

## QUIET TITLE ACTIONS:

### TROUBLE ON THE FRONT RANGE

#### I. Introduction

A “quiet title action” is a lawsuit brought by a person or entity claiming title to all or a portion of a specific parcel of property and requesting the court to find that the plaintiff’s title is superior to any interest held or claimed by any of the named defendants. It is a mechanism to cure defects in the title to property, thereby providing assurance to the owner who brings the action, as well as subsequent purchasers, of the status of title and correctness of the real property records. Quiet title actions, strict recording requirements and the involvement of title insurance companies are all reasons why the real property records maintained in each county of each state of the United States provide a higher degree of reliability than is found in most other countries. By maintaining accurate public records, and having statutory provisions that mandate recording requirements and allow for title curative actions, condemnation for access, foreclosure, descent and distribution, among others, the productive use of real property is maintained and peoples’ expectations of the quality of title they obtain is preserved.

In Colorado, a quiet title action is usually brought pursuant to C.R.C.P. Rule 105. It is sometimes called a “Rule 105 Action.” The lawsuit is often brought when there has been a defect in record title arising out of missing parties, deaths of parties in ownership or with rights to the property, or (as will be discussed in the *Taylor* case below) parties whose names cannot be determined. Quiet title actions are also used when a new chain of title is being created, for instance, after a tax sale in which a tax

certificate is redeemed after three years and an assessor's deed has issued. The same is true for title established as a result of adverse possession or accretion (when property is bounded by water, usually a river, and the river changes course).

The typical quiet title action is brought against both known and unknown parties. Known parties are those having some record interest in title or having possession of the property. Also, persons with a potential claim are named if the plaintiff seeks to terminate those potential claims. Unknown parties are those which are not named specifically, but who may claim an interest in the property derivative of the named parties or as a result of the subject matter of the action. Unnamed parties are usually deemed served with notice of the action by publication, which the court has the authority to require and monitor.

Quiet title actions are either contested or uncontested. As the name implies, when the named defendants contest the claims of the plaintiff, each is trying to assert superior title to the subject property over the other. In that event a trial is held, evidence is presented, and at the conclusion of the trial, the judge enters a decree which quiets title in the name of the prevailing party. That decree is then recorded in the real property records of the county where the property is located and becomes part of the "chain of title."

## **II. Quiet Title Actions After *Lobato v. Taylor***

*Lobato v. Taylor* is the third lawsuit involving property that was formerly known as the "Taylor Ranch" in the San Luis Valley. The property was acquired in the early 1960s by South Carolina lumberman Jack Taylor. Taylor was allegedly aware that the

Ranch was part of a Spanish land grant from the 1600s, (later recognized by the United States), that gave certain rights to area residents to hunt, fish, graze, and collect firewood off of the Ranch. The first action, brought by Taylor in federal court in 1965, was his attempt to terminate the residual rights of area residents in the Ranch. The 1960's action ended in an order quieting title in Taylor's name, although conflict ensued for many years among Taylor and area residents who did not recognize or comply with the Court's order. In the second action, brought in 1994, the state district court found that Taylor's notice by publication in 1965 was inadequate given that he could have determined and served each individual claiming an interest in the Ranch. Although a number of people were personally served, most interested parties were not. This is perhaps most interesting given the period of time that had elapsed (approximately 250 years) between the grant and the entry of the order and the first action and second action (almost 30 years). The third and final *Lobato* case determined that although Taylor had served 316 defendants, named an additional number of defendants and had published notice, the quiet title action decree entered in 1965 was not valid and undertook to further recognize and adjudicate the rights of the area residents giving them a vested interest in the Ranch. The dissent in *Lobato v. Taylor* noted that the Court's actions were detrimental to the purposes of quiet title actions to establish and preserve property rights and to provide a reliable set of real estate records upon which third parties can rely.

Though by no means a "typical" quiet title action, the fact that the court may have stretched the time periods in which the *Lobato* plaintiffs could seek redress, expanded the notice requirements, and focused on the fact that the rights asserted and

adjudicated were historic, usufructory\* rights, are of particular interest given the events going on now along the front range, described below.

### **III. The Return of the Cheyenne and Arapaho**

In late 2003, the Cheyenne and Arapaho tribes of Oklahoma placed the front range of Colorado on notice that it has a pending land claim in over 30 counties. In fact, the land area consists of approximately 40% of the State of Colorado. The tribes' actions arise out of what they claim is a breach by the United States Government of the Government's obligations under the Treaty of Fort Laramie, dated September 17, 1851. In that treaty, the United States acting by and through its Indian agents and the United States Army, attempted to shrink the territory occupied by, among others, the Sioux, Dakotas, Crows, Utes and the Cheyenne and Arapaho tribes. Specifically, the Cheyenne and Arapaho were allocated that territory

[C]ommencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

This description encompasses most of the front range of Colorado, extending east to the Kansas border. The Treaty went on to further describe that

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\* **Usufructory:** The right to utilize and enjoy the profits and advantages of something belonging to another so long as the property is not damaged or altered (*American Heritage Dictionary*).

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

The preliminary response by the Department of Interior, through the Bureau of Indian Affairs, is that the rights of the Cheyenne and Arapahos to lands in Colorado were diminished in several subsequent treaties, including the Treaty of Fort Wise in 1861 and the second Treaty of Fort Laramie in 1868. Countering that argument and reaching into one of the most dark episodes in Colorado history, the Cheyenne and Arapaho tribes point to the Sand Creek Massacre. The Sand Creek Massacre occurred on November 29, 1864 when Colonel John M. Chivington led approximately 700 volunteer soldiers to a village of about 500 Cheyenne and Arapaho people camped along the banks of the Big Sandy Creek in southeastern Colorado. Although the Cheyenne and Arapaho people believed they were under the protection of the U.S. Army, Chivington's troops killed about 150 people, mainly women, children and the elderly. Ultimately, the massacre was condemned following three federal investigations (source: United States Department of Interior, Historic Site Information for Sand Creek). The tribes contend that the Sand Creek Massacre was a form of genocide that had the effect of inhibiting their participation in subsequent treaty discussions or being able to negotiate effectively when they were relocated to Oklahoma in the late 1860s and 1870s.

Of course the tribes' contentions are not themselves without guile. They are aware that the claims they make are limited by the passage of time and the fact that current tribal members are four and five generations removed from Sand Creek.

Therefore, in exchange for 500 acres near Denver International Airport and sanction by the Colorado Governor to allow gambling, the tribes are willing to “settle.”

While not identical to the claims of the *Taylor* litigants, the rights granted the Cheyenne and Arapaho tribes under the treaties, were also, in essence, usufructory rights, and the tribes have wisely used the threat of due process claims to adjudicate rights at this time. By claiming a binding agreement that was repudiated and breached through the actions of the United States Government, including genocide, the tribes will allege that the intervening 125 years should be dismissed as the time period necessary for them to be able to rebound, assess the situation and seek to correct past injustices. Similar aboriginal title claims in Hawaii and Michigan have been effective in having a chilling effect on property values in areas affected by the claims. Whether the tribes will be successful in Colorado remains to be seen. The initial response by the Department of Interior is that the claims are without merit. This is, however, subject to review and, of course, litigation.

Is it likely that the Cheyenne and Arapaho will be restored to the lands they held pursuant to the Treaty of Fort Laramie? No. The approximately three million citizens that occupy the front range and the billions of dollars of real estate and capital investment are likely a more formidable target than a lumber baron from North Carolina.

➔ **RULE 105. ACTIONS CONCERNING REAL ESTATE**

**(a) Complete Adjudication of Rights.** An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties. The court may at any time after the entry of the decree make such additional orders as may be required in aid of such decree.

**(b) Record Interest; Actual Possession Requires Occupant Be Party.** No person claiming any interest under or through a person named as a defendant need be made a party unless his interest is shown of record in the office of the recorder of the county where the real property is situated, and the decree shall be as conclusive against him as if he had been made a party; provided, however, if such action be for the recovery of actual possession of the property, the party in actual possession shall be made a party.

**(c) Disclaimer Saves Costs.** If any defendant in such action disclaims in his answer any interest in the property or allows judgment to be taken against him without answer, the plaintiff shall not recover costs against him, unless the court shall otherwise direct, provided that this section shall not apply to a defendant primarily liable on any indebtedness sought to be foreclosed or established as a lien.

**(d) Execution of Quitclaim Deed Saves Costs.** If a party, twenty days or more before bringing an action for obtaining an adjudication of the rights of another person with respect to any real property, shall request of such person the execution of a quitclaim deed to such property and shall also tender to such person \$20.00 to cover the expense of the execution and delivery of a deed and if such person shall refuse or neglect to execute and deliver such deed, the filing by such person of a disclaimer shall not avoid the imposition upon such person of the costs in the action afterwards brought.

**(e) Set-Off for Improvements.** Where a party or those under whom he claims, holding under color of title adversely to the claims of another party, shall in good faith have made permanent improvements upon real property (other than mining property) the value of such improvements shall be allowed as a set-off or as a counterclaim in favor of such party, in the event that judgment is entered against such party for possession or for damages for withholding of possession.

**(f) Lis Pendens.**

(1) *Filing and Notice.* A notice of lis pendens may be recorded as provided by statute.

(2) *Determination of Effect on Real Property.* Any interested person may petition the court in the action identified in the notice of lis pendens for a determination that a judgment on the issues raised by the pleadings in the pending action will not affect all, or a designated part, of the real property described in the notice of lis pendens, or a specifically described interest therein. After a hearing on such petition, the court shall

make findings of fact and enter an order setting forth the description of the property as contained in the recorded notice of lis pendens and the description of the portion thereof or the interest therein, if any, the title to which will not be affected by judgment on the issues then pending in the action. Such order shall be a final judgment as to the matters set forth therein and if the order includes the determination required by Rule 54(b) as to its finality apart from remaining issues, it shall be appealable only as a separate judgment of that date.

(3) *Disclaimer.* Nothing in this Rule 105(f) shall be construed so as to preclude any party litigant from disclaiming an interest in all or any part of the real property affected by such notice of lis pendens, by filing with the court an instrument so indicating, containing a reference to the notice of lis pendens by its recording data sufficient to locate it in the records of the clerk and recorder. The filing of such instrument with the court then having jurisdiction shall bar any further claims of said party to such real property in said action.

(4) [Repealed].

**(g) Description of Real Property.** In any proceeding for the recovery of real property or an interest therein, such property shall be designated by legal description.

CREDIT(S)

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