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Adverse Possession and Land Grants

**Prepared by New Mexico Legal Aid Inc. for the New
Mexico Land Grant Council**

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Adverse possession is a method of acquiring title to real property by taking possession of a piece of property, and maintaining possession of it for a certain number of years without being sued or excluded by the owner.¹ If the adverse possessor meets other statutory and common law requirements, he or she is deemed to have title to the land as his or her private property. At that point the former owner no longer has a valid trespass suit, and the adverse possessor has a superior claim of title against any other claimant, including the previous owner.²

The statutory period for adverse possession in New Mexico is ten years.³ This means that an owner of land must take action against someone within ten years of that person taking possession of the land in order to prevent the person from acquiring superior title.

Adverse possession usually cannot be applied against governmental property, only private property. The current land grant statutes were amended in 2007 to disallow adverse possession claims against land grants that are governed as political subdivisions.⁴ However, land grants should be aware of the legal implications of adverse possession in order to 1) protect common lands from current claims of pre-2007 adverse possession, and 2) use adverse possession as a tool to reacquire or assert ownership of common lands whose status may be disputed. The need for this is

particularly necessary for a land grant whose boundaries are not well defined, or are not fenced, or that are prone to continuous trespass.

Defensive Strategy for Pre-2007 Adverse Possession Claims

In 2007, the New Mexico legislature passed Section 49-1-11.2, NMSA 1978 which provides that those land grants that are managed, controlled and governed as a political subdivision are not subject to adverse possession claims to or defenses against⁵ common lands, with one important exception: those claims or defenses that vested prior to June 15, 2007.⁶ (See Appendix A) What that means is that the 10-year period of possession must be COMPLETED before June 15, 2007, or the adverse possession claim fails. Even if a person began possession of common lands prior to June 15, 2007, if the 10-year period of possession was not completed before June 15, 2007, there is no valid claim.

The basic elements of establishing a successful adverse possession claim are (1) open, continuous, exclusive, actual, visible, hostile and notorious possession for ten years, (2) color of title, and (3) payment of taxes. These requirements are described more fully below. The claimant must meet *all* of these requirements for the *full* 10-year period. If any one requirement is not met, the adverse possession claim fails and the claimant does not acquire title to the land.⁷

Continuous possession for ten years: The possession of the land cannot be intermittent. Possession must be for a continuous, uninterrupted 10-year period which is completed before June 15, 2007.

Hostile possession: This term means that the possession must be by someone who does not have some sort of right to be on the land and who is there without permission, so that it is clear that the possession is adverse or hostile to the ownership rights of the true owner.⁸ A very important consequence of this requirement is that an heir to a land grant cannot show hostile possession by simply occupying and using a portion of the common lands, even if the heir did not have permission.⁹ New Mexico courts have held that since all heirs have the right to be present on and use the common lands, this type of possession is assumed to be permissive and not hostile.¹⁰ For this reason the 10-year period would not even begin running because the element of hostile possession is lacking. Heirs have a heightened requirement for proving hostile possession and in most cases will not have a valid claim of pre-2007 adverse possession of common lands.

Actual possession: The claimant must actually enter the land. Even though the claimant may have a deed purporting to convey the land to the claimant, the 10-year period will not begin to run until the claimant actually enters and physically possesses the land.¹¹

Open, visible and notorious possession: Claimants cannot conceal their presence or their use of the land. The 10-year period does not start running until the claimant's possession is open and visible, so as to constitute a degree of notice to the true owner.¹²

Exclusive possession: The possession of the land cannot be shared with other users or with members of the public in order to have a

valid adverse possession claim. If others attempt to use the land, the claimant must take steps to prohibit them from access to or use of the land, or else the element of exclusive possession is lacking.¹³

Keep in mind that the Legislature in 2007 put a stop to the ability of people to privatize land grant common lands by adverse possession, except for prior vested claims, so the above requirements only come into play if a claimant began occupying the land prior to June 15, 1997. After that date it would have been impossible to complete the 10-year period before June 15, 2007 so the claim would fail even if the rest of the requirements were met. For this reason, claims of adverse possession against land grants should become rarer as time goes on.

New Mexico court cases illustrate how these requirements are applied in specific situations. The court will look at the specific character of land at issue and its use to determine the exact type of acts necessary to constitute adverse possession.¹⁴

For example, the court granted title to the adverse possessor where the land at issue was undeveloped and uninhabited, and the adverse possessor established corners, cut a path around the exterior boundaries, posted "no dumping" signs, blocked roads across the premises, and paid taxes on the property.¹⁵ In a similar case, the court found adverse possession had taken place when the adverse possessor erected "no trespassing" signs, cleared brush, repaired and straightened fencing around property, used a locked gate to limit access to a road going through property, granted permission to access property to third party, and paid taxes.¹⁶

For land grants, the lesson from these cases and many others, is that if a land grant has been vigilant in its supervision and management of its common lands, it will not be taken by surprise if someone asserts pre-2007 adverse possession. While it is not possible to determine the exact requirements a court would impose on an adverse possessor in any given case, it is clear that an adverse possessor will be required to provide at least some form of notice that he is claiming adverse possession. At a minimum, notice would require a combination of the following:

- Erecting, maintaining, or repairing fencing around property or clearly marking the boundaries of the property claimed;
- Placing signage around the property restricting use or access to it;
- Clearing land for improvements or for the purpose of asserting dominion over property; or
- Requiring permission to enter property or blocking access to entrances to the property.

Land grants should be on the lookout for any of these activities taking place on common lands and should try to determine how long they have been taking place.

Color of title. In addition to continual possession for ten years, an adverse possessor must base his or her claim on color of title.¹⁷ In other words, the adverse possessor must be able to point to a writing or other conveyance document purporting to convey the land under which the claim of title is asserted.¹⁸ Some of the documents the courts have accepted as color of title sufficient to meet this requirement include quitclaim deeds¹⁹, a certificate of sale for taxes²⁰, a government

patent²¹, a void deed²², and a quiet title decree or other judgment from the court.²³

Keep in mind that the fact that the land grant has its own patent or has recorded a valid deed of its own for the same land doesn't necessarily trump these types of documents and prevent adverse possession from taking place. Adverse possession is not like a quiet title suit -- it's not a contest of whose document is more valid, the land grant's or the individual's. It is a question of whether the individual met all the requirements and was not sued or excluded by the land grant during the 10-year period. A title document can meet the color-of-title requirement even if it appears to be weaker than the land grant's title documents. The question then becomes whether all of the other requirements for adverse possession were met. So in preparing to challenge an adverse possession claim, a land grant should not simply rely on its own title documents.

One final note on the color of title requirement: an adverse possessor must hold color of title *in good faith*, i.e., he or she cannot create or acquire the title document with the intent to defraud the person or entity having better title²⁴, although it is a difficult burden to prove this.²⁵ If, however, the adverse possessor concedes at any point in the 10-year period that someone else has title, for example, by offering to buy the land or by paying someone for use of the land, the 10-year period is interrupted and the claim would fail or would have to start all over again.

Paying taxes. The adverse possession statute further requires that an adverse possessor pay property taxes on the adversely possessed land.²⁷ Non-payment or an interruption in the

payment of taxes on the property is fatal to a claim of adverse possession.²⁸ An individual satisfies this requirement by paying taxes for the 10-year period, even if the land grant itself has paid the full taxes on the same land for the same period. The continuous payment of taxes alone is insufficient to gain title by adverse possession. However, if a land grant notices that an individual was paying taxes on a tract of common lands for a 10-year period or longer before 2007, that could be an indication that a claim of adverse possession is forthcoming, or that an adverse possessor will assert adverse possession as defense against a trespass claim brought by the land grant. Land grants should check with their county clerks or county assessors to verify their exclusive payment of property tax on all tracts of common land.

Offensive Strategy to Assert Adverse Possession Claims

Understanding how someone might assert an adverse possession claim against a land grant helps the land grant protect common lands from encroachment. It also helps land grants assert or strengthen their own claims for specific tracts of common lands whose ownership is disputed or is prone to frequent, continuous trespass. The same legal standards that apply to individuals asserting adverse possession apply to land grants. Therefore, land grants should follow the framework above in order to establish color of title, continuous possession for ten years, and payment of taxes, for a disputed tract of land. At the end of that time the land grant will be able to say that they extinguished anyone else's potential claim of title to that tract,

because that person "lost" their claim to the adverse possession by the land grant.

Land grant color of title. Land grants trace title to common lands back to the sovereign governments of Spain and Mexico, and in the late 19th and in the 20th century to the United States. The court's acceptance of many different types of written documentation establishing color of title – even if deemed invalid – should allow a land grant to rely on historical documents defining land grant boundaries and indicating the conveyance from the sovereign to the land grant. Federal court decisions and federal patents are also examples of written conveyances establishing color of title, as long as the description in the conveyance document is sufficient to locate and identify the tract at issue.²⁹ As with any adverse possessor, the land grant must rely in good faith on its title to the land, and may not be attempting through its claim to defraud a legitimate owner of his or her land.

Land grant payment of taxes. As stated above, the land grant, like any adverse possessor, must pay taxes on the property it is adversely possessing. The taxing body will not care that it may be receiving multiple payments of taxes for the same property. For example, a county assessor may send the property tax bill to one person or entity, but the county assessor will accept payment from multiple parties for the same parcel. Land grants should inventory their common lands and compare the inventory with the county assessor to ensure that every inch of common lands is assessed for tax purposes to the land grant.

Although costly, land grants should consider hiring a professional surveyor to produce a

survey of contested or potentially contested property. The survey or plat may be registered with the county clerk and will serve as the blueprint for setting up boundary markers or fencing, a key element of establishing continuous possession.

Land grant continuous possession for ten years. Fencing, erecting signage, or any other indication of dominion over specific tracts of common lands already discussed may be viewed by the general public as the land grant simply protecting what everyone already understands to be common lands from encroachment. However, these acts may be used offensively to claim what used to clearly belong to the land grant but for whatever reason is now in dispute. The land grant may not believe that the person has a valid dispute or a valid claim to the piece of land, but taking these steps would give the land grant added assurance or an added legal basis for prevailing if the dispute ever went to court. In other words, only the board of trustees or heirs may know the intention behind asserting dominion over the particular tract of common lands.

The 2007 statutory provisions protecting land grants organized as political subdivisions from adverse possession claims by private parties do not apply to *land grants* adversely possessing private claims³⁰ that may rightfully belong to them. In other words, a land grant may begin adverse possession of disputed land at any time, even today. If a land grant has color of title to those lands and has paid property taxes on those lands, it is in a position to begin asserting dominion for the purpose of starting the clock on ten years of continuous possession. Just to reiterate what was mentioned above, a land grant employing

an adverse possession strategy should, at a minimum:

- Erect, maintain, or repair fencing around property or clearly mark the boundaries of the property claimed
- Place signage around the property restricting use or access to it
- Clear land for improvements or for the purpose of asserting dominion over property
- Limit access and require permission to enter property or block access to the entrances to the property.
- Understanding adverse possession generally, and how it specifically applies to land grants, is an important tool for land grant boards of trustees. Land grants that understand when the requirements for adverse possession have not been met can better deter individuals from making adverse possession claims or other types of claims of common lands. Land grants operating under color of title may also want to employ adverse possession in order to reestablish control over or assert title to land that once clearly belonged to a land grant. A land grant's successful use of adverse possession principles is a relatively inexpensive alternative to more time- and resource-intensive ways to establish legal title, for example, by initiating a quiet title action. *For more information contact New Mexico Land Grant Council at nmlandgrantcouncil@unm.edu or New Mexico Legal Aid at (505) 982-9886.*

¹ Special thanks to Melissa Magee and the University of New Mexico Natural Resources and Environmental Law Clinic for their editorial assistance.

² Property: Cases and Materials, 2nd Ed., Smith Larson, et al. (2008); https://www.law.cornell.edu/wex/adverse_possession (accessed 6/9/2016).

³ Section 37-1-22, NMSA 1978.

⁴ Section 49-1-11.2, NMSA 1978.

⁵ A “defense against” common lands may be asserted when a land grant organized as a political subdivision brings a trespass claim against an individual and the individual asserts as a “defense against” the trespass claim that he or she has a vested adverse possession claim that grants title to the adverse possessor.

⁶ The text of this statute is attached to this fact sheet. The effective date of the adverse possession statute amendment was June 15, 2007, 90 days after the legislature adjourned.

⁷ Hernandez v. Cabrera, 107 N.M. 435 (1988).

⁸ Heron v. Conder, 77 N.M. 462 (1967).

⁹ Bd. Of Trs. v. Griego, 136 N.M. 688 (2005).

¹⁰ *Id.*

¹¹ Marquez v. Padilla, 77 N.M. 620 (1967).

¹² *Id.*

¹³ Hernandez v. Cabrera, 107 N.M. 435 (1988).

¹⁴ Prince v. Charles Iffeld Co., 72 N.M. 351 (1963).

¹⁵ Stull v. Board of Trustees, 61 N.M. 135 (1956).

¹⁶ C & F Realty Corp. v. Mershon, 81 N.M. 169 (1969).

¹⁷ Section 37-1-22, NMSA 1978.

¹⁸ Sandoval v. Perez, 26 N.M. 280 (1920).

¹⁹ Thurmond v. Espalin, 50 N.M. 109 (1946).

²⁰ Chambers v. Bessent, 17 N.M. 487 (1913).

²¹ Ward v. Rodriguez, 43 N.M. 191 (1939).

²² Williams v Howell, 108 N.M. 225 (1989).

²³ Apodaca v. Hernandez, 61 N.M. 449 (1956);

Currier v. Gonzales, 78 N.M. 541 (1967).

²⁴ Palmer v. Denver & R.G.W.R.R., 75 N.M. 737 (1966).

²⁵ Thurmond v. Espalin, 50 N.M. 109 (1946).

²⁶ *Id.*

²⁷ Section 37-1-22, NMSA 1978.

²⁸ Jackson v. Gallegos, 38 N.M. 211 (1934).

²⁹ On adequacy of description see Romero v. Garcia, 89 N.M. 1 (1976); Sanchez v. Garcia, 72 N.M. 406 (1963).

³⁰ Adverse possession may not be asserted against government owned property.

Appendix A
Provisional Statute on Adverse Possession

49-1-11.2. Adverse possession.

Statute text

A land grant-merced managed, controlled and governed as a political subdivision pursuant to Chapter 49 NMSA 1978 shall not be subject to adverse possession claims to or defenses against the common lands administered by the political subdivision, provided that those claims or defenses have not vested prior to the effective date of this section.

History

History: Laws 2007, ch. [266](#), § [1](#).

Annotations

Effective dates. — Laws 2007, ch. [266](#) contained no effective date provision, but, pursuant to N.M. Const., [art. IV](#), § [23](#), was effective June 15, 2007, 90 days after the adjournment of the legislature.