



This historical agricultural access road that a neighbor used passes through land protected by a conservation easement. Things got contentious for the land trust when the neighbor wanted to use it as access for a residential subdivision. Dealing with this issue cost the land trust over \$10,000, although it did eventually come out on top and disallowed the residential access through the easement.

BY Sheila McGrory-Klyza

Adverse Possession:

this **land** is whose **land** ?



Whenever two parcels of land share a common boundary, disputes are sure to happen. These disputes often result in an adverse possession claim, one of the more common challenges that landowners, and land trusts, face. Although the term sounds like complex legalese, the idea is rather simple. In layperson's terms, adverse possession is a claim by another landowner that you no longer own some or all of your land because you did not defend it. The other person used the land for a certain period of time and now he or she owns it. This situation is otherwise known as "squatter's rights" or the manifestation of the "possession is 9/10ths of the law" maxim.

THEORETICALLY, A CONSERVATION EASEMENT could survive an adverse possession claim. If the situation is not handled carefully, however, some conserved land could end up being owned by a neighbor, damaging the conservation resources and complicating the work of the land trust. At its worst, adverse possession has the potential to fragment the resource base and even extinguish the portion of the easement affected by the claim.



At its worst, adverse possession has the potential to fragment the resource base and even extinguish the portion of the easement affected by the claim.

ADVERSE POSSESSION CASES span the country and the patterns tend to be similar, although the requirements to prove a case vary from state to state and also can vary according to the density of development around the land in question. The length of time governing adverse possession is ruled by state law and generally ranges from 10 to 30 years. Also, the person taking the land needs to have occupied it in an open, hostile and notorious manner for the entire length of time (although they can add on a prior owner's time if they can prove the same points and if the occupation is continuous). This means that the usage of the land needs to be obvious to anyone who takes reasonable care of the property, and the owner has done nothing to stop it. These criteria vary from state to state, as well as from urban to rural land; therefore, it is highly advisable for a land trust to talk to an attorney when faced with a potential claim.

"THE LANDOWNER WAS UNAWARE of adverse possession law," Sands says. "But as soon as we told him he could lose some of his land, he got everything cleared off. It's important to encourage landowners to resolve these issues quickly because it's in their own best interest to do so." Sands admits, though, that this is a best case scenario and problems are not usually so easily reconciled. He advises having a good boundary survey done before the baseline is conducted: "If we hadn't, we wouldn't have known the RVs were trespassing." The baseline is then the ideal time to look for encroachments and possible adverse possession issues.

AT TIMES, A SETTLEMENT IS necessary to resolve disputes. Larry Kueter, a Land Trust Alliance board member and Colorado lawyer whose firm specializes in land trust work, is very familiar with the pros and cons of settlements and offers this advice: "Settlements need to be carefully considered. It's important to look first at the conservation result and determine that it's not negative. Secondly, a land trust doesn't want the reputation that all someone has to do is threaten them and they'll run to the settlement table. Public perception is important."

KUETER CURRENTLY HAS THREE adverse possession cases on his desk. All three are prescriptive rights claims, which means the claim is on an easement, not on the actual title. All cases pertain to an historic right of access, which Kueter says is the most common type that he sees in Colorado. Two of his cases are quite similar: a landowner conveys a conservation easement to a land trust, which limits access to the land. A third party historically has had a right of access, and now wants to legally confirm that access. As Kueter describes it, "The third party does a title search and all of a sudden the landowner and the land trust are defendants."

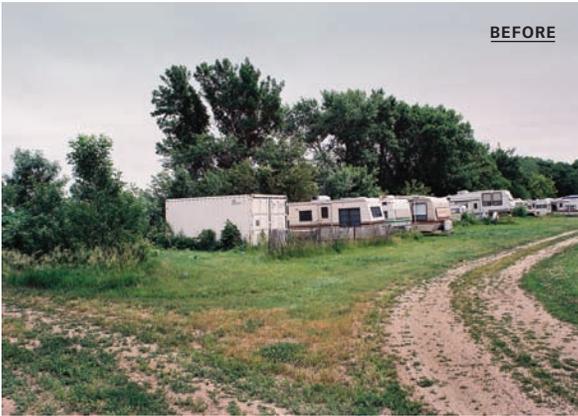
WHEN THIS HAPPENS, good recordkeeping and monitoring of easements are essential and could prove important in defending a land trust's rights. Kueter also emphasizes the importance of the balance between maintaining the landowner relationship, controlling the organization's role in the case and thus

Definition

adverse possession:

In layperson's terms, adverse possession is a claim by another landowner that you no longer own some or all of your land because you did not defend it. The other person used the land for a certain period of time and now he or she owns it.

SOMETIMES ADVERSE POSSESSION issues can be resolved by simply educating landowners about the potential consequences. The Nebraska Land Trust recently faced a situation in which RVs from a commercial campground on the Platte River had encroached on an easement-protected property next door. While doing the baseline documentation on the conserved property, the staff discovered the derelict RVs. Executive Director David Sands says that they documented the discovery in a letter to the landowner, who then enlisted his attorney to contact the neighbor. The RVs, which had been there for years, were removed within a few months.



The first photo shows the RVs lined up on the south side of the easement property (the road is the approximate property line). The second photo is after they were removed. The storage trailer in the foreground of both photos belongs to the easement landowner and was allowed to stay as a secure place for him to store decoys and other hunting gear.

the amount of resources to be committed, and achieving a result that doesn't damage the land's conservation value. "It's not an easy triangle, and a land trust has to really think things through from the beginning, so it doesn't completely defer to the landowner who might settle for a result that damages the conservation values, but also so it doesn't promise support to a landowner that it can't fulfill," Kueter says. "An organization's resources could easily go down a black hole in defending just one of these cases if it allows the landowner to determine the land trust's role in the case. It's critical to have a frank discussion with the landowner so expectations are clear."

GIVEN HOW COMMON SUCH cases are, it is vital that land trusts plan for them financially. As third party actions, they are not much within an organization's control. Often one landowner has a grudge against another landowner and is using an easement to direct his or her antagonism toward the neighbor. Land trusts can find themselves pulled into the middle of longstanding disputes. Just being a passive participant in a case can cost a land trust \$10,000, a figure that can rise to many more times that amount if the land trust is an active participant. A California land trust successfully defended such a case in 2009 at a cost of more than \$150,000.

SOMETIMES AN ORGANIZATION is faced with a situation in which a landowner adjacent to conserved land will not cease from using the land even after letters are written and firm requests are made. The landowner holding the easement, or the organization if it is fee-owned land, is seemingly left with no other choice than to become a plaintiff. Not only is this a costly endeavor, but it could create a public relations problem for the organization. Other landowners who are considering donating land or selling an easement may become concerned that the organization cannot adequately protect its land.

TO AVOID BEING PLACED in the position of plaintiff or defendant, one tactic that land trusts can use is to work to pass legislation, either on their own, if they are large enough, or through their state coalitions. Rupert Friday, director of the Rhode Island Land Trust Council, a coalition of 45 land trusts, did just that: "The approach we've taken is to try to establish state policies to reduce the risk of adverse possession claims." In 2008, the Rhode Island Legislature passed a law that exempts land owned by nonprofit organizations for conservation purposes from adverse possession claims. The legislation also protects conservation easements. It took two years to accomplish and was not an easy process due to state politics, but Friday urges other land trusts to consider this approach: "Most land trusts in Rhode Island are all-volunteer and there can be miles of abutting property lines. Patrolling borders and doing legal work for violations is not only expensive, but really time consuming. My advice to other land trusts is to talk to your state coalition and get adverse possession set up as a priority issue for state legislation."

LIKE OTHER ISSUES FACING land trusts, the solutions to adverse possession cases are often complex and demand organizational commitment. There is no real way to prevent these situations from arising, but good recordkeeping, trusting landowner relationships, conscientious monitoring, and strategic and financial planning will go a long way in achieving a positive result. 🌿

FOR INFORMATION ON HOW THE PROPOSED CONSERVATION DEFENSE INSURANCE PROGRAM COULD HELP YOUR LAND TRUST DEFEND AGAINST AN ADVERSE POSSESSION CLAIM AS WELL AS OTHER LEGAL CHALLENGES, VISIT THE ALLIANCE WEBSITE AT WWW.LTA.ORG/CDINSURANCE.

SHEILA MCGRORY-KLYZA IS A FREELANCE WRITER AND EDITOR IN BRISTOL, VERMONT.

The Land Trust Alliance presents these case studies to offer general lessons learned and ideas on conservation defense. Land trusts should discuss their particular circumstances and options with competent professionals.

The Rhode Island Land Trust Council worked for two years to pass a law that exempts land owned by nonprofit organizations for conservation purposes from adverse possession claims. The legislation also protects conservation easements.

