938, 948 (2002).

Here, we look to extrinsic evidence to construe the Beaubien Document for two reasons. First, as Lazy Dog tells us, extrinsic evidence may reveal ambiguities. Second, the document is ambiguous on its face with respect to where the landowners could exercise their rights.".... "We (the Colorado Supreme Court), cannot determine from the face of the document what lands were burdened by the rights Beaubien conveyed to the first settlers.

Id. at 947-48.

Then the court concludes the location in the document is the "mountainous area of the grant of which the Taylor Ranch is a part." *Id.* The subsequent argument the court makes flows from the existence of the following language in the deed from Beaubien to Gilpin:

"Rights of way of record [and] all rights of way heretofore located and now maintained and used on, through, over, and across the same [and]....and.... claims of the local people by prescription or otherwise to rights to pasturage, wood, and lumber and so-called settlement rights in, to and upon said land." hird, the landowners' access rights are expressly mentioned in Taylor's deed. The deed subjects his property interest not only to "rights of way of record," but also to "all rights of way heretofore located and now maintained and used on, through, over, and across the same." It further subjects the conveyance to "claims of the local people by prescription or otherwise to rights to *pasturage, wood, and lumber and so-called settlement rights* in, to, and upon said land.

Id. at 948.

The Gilpin deed, however is based upon the Beaubien document, and the court strongly emphasizes the importance of the latter. *Id.* Further, the Court's admitted that the Beaubien document did not determine what lands are burdened. *Id.* at 947.

opinion, when it states the land of the Taylor Ranch is not “co-extensive” with the land stated in the Beaubien document. Once again, the court reveals the fictionality of its ruling, as it did with the term “over inclusive,” in regard to the order requiring personal service in the Torrens action on all residents of Costilla County who owned their settled land, at the time of Gilpin’s ownership.

A LEGAL FICTION

The lower court in *Lobato*, (reversed), also analyzes the Beaubien document, and finds it is not precise enough to constitute an express grant of the easement. The court rules it does not reveal precise specifications of the property and of course does not specify each settler’s alleged, individual easement. The document, it remarks, also lacks the words, “heirs and assigns,” as required to pass title to real property rights to easements as per heretofore long settled, common law. The court rules the Beaubien document functions as a deed, but continues to label it the “Beaubien document,” when at best it only refers to property to the north of the Mountain Tract. (Why doesn’t the court call it the “Beaubien Deed?”) At the same time, the deed from Beaubien to Governor Gilpin indicates an exceedingly vague attempt to grant prescriptive easements.¹¹¹ *There are no specifics.* Also, this deed, like the deed to Taylor, is totally supported by the Beaubien document. The finding alone of intent to grant the easements, in the lower court findings, became central to the ultimate findings of the Colorado Supreme Court. Beaubien’s alleged intent became pivotal in the Colorado Supreme Court’s decision. It was utilized by the court to enable it to grant *implied easements*. One may justly and logically go so far as to characterize the so-called, “Beaubien document” as simply irrelevant. If this is so, on the court’s own terms, the entire case should have been decided against the settlers.

TERMINATION OF A USEFUL LEGAL FICTION.

¹¹¹ *Lobato v. Taylor*, 70 P.3d at 1162 (Colo. 2003). The Gilpin deed states, “certain settlement rights before then conceded by said Beaubien to residents of the settlements of Costilla...shall be confirmed by said William Gilpin.” *Id.*

The *Lobato* decision, to give fair credit, does do an excellent job of debunking certain, albeit minor, legal fictions. The court found there were easements by implication. Namely, prescriptive easements, easements by prior use and easements by estoppel. The elimination of the “adversity” requirement for an implied easement by prescription, removed the need for the court to create fictitious presumptions as to why the possession by the trespasser was “adverse” to the landowner. Nevertheless, for reasons soon to be explained, all this accomplished was to again strengthen the hand of potential, adverse possessors. It would be preferable, for title security, to retain the adversity requirement for easements by prescription. *Cases that do not show adversity should not find for easement by prescription.* If this procedure is followed, we also remove any need for a legal fiction! If permission to cross the land is given, it is not an adverse use – prior to *Lobato*, and a handful of other aberrant cases. It is submitted that this is the preferred course to follow.

It is common in state law to find a requirement that easements by prescription require “adversity,” i.e., the opposite of a permissive use. The rule requiring adversity, as it is usually applied, would have been a major impediment to the court’s decision. However, because decisions in states requiring adversity often used ‘convoluted explanations’ to explain how a permitted use was actually hostile and met the adversity rule in certain circumstances, numerous legal fictions were created on a case by case basis. These legal fictions, actually numerous, separate little legal fictions, were dispensed with in *Lobato*. This finding has serious, negative implications, particularly concerning adverse possession claimants and the preservation of wild lands.

THE COURT REMOVES A LEGAL FICTION BUT ENCOURAGES ADVERSE POSSESSION

So, again, the procedures indicated by the new Restatement caused the demise of another fiction. The dilemma here is that an easement by prescription is very similar to an adverse possession claim. Both involve someone trespassing for an extended period of time. One is a claim of right of transit. The other is a claim to the land itself. They are very intimately related. A continuing trespass can ripen into an easement, or an adverse possession, depending upon the circumstances. An adverse

possession includes an intentional easement by prescription. So the court allows easement by prescription, and an implied easement, no less, without any adversity whatsoever. An adverse possession claim always requires adversity. The court is again chipping away at title security, in the guise of doing equity for the settlers. What the court has done is to set a second, powerful precedent. Now, if a land owner gives someone permission to pass across his property, he must always fear an easement by prescription claim may come in the future, upon the expiration of the state's adverse possession, statute of limitations. Therefore, a landowner *is compelled to exclude all persons crossing his land*, and the classic method, of simply giving permission to cross, will no longer protect the landowner.

The court gives various examples and then explains adversity is not required when the parties *intended* an easement but failed to place the agreement in writing. Again, the court is holding that a finding of intent is a part of the law, this time in regard to prescriptive easements. This rule applies also when there is an imperfect grant of the easement.¹¹² Prior courts have found adversity even where a servient owner gave consent.¹¹³ This case states there may be an easement by prescription where the original use was on consent with the servient owner and "use of right has continued for more than 10 years."¹¹⁴ A defective conveyance could be evidence of an implied easement, as stated in the Restatement, Third. The court also found a trend in the law of Colorado to apply the same rules to access easements as well as to profits, i.e., the latter to take something from the land, such as firewood, in the instant matter.¹¹⁵ The 2002 ALI

¹¹² RESTATEMENT (THIRD) OF PROP.: SERVITUDES §, 2.16, A prescriptive use can be "(1) a use that is adverse to the owner of the land or the interest in the land against which the servitude is claimed, or (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude." *Id.*

¹¹³ See, e.g., Kirby v. Hook, 701 A.2d 397, 404 (Md. 1997) (applying an exception to the general rule that permissive use can never ripen into a prescriptive easement, where the grant of the easement was barred by the statute of frauds.)

¹¹⁴ Loughman v Couchman, 47 N.W. 2d 152, 154 (Iowa 1951).

¹¹⁵ State v. Kortge, 733 P.2d 466, 469 (Or. Ct. App. 1987). This case holds, whether an easement for simple access, or a profit to take some physical entity from the land, the same basic rules apply. Figljuzzi v. Carcajou Shooting Club, 184 Wis. 2d 572 (Wis. 1994). The court examined the First Restatement which states it treats easements and profits the same. RESTATEMENT (FIRST) OF PROP. § 450 SPECIAL NOTE (1944), This was

Restatement reaffirms they are *equivalent*. The court could have held that the heirs were entitled to access easements, but not profits. This, however, would be counter to the overall thrust of the ALI restatement, which is to advance a highly unified approach. The Third Restatement defines both easements and profits simply as “servitudes.” The Colorado high court thereby rejected the intermediate appeals court finding that the law of implied easements applied only to access rights and did not apply to profits or use rights. The Colorado Supreme Court held it applied to both kinds, and labeled them both “servitudes.” This finding is as per the language contained in the Real Property Restatement, Third, Servitudes.

One could reasonably interpret this as a minor, “statutory” legal fiction, “for a lawful purpose,” i.e., to apply rules as to quite different servitudes in a “uniform” manner. A profit a prendre and an easement, shall henceforth be deemed equivalent, according to the ALI. Whereas, an easement, or access right, is in reality not equivalent to a profit, i.e., an access right, plus a right to remove something from the land.

PART IV

TORRENS TITLE UNDER SEIGE AND INCREASED RISK OF ADVERSE POSSESSION AND DAMAGE TO WILD LANDS

The states of Colorado,¹¹⁶ Massachusetts, and several others all utilize a so-called, “one-step,” court ordered Torrens Title “judgment,” only awarded by the court after *trial*. This was the procedure Taylor weathered for five long years in the federal district court in Denver, Colorado, and for two more years, to confirm the findings in the appellate court. It is an expensive and sometimes unnecessarily cumbersome process, as it by definition, requires a trial.¹¹⁷ Supposedly, the process by

emphasized and clearly stated once again, in the Third Restatement (Third). The primary modification in the latter, was the implication of a profit that could be found, based on an oral grant, or an imperfect, written grant; the Beaubien document, in the latter situation.

¹¹⁶ Lobato v. Taylor, 70 P.3d 77-109 (Colo. 2002)..

¹¹⁷ Goldner, *supra* note 3. Barry Goldener notes an advantage of the Torrens system of title registration is the increased security to the registrant. *Id.* A second advantage is its opportunity to reduce the costs of subsequent transfers. *Id.* These costs of subsequent transfers are quite small. See also, *The Consumer's Need for Title Registration*, 4 N. KY.

trial, that Jack Taylor followed, should mean title is almost without exception, ironclad. Torrens Title also always precludes adverse possession claims that accrue either prior to or subsequent to the granting of the Torrens Title. Upon conclusion of the statutory time period, the owner receives a government guaranteed certificate of title, with any exceptions, such as federal liens or public easements, noted on the face of the title certificate. Any other objection, brought for example by a latecomer, may be satisfied by money damages or a state compensation fund, only. The Torrens Title is to remain wholly intact.

The basis of the theoretical concept for a Uniform State Law Torrens system is that land titles should be, in theory and practice, inexpensive to acquire and indefeasible, once granted. It is also postulated that in a mere recordation of title state, the costs of a whole new title search, every time the title changes hands, is excessive and unnecessary. Also, as the chain of title grows longer and longer, with each sale of the property, errors are increasingly likely to occur. The originally conceived Torrens Title process requires an assurance fund to indemnify anyone who suffers a loss due to the improper registration of the property.¹¹⁸ The Colorado Torrens law allows for a suit for damages, but *Lobato* chose not to relegate the settlers to a suit for money damages.

Other nations also have embraced the Torrens process, such as Australia, Honduras, the British Commonwealth, Vancouver, New Zealand, Wales, and Jamaica.¹¹⁹ Sir Robert Torrens, a British subject, created the procedures to be followed in the registration of real property when he was the premier of South Australia. In 1858 he drafted the Torrens Law. This is a real property title method originally applied to the

L. REV. 253, 266 (1977). The savings accrue because a title search beyond the exceptions stated on the face of the certificate is unnecessary. *Id.*

¹¹⁸ Goldner, *supra* note 3. See also A. Simpson, Land Law And Registration 178-83 (1976). The Land Transfer Act of 1892 commenced the process that created the assurance fund. *Id.* This first "introduced the important innovation of a compensation fund for persons who suffered through any mistake on the registrar." *Id.* A small fee, of one quarter of one per cent or less of the value, would be paid by the registrant to fund the assurance fund. *Id.*

¹¹⁹ Goldener, *supra* note 3, at 176-83. See also, A. SIMPSON, LAND LAW AND REGISTRATION 176-83 (1976). In England the concept was born in 1857. It was contained in the report of Robert Wilson to the 1858 Report. *Id.*

certification of title of ships in Australia, which increased ease of sale.¹²⁰ Many other countries, including Britain, exhibit a legal preference for the English, “two- step” method of registration that usually obviates the necessity for a lengthy and costly trial.¹²¹ In Taylor’s case, he probably would have opted for a trial anyway because of the disputed nature of the settlers’ claims. In the United States, the requirement of a court judgment *in all cases*, prior to granting Torrens Title, has hindered acceptance of the Torrens method. This is rectified in the English, “two-step” process, which it is suggested, is far more economical and in the end results in title as secure as by the American, “one-step,” trial mandated method. This “one-step” method requires a court issue the judgment, as per the constitutional mandate of the Fourteenth Amendment. In the “two-step” procedure, if there is no trial, the United States Constitution does not require the intercession of the judiciary.

In the English streamlined procedure, actual notice is served on all potential claimants and as a first step, *prima facie evidence of title* is issued reasonably quickly by the British land registry. Then, after a substantial waiting period of years, the final Torrens Title is issued. In the interim, any adverse claimant may file his claim against the property, or “be forever barred.”¹²² Usually, there is never a need for a trial and judgment. This of course makes the preferred English method, in most cases, far less costly. Once a functioning Torrens system is put into effect, costs will initially be higher for the first registrant only. After that the Torrens process will cost subsequent registrants *less than recordation of mere evidence of title, purchase of title insurance and examination of ever lengthening chain of title*. The legislative branch as a salutary measure may evaluate the concept of a contingency/assurance fund to pay damages

¹²⁰ R. POWELL & P. ROHAN POWELL ON REAL PROPERTY: ACQUISITION AND TRANSFER OF INTERESTS IN LAND: REGISTRATION OF TITLE R.2 (1993).

¹²¹ The trial procedure that Jack Taylor followed should be as ironclad as the British, “two step” procedure. Taylor went through extended hearings and a full – blown trial, resulting in a “successful” judgment and award of Torrens Title by the federal district court in Colorado. The procedure took seven years, from 1960 to 1967!

¹²² Goldener, *supra* note 119, at 661, 690. The waiting period will be anywhere from five to twenty years, depending upon the state where the property is located. *Id.* In the interim, the traditional title recording process will be used to protect title. On subsequent sales, this traditional recordation step will be dispensed with. *Id.*

to any "latecomers" whose rights were impinged upon by the granting of Torrens Title. The court could have utilized the existing assurance fund in the instant matter. Therefore, a land registry assurance fund is urged herein in the strongest possible terms. The alternative is severe damage to title security, as took place in *Lobato*. Torrens Title must be encouraged and protected in the United States as it is already in many other countries. Finally, Torrens Title would be immune to adverse claims that are not noted on the face of the registered title certificate. It will erase any prior claims and will also prevent any future claims as to issues not appearing as exceptions on the face of the certificate of title. Torrens Title will permit the property to be sold as easily and quickly as an automobile and with low cost.

This procedure gives the registrant a clear title, free of hidden liens or defects. It is a substantial negative in the overall social impact of the *Lobato* holding that the validity of a Torrens Title was unnecessarily sacrificed in the process.¹²³ This is a negative, no matter what you surmise concerning the settler's rights, or the absence of them. The theory chosen by the court, that all Costilla County residents should have been served in the Torrens action, lacks legal basis as it fails to connect all those persons to possession of easements or actual use of any of the easement rights. The court has employed a broad-brush approach. The settlers' tactics were also quite dilatory in this regard. The settlers' attorneys moved with glacial slowness and generally impeded acceptance of service. Also, the settlers were not paying their attorneys, and cooperation was minimal between attorney and client.¹²⁴ The reality is, the court-appointed title examiner asked the attorney for the settlers to provide the names of those residents who should be served in the Torrens action. Their attorney, Elio E. Romero, said he had been unable to obtain the information and "no list existed." But that "*the claims are made on behalf*

¹²³ *Id.* at 661, 690. *See, e.g.,* S. ROWTON SIMPSON, *LAND LAW & REGISTRATION* 176-83 (Cambridge U. Press 1976). The British first created the Torrens procedure in 1857. *Id.* It was contained in the report of Robert Wilson to the 1858 report. *Id.* The concepts were refined and clarified in Lord Cairn's Land Transfer Act of 1875. *Id.* Under the Act, land registrations were purely voluntary. *Id.* In Britain, a pervasive and excellent Land Registration Act was approved by the Crown on February 26, 2002. *Id.*

¹²⁴ JOHNSTON, *supra* note 7, at 267.

of all owners of land in Costilla County.”¹²⁵ In this way, the settlers could drag their collective feet, impede service, refuse to identify themselves and put the whole burden on Taylor and his attorneys.¹²⁶ Taylor examined the real property records and served all of those settlers who had filed any easement or any other lien. The federal district court also required him to serve any parties who were grazing cattle on the land. Taylor followed these instructions as well.¹²⁷ By obtaining a Torrens Title, Jack Taylor was doing what any prudent lumberman would do when faced with ownership of a huge piece of largely virgin land of considerable value that was almost impossible to patrol for trespassers. Following the court’s decision in *Lobato*, it is easier for random trespassers to establish adverse possession claims, in addition to the implied easements the court has already granted to the heirs and assigns of settlers.¹²⁸

¹²⁵ *Id.* at 215-216. 215-216, Judge Arraj ordered publication as well as issuance (service) of summonses. *Id.* All defendants named in Taylor’s application and those persons named in the title examiners report as “being in possession of said premises or having of record any lien, right, title, or interest in said premises.” *Id.* Taylor’s attorney mailed 400 copies of the summonses to the U.S. Marshal’s office in Denver for personal service. *Id.* A return of service report was filed by the Marshal, listing those defendants who were served. *Id.* Defendants were dilatory in answering the summons, and the court granted several adjournments, well past the legal default dates, giving the “settlers” adjournment upon adjournment to file answers; oanswers. thers were served by publication, as per the judge’s order. *Id.* After years in court, service of summonses on hundreds of settlers and numerous publications in the *Costilla County Free Press*, it is hard to believe that any residents with alleged easement rights, were unaware of the Torrens proceeding.

¹²⁶ *Id.* This is absurd because at common law the burden is always on the party asserting the right.

¹²⁷ *Lobato v. Taylor*, 70 P.3d 1152, 1165 (Colo. 2003). The Colorado Supreme Court ruled this was insufficient, and that Taylor’s attorneys should have examined the tax records for Costilla County. *Id.* The dissent in this aspect of the case, involving res judicata issues, points out, however, that this is an extreme and highly unusual position taken by the court. *Id.*

¹²⁸ *Lobato v. Taylor*, 71 P.3d 938 (2002). There are several reasons why the court’s ruling in *Lobato* is extremely damaging to the fabric of security of real property title. What may be less obvious is the greatly increased risk of adverse possession claims and subsequent loss of quite substantial wild lands to long-term trespassers who in the court’s estimation have fulfilled some economic exploitation of the land, commensurate with the economic uses to which the property is, by its nature, suited. This is because precedent links the possible economic uses of land to the degree of activity the adverse possessor has to exhibit. Wild lands can be adversely possessed very easily, with a bare minimum of

AN ASSURANCE FUND IS CRUCIAL

An assurance fund, which should always accompany Torrens Title legislation, may include general state revenues if the fund proves otherwise insufficient. The Colorado Torrens Title Act of 2002 provides for a suit alleging indemnification and damages by an aggrieved party. The Act also provides for an assurance fund claim for loss or misfeasance.¹²⁹ The existence of the assurance fund, in addition to the availability of the indemnification remedy, makes it even more reasonable for the court *not* to have disturbed Taylor's Torrens Title.

Adverse possession is a very real threat, and is widely and frequently employed by determined trespassers in the United States. It has deeply rooted, ancient origins and is well established in American jurisprudence. Historically, the first recorded versions of the rule appear in Hammurabi in 2000 B.C.¹³⁰ We are confronting a law and procedure that has been with us for four thousand years. The ongoing threat of adverse possession claims is a primary reason a person applies for Torrens Title. In

activity. In *Le Sourd*, a poacher of fish, who installed traps under the water, succeeded in claiming title by adverse possession. The court's theory was "constructive notice." *Le Sourd v. Edwards*, 86 N.E. 212 (1908).

¹²⁹ Colorado Statutes. Article 36 Torrens Title Registration Act: 38-36-187(2002). The Colorado Torrens law has a provision for indemnification, for mistake or misfeasance of the registrar of titles or his agents. The Act also provides for actions against the county treasurer and/or any other defendant. In addition, 38-36-131 provides in pertinent part that "any person having an interest or lien upon the land who has not been actually served with process or notified of the filing of the application or the pendency thereof may at any time within ninety days after the entry of such decree, and not afterwards, appear and file his sworn answer..." 38-36-131, par. 2, also states "Any person aggrieved by such decree in any case may pursue his remedy by suit in the nature of an action of tort against the applicant or any other person for fraud in procuring the decree and may also bring his action for indemnity as provided for in section 38-36-187." 38-36-188 states the law in an action in which there are defendants, other than the county treasurer. Therefore, if an execution of judgment against such other defendant is returned unsatisfied, in whole or part, the plaintiff shall have recourse against the county treasurer out of the assurance fund. There are clearly various remedies available to the court and the settlers, other than invasion of the Torrens Title.

¹³⁰ W.W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 355 (Cambridge University Press 1951).

Massachusetts, for example, most persons applying for Torrens Title *initially acquired their title by adverse possession*. They should have a sound appreciation of the degree and nature of the threat of adverse possession to a property owner's apparently secure title!¹³¹

A prescriptive easement is similar to an adverse possession claim. By irresponsibly damaging the protection of the Torrens Title in the instant case, the court has also weakened the position of all owners who are wary of potential adverse claimants, i.e., owners of wilderness tracts. The court's cavalier attitude towards Torrens Title is quite regrettable.¹³²

There are numerous advantages to a Torrens Title.¹³³ Disregarding the accuracy of the private or government databases, in non-Torrens

¹³¹ Todd Barnet, *The Uniform Registered State Land And Adverse Possession Reform Act, A Proposal For Reform Of The United States Real Property Law*, 12 BUFF. ENVTL. L.J. 27 n. 93 (2004).

A call to the deputy recorder of the Massachusetts Land Court in October of 2003, for example, led to some light being shed on registration practices. She confirmed a court action was required and there would be a final judgment. Time to begin and complete the actions varied from one to ten years. The costs paid to the Land Court in fees alone include a \$700 filing fee and excluding private attorney's fees, may amount in all to several thousand dollars. Massachusetts does have a parallel and much more popular recordation system. Once registered, a claimant cannot argue for adverse possession. *She also noted that a substantial number of persons registering their property for the first time are adverse claimants! They are seeking a survey by the Land Court to clarify the boundaries and also apparently are familiar with the risks and uneasiness caused by a potential adverse possession claimant. With registration, they "can rest easy"*.

Id. (emphasis added).

¹³² John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 817-823 (1994). One of the topics discussed is the paucity of notice that the adverse claimant gives to the landowner. *Id.* Sometimes, surprisingly little notice will be sufficient for the claimant to gain title. *Id.* In the aforementioned Le Sourd case, adverse possession was found as to wetlands that were fished with traps tied to trees below the waterline. *Le Sourd v. Edwards*, 86 N.E. 212, 213 (Ill. 1908). Constructive notice was found, although the owner could not see the traps! *Id.* at 214. The court noted that the claimant's activities were visible as he "blazed the trees . . . and attached the traps . . ." *Id.* Unfortunately for the record owner, the court held the invisible fish traps under the water, plus the markings on a few trees, constituted a visible "appropriation . . . [of the land] for the only purpose for which the land could be used." *Id.*

¹³³ *Lobato v. Taylor*, 70 P.3d 1152, 1174 (Colo. 2003), *cert. denied*, 124 S.Ct. 922 (2003).

registration states, the purchaser is only recording *evidence* of title, and not title itself.¹³⁴ Recorded title is achieved by *recording evidence of title*; registered title by *registering a certificate of title*. Torrens Title follows the registration process. *Adverse possession claims* are permitted to bloom in an environment of record title and would be quite substantially reduced if we instituted a registered real property, uniform state Torrens Law in the United States.¹³⁵ States that now have a Torrens Law and procedure available are Colorado,¹³⁶ Georgia,¹³⁷ Hawaii,¹³⁸ Massachusetts,¹³⁹ Minnesota,¹⁴⁰ North Carolina¹⁴¹ (Jack Taylor's home state), Ohio,¹⁴² Virginia,¹⁴³ Pennsylvania¹⁴⁴ and Washington.¹⁴⁵

After the court's decision in *Lobato*, various questions remained, such as whether seven settlers who were "personally served and named" in the Torrens action would be barred from easement rights, despite the court's ultimate ruling in favor of settlers' rights. Justice Mullarkey, writing for the court, held that they would be so barred on *res judicata* grounds. In this opinion, the court made some interesting "admissions" about the Colorado Torrens Title Act. The opinion reveals a challenge to Torrens Title, namely, "strictly limits attacks on a title registered under the Act.

¹³⁴ See Charles Szypszak, *Public Registries and Private Solutions, An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663,664 (2003). See e.g. James R. Carret, *Land Transfer – A Reply to Criticisms of the Torrens System*, 7 HARV. L. REV. 24 (1893).

¹³⁵ 14-83 Richard R. Powell & Patrick J. Rohan, *Powell on Property* § 83.01 (1968). In the United States, Torrens registration is most widely employed today in Hawaii, Minnesota and Massachusetts. *Id.* Powell mentions that New York and Illinois permit filing of the registered title certificate as evidence of title in the existing *record title* system in those states. *Id.* Powell also discussed the Torrens system with several attorneys in the eastern part of the U.S. and they said several timber companies preferred the registration process to preclude adverse possession claims. *Id.*

¹³⁶ Torrens Title Registration Act, COLO. REV. STAT. §§ 38-36-101 – 199 (2002).

¹³⁷ GA. CODE ANN. §§ 44-2-4—44-2-253 (2007).

¹³⁸ HAW. REV. STAT. §§ 501-1--501-211.

¹³⁹ MASS. GEN. LAWS ANN. ch. 185 (West 2007).

¹⁴⁰ MINN. STAT. ANN. § 508 (West 2007).

¹⁴¹ N.C. GEN. STAT. ANN. § 43 (West 2007).

¹⁴² OHIO REV. CODE ANN. §§ 5309 – 5310 (WEST 2007).

¹⁴³ VA. CODE ANN. § 55.112 (West 2007).

¹⁴⁴ PA. STAT. ANN. § 21 (West 2007).

¹⁴⁵ WASH. REV. CODE ANN. § 65.12030.

Any challenge must be made within 90 days of the entry of judgment, and a successful claimant may recover only damages, not property rights.”

A LACK OF CREDIBLE EVIDENCE OF A BREACH OF THE FOURTEENTH AMENDMENT

The court then advanced the theory that the due process clause of the Fourteenth Amendment mandates a different finding where there is a lack of proper notice.¹⁴⁶ The court opined, “All residents of Costilla County should have been served.”¹⁴⁷ This is a legal fiction, as simply including “all residents of the county” does not require any proof by these residents that they have any connection to the original Beaubien document or to Gilpin’s ownership. It was also the very same theory that was offered by attorney Romero on behalf of the unnamed and elusive “settlers.” It is sometimes said that when there are powerfully persuasive arguments in a dissent, the dissent may one day become law. This may turn out to be the situation in *Lobato*.¹⁴⁸ As for the notice issue, Taylor’s attorneys were of

¹⁴⁶ *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003) (Justice Mullarkey ruled the federal court misinterpreted Colorado state law in regard to notice of the Torrens action to the “settlers.”).

¹⁴⁷ *Id.* (Justice Mullarkey states: “In conclusion, we clarify that reasonable access rights to the Taylor Ranch accrue to all who own land in Costilla County that was at all settled at the time of the Gilpin ownership. All of these persons should have been personally named and served in the Torrens action.”).

¹⁴⁸ *Id.* Justice Kourlis, dissenting, notes:

I first note an inconsistency between this court’s 1994 opinion in *Rael* and the present opinion. The majority here determines, as a matter of law, that all landowners in Costilla County were entitled to notice in the Torrens Action. In *Rael*, the court specifically rejected any such conclusion, and rather carved out a question of fact to the trial court. The trial court then reached principled findings, grounded in law and evidence, regarding the identity of the various individuals whose interests were readily ascertainable. The majority court reversed those findings, now holding as a matter of law that all landowners in the County had readily ascertainable interests. If the court had so intended, a remand to the trial court in 1994 (to ascertain who had what interests) would not have been necessary....Such a broad- brush determination belies all requirements associated with the acquisition of such rights – which are, necessarily related to the use a particular claimant may have made of the property.

high caliber and, of course, wished to give legally adequate notice. Taylor knew there was a cloud on the title due to the historical uses to which the property had been put. Taylor filed the action in federal district court on the basis of diversity jurisdiction because he was a North Carolina resident. In the proceeding Taylor named and served 316 defendants individually that his attorneys surmised could conceivably file a claim against the property. Based on the testimony of the court-appointed title examiner, he served an additional 142 defendants, comprising, in sum, all of the defendants with any possible legal claim. Many of these people were personally served by the U.S. Marshal.¹⁴⁹ Two years later, in 1969, the Tenth Circuit Court of Appeals affirmed entry of the Torrens Title.¹⁵⁰ One may well ask what else is required of a prudent purchaser of property. Is seven years in court and obtaining a Torrens Title not sufficient? The doctrine of "finality of judgment" also discourages reversing long established orders of the court, particularly on flimsy evidence.

The broad and extensive damage to title by the *Lobato* court has created a negative effect in regard to wild lands.¹⁵¹ The Colorado high court also rejected the intermediate appeals court finding that the law of implied easements applied only to access rights and did not apply to profits or use rights.¹⁵² The Colorado Supreme Court held it applied to both "servitudes." The Restatement, Third mentions the importance of

Id.

¹⁴⁹ JOHNSTON, *supra* note 2, at 216. Taylor's attorneys scoured the Costilla County real property, government indexes to locate all persons with any lien or document on file, alleging rights in the Taylor Ranch. *Id.*

¹⁵⁰ Justice Kourlis, in his dissent, notes: "I fear that the majority has created a circumstance in which these rights (the easements) may come as a windfall to individuals who have no history in the area, no tie to people who actually exercised the rights and no legal entitlement." *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003).

¹⁵¹ Herein, "wild land" is defined as land in its original, pristine condition, or property that has been cleared or cultivated, but now has been essentially returned to its original state.

¹⁵² *Lobato v. Taylor* emphasizes a possible trend in finding that uniform concepts of equity apply to all servitudes, no matter if access easements, or profits a prendre. Both give effect to a party's intent in situations where the common law rules as to deeds may not have been fully complied with. The ALI Restatement (THIRD) has been instrumental in this process as well.

protection of the environment.¹⁵³ The Restatement, Third, as we know, was also crucial to the court's final decision for settlers' easements,¹⁵⁴ but by undermining the security of Torrens Title, the way is now open for trespassers to establish adverse possession. Trespassers can masquerade as easement holders, steal timber and firewood, and then assert adverse claims.

Lobato thus permits an easement by permissive use. This is highly unusual. Now, access following permission may be sufficient to claim title to substantial tracts of the Taylor Ranch. The court has opened the door to an upsurge in a possibly destructive pattern throughout the Southwest. As the requirements for a successful adverse possession vary according to the uses to which the land may be put, adverse possession on wild lands is especially easy to establish.¹⁵⁵ The adverse possession factually required by a court is directly linked to the "productive uses" to which the land can realistically be put. Wild lands have few and limited productive uses, therefore, little is required of the adverse possessor to make out a valid claim. (Jack Taylor's son Zack complained about the court's trivialization

¹⁵³ *Barnet*, *supra* note 110, at 1.

As a result of legal fiction, the myriad state laws in regard to adverse possession pose a serious threat to our remaining wild lands. Under 50 different and peculiar statutes, a time limitations model functions in a manner well beyond the usual *statute of limitations*. It not only deprives the owner of his right to evict the trespasser, but by its operation, also may permit the court to grant title. There are various statutory time requirements for adverse possession, which may be as little as one, or as many as sixty years.

Id. In the United States, the legal fiction of adverse possession first appeared in the early 1800s. The elements required for an adverse possession are a taking that is actual, open and notorious, exclusive and continuous, hostile and under claim of right. If the trespasser fulfills these requirements, he may acquire legal title on minimal or no notice to the title owner. In the U.S. the law of adverse possession operates under the twin legal fictions of *constructive notice* and a *radical statute of limitations model*. *Constructive notice* means the law states the title owner is actually or *constructively on notice* that a trespasser is openly and continuously on his land. The reality is the owner actually has no knowledge of the trespasser's presence on his land. *Id.*

¹⁵⁴ *Lobato*, 71 P.3d at 950.

¹⁵⁵ This was precisely the argument Jack Taylor made to the court on one occasion, to no avail. *Id.* at 942. People were trespassing on his land, while alleging or implying that they were settlers. *Id.* He was concerned about title to his land. *Id.*

of his Torrens Title.¹⁵⁶) For example, one case held that hiking and hunting were sufficient to win title to forestland.¹⁵⁷ That case was not an isolated finding. The alternative to this sort of legalized land theft, and potential damage to private, wild lands is simple, Torrens Title - and a uniform law throughout the 50 states to accomplish this goal!

The assurance fund must rationally be put in place in each state that utilizes the preferred Torrens system. It is an integral part of the original Torrens procedure and should be included in each state's Torrens law. Assurance funds may easily be financed by a one-quarter to one-half of one per cent of assessed value registration tax. The liability of the real property registration agency will be only secondary, with the exception of allowing a primary action versus the registrar, for mistake, registrar's error or fraud of a party.¹⁵⁸

CONCLUSIONS

Lobato v. Taylor is a landmark case. It achieved a possibly commendable, "moral" goal of implicitly vindicating a treaty the United States entered into with Mexico in 1848. It is also emotionally satisfying that historical Mexican "rights", in the nature it appears of mere licenses, triumphed over a "greedy" land baron. It is, however, a commonplace of the law to note that moral obligations are not legally enforceable. The court achieved its rationale by creating, and then relying on, substantial legal fictions. The court employed these fictions to attain the result it desired, and in so doing, it violated settled rules of real property common law that have been in existence for hundreds of years. Among the fictions relied upon is the requirement that a valid deed must specifically name individuals, or entities, which intentionally convey rights to clearly described land. The court justified its assault on Torrens Title by concluding a lack of proper notice by Taylor in his Torrens application

¹⁵⁶ Zack Taylor, who inherited the land from Jack, his father, complained that the Torrens Title awarded in 1967 to his father, Jack Taylor, stated it could not be challenged after 90 days had elapsed. *Id.*

¹⁵⁷ *Butler v. Lindsey*, 361 S.E. 2d 621, 623-24 (S.C. Ct. App. 1987).

¹⁵⁸ Barry Goldener, *The Torrens System Of Title Registration: A New Proposal For Effective Implementation*, 29 UCLA L. Rev. 661, 690 (1982). *E.g.*, A. SIMPSON, LAND LAW AND REGISTRATION 176-83 (1976).

TORRENS TITLE LOST TO LEGAL FICTIONS

that violated the Fourteenth Amendment. The court makes its express admission that it is permitting a legal fiction when the court states in its evaluation of the Beaubien document that the Rito Seco is “*not co-extensive*” with the Taylor Ranch and again when it states that the document is a deed.

The second fiction is that the court both applied Mexican law, and did not apply Mexican law, to reach its decision. Part of this decision is the court’s implicit finding that intent is therefore not a part of the law of real property!¹⁵⁹

A third fiction is that all Costilla County residents who owned land that was settled during, or prior to, the time of the Gilpin ownership were entitled to notice via personal service of and are successors in title to the settlers’ easement rights. A Fourteenth Amendment lack of due process was cited by the court as the starting point to invalidate the Torrens Title. All service, whether personal or by publication, was by order of the federal district court and was confirmed by the circuit court of appeals in 1967. This fiction is based on the fallacious theory the court propounded of a proven chain of title because present day owners of land could prove some settlers were there at the time of Gilpin’s ownership of the Taylor Ranch lands.

The Torrens Title that Taylor so laboriously acquired after seven years in court has been seriously damaged, indeed. The reliability of Torrens Title in the broad view has likewise been thrown into question. In the process, some rather minor, legal fictions were excluded by the court. At the same time, however, these three, new and damaging legal fictions were created. They were employed by the court to circumvent settled American common law and not to “temporarily achieve some minor, lawful purpose.” By comparison, a ruling in an adverse possession case that finds adversity, where it doesn’t exist, is a fiction preferable to *Lobato’s* finding that an easement by prescription does not require adversity. Some legal fictions, such as this last one, may be beneficial.

Reliable, common law protection is, above all, an environmental necessity. In appearing to ignore the law, the court in practice has firmly

¹⁵⁹ Certiorari to the Colorado Court of Appeals, p. 5, opines “These property rights trace their origins to the time before Colorado’s statehood when southern Colorado was still part of Mexico.”

placed itself on the side of the adverse possessors who are now free to exploit and damage our privately owned, wild lands. The court's "precedent" is a bad one, as it weakens title security, as well as the doctrine of finality of judgment.

Legal fiction analysis, it is hoped, enables scholars, lawyers and legal scholars to understand more fully and accurately what the *Lobato v. Taylor* decision actually has accomplished, while acknowledging the court's admirable, if misguided, altruism.¹⁶⁰ The court's decision in *Lobato v. Taylor* may not play well once the initial enthusiasm has faded. The decision appears to be myopic. Hopefully, damage to wild lands will not be too severe and other courts will find a way to distinguish the judgment.

¹⁶⁰ Justice Kourlis, writing the opinion for the dissent, joined by Justice Rice:

This case has had a tortuous history, of almost Dickensian proportion. Yet, despite the convoluted procedural background, clear rules of law apply and those clear rules operate to preclude these claimants from asserting any interest in the Taylor Ranch property. Counterbalanced against these clear rules of law are individuals who represent part of the history and heart of Colorado. However, acceding to their claims is truly a departure from settled principles of property law, finality of judgment and certainty of title. I respectfully dissent, and would affirm the trial court's rulings regarding the sufficiency of notice.

Lobato v. Taylor, 70 P.3d 1152, 1176 (Colo. 2003).