UNIVERSITY OF
COLORADO LAW REVIEW
Volume 77, Issue 2 *2006*

ADVERSE POSSESSION AND CONSERVATION: EXPANDING TRADITIONAL NOTIONS OF USE AND POSSESSION

ALEXANDRA B. KLASS*

At common law, very minimal actions were needed to establish the "exclusive possession" necessary to acquire land by adverse possession when the land was "wild" or undeveloped. This minimal burden to adversely possess wild lands, which is still the general rule today, stands in contrast to the much higher standard necessary to adversely possess developed lands. This article explores why the lesser standard for adverse possession of wild lands remains a threat to many of the millions of acres of land in this country that are still undeveloped. This article then proposes that courts modernize the adverse possession doctrine to expand traditional notions of use and possession in the context of wild lands to reflect the growing need for conservation in today's world.

INTRODUCTION

Today, over five million acres of land (an area larger than the District of Columbia, Connecticut, and Rhode Island combined) are protected from development because landowners have voluntarily conveyed these lands to nonprofit land trusts or government agencies or agreed to perpetual development restrictions by granting "conservation ease-

* Associate Professor of Law, William Mitchell College of Law. Thanks to Bradley C. Karkkainen, James E. Krier, Nancy McLaughlin, John Copeland Nagle, Russell F. Pannier, J.B. Ruhl, Jeffery Evans Stake and Richard Warch for their invaluable ideas and comments on earlier versions of this article. Special thanks to Susan Gretz and Gail Lewellan of The Nature Conservancy of Minnesota for their "on-the-ground" insights regarding conservation easements.

ments"[1] to such organizations.[2] Many other lands are informally set aside by private owners to remain undeveloped for conservation purposes. Various motives underlie decisions to permanently remove lands from economically productive use. These motives include protection of forestland, wetlands, and other natural areas; protection of animal and plant species; preservation of farmland; prevention of urban sprawl; creation of buffer space to maintain the value of nearby developed lands; charitable giving in connection with estate planning; and a desire to obtain state and federal tax benefits created to encourage the protection of land for conservation purposes.

National surveys indicate that the vast majority of Americans support present-day conservation efforts and believe that continued development of land without regard to conservation is misguided.[3] Indeed, the media coverage in April 2005 of the sighting of an ivory-billed woodpecker, thought to be long extinct, in central Arkansas near conser-

1. A "conservation easement" is a nonpossessory interest in land in favor of a third party (usually a land trust or government agency) that imposes limitations or affirmative obligations on use of the land for the purpose of protecting its natural, scenic, or open space values or assuring its preservation for natural, recreational, or agricultural uses. *See infra* note 73 and accompanying text.

2. *See* Press Release, Land Trust Alliance, Private Land Conservation in U.S. Soars (Nov. 18, 2004), http://www.lta.org/newsroom/pr_111804.htm [hereinafter Land Trust Census] (2003 National Land Trust Census showing acreage protected by conservation easement increased 266% since 1998, from 1,385,000 acres to 5,067,929 acres in 2003 and total acreages conserved by local and regional land trusts has doubled from 4.7 million to 9.4 million during the same time period). These numbers do not include the more than 15 million acres protected by national land trusts such as The Nature Conservancy and Ducks Unlimited. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 487 & n.22 (2004). *See also* Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE 9, 19–20 (JULIE ANN GUSTANSKI & RODERICK H. SQUIRES eds., 2000) (citing 1998 data showing 4.7 million acres in conservation easements and providing comparative size information); Jeffrey M. Tapik, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 259 & n.2 (2002); The Nature Conservancy, Answers to Frequently Asked Questions, http://www.nature.org/pressroom/files/faqs.pdf (last visited Nov. 8, 2005) (stating that as of September 2003, The Nature Conservancy had protected 15 million acres in the United States and an additional 102 million acres worldwide).

"Land Trusts" are charitable organizations that operate on a local, state, regional, or national level, and are created under federal tax laws for the purpose of conserving land for its "natural, recreational, scenic, historical and productive values. Land trusts can purchase land for permanent protection . . . accept donations of land or the funds to purchase land, accept a bequest, [or purchase] or accept the donation of a conservation easement." *See* Land Trust Alliance, Frequently Asked Questions, http://www.lta.org/faq (last visited Nov. 8, 2005).

3. *See infra* note 69 and accompanying text.

vation lands highlights the interest of the American public in open space preservation issues.[4]

At the same time, however, scholars have expressed concern over the years that lands encumbered by conservation easements and other "wild" or undeveloped lands are threatened by historic, common law property doctrines, including the doctrine of adverse possession.[5] This is because common law rules developed during the expansionist nineteenth and early twentieth centuries allowed very minimal actions on the part of an adverse possessor such as hunting, fencing, clearing of small areas, and other sporadic acts to qualify as "exclusive possession" of wild lands for purposes of acquiring that land by adverse possession. This minimal burden on the adverse possessor with regard to wild lands stands in contrast to the much higher standard necessary to acquire other, "economically productive" lands by adverse possession.[6]

This article explores whether adverse possession case law has taken steps to "catch up" with our current conservation ethic and, if not, whether state statutes and local practices have overcome historic biases against leaving wild lands in a natural state. The short answer appears to be that state statutes and formal conservation practices[7] now provide far more protection for lands enrolled in conservation easements than in prior years, sheltering those lands from the formerly harsh effects of the common law. Moreover, some courts have begun incorporating conservation principles into their application of the doctrine of adverse possession to wild lands.[8] However, the statutory developments and formal conservation practices provide little protection for the vast number of wild lands that currently are not enrolled in conservation easements, and the positive case law developments, while a promising trend, remain sparse as a result of the continued application of out-of-date, pro-development principles.[9] As a result, this article proposes a doctrinal shift in adverse possession law to further preserve wild lands for conser-

4. *See, e.g.*, *Ivory-billed Woodpecker Not Extinct*, CNN.COM, May 2, 2005, http://www.cnn.com/2005/TECH/science/04/28/woodpecker/; *Ivory-Billed Woodpecker Rediscovered in Arkansas* (NPR radio broadcast Apr. 28, 2004), http://www.npr.org/templates/story/story.php?storyId=4622633.

5. *See generally* William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 104–05 (1996); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994); Tapik, *supra* note 2.

6. *See infra* notes 42–44 and accompanying text.

7. The term "formal conservation practices" refers to the studies, monitoring and other activities conservation groups perform on lands held in trust or subject to a conservation easement in order to ensure protection of conservation values. *See infra* Part II.B.

8. *See infra* notes 133–39 and accompanying text.

9. *See* Sprankling, *supra* note 5, at 884.

vation purposes. This shift would result in courts focusing, for the first time, on evidence that the owner intended to leave the land in a natural state, or that the owner's actions resulted in a conservation benefit, thus formally recognizing conservation as a "use" of land and a "possession" of land in a way that has been ignored in the past.

Part I of this article discusses the history and doctrinal bases of adverse possession, with a focus on the application of the doctrine to wild lands. Part II addresses the history, legal treatment, and statutory development of conservation easements and why adverse possession and other common law property doctrines pose less of a threat to conservation easements and lands placed in conservation trusts than they have in the past. Finally, Part III proposes redefining the concepts of "use" and "possession" in the context of wild lands. Relying on precedent from the areas of water law and adverse possession of chattels, Part III suggests that courts should take into account evidence of conservation intent and conservation effect by the land's true owner to preclude a showing of exclusive use or possession by the adverse possessor. This Part also explains how the concept of "ecosystem services" can provide an economic framework to justify the intrinsic value of wild lands. Part III concludes by explaining that because adverse possession is primarily a creature of state common law, courts have ample authority to use the tools described in this Part to effect a modern shift away from a pro-development ethic to a conservation ethic.

I. ADVERSE POSSESSION AND ITS APPLICATION TO WILD LANDS

A. History and Elements of Adverse Possession

Adverse possession is a method of transferring an interest in land without the consent of the true owner and over the objections of the true owner.[10] The doctrine of adverse possession dates back at least to sixteenth century England and has been an element of American law since the country's founding.[11] As every law student learns in her first year of law school, an occupant of land acquires title to the land by adverse possession if her possession is: (1) actual and exclusive; (2) open and notorious; (3) adverse or hostile under a claim of right; and (4) continuous for the statutory period.[12] As a practical matter, every United States juris-

10. 16 POWELL ON REAL PROPERTY § 91.01[2] (Michael Allan Wolf ed., Matthew Bender 2005) (1949).

11. *Id.* § 91.01[1].

12. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 139 (5th ed. 2002). "In several states (principally in the West), the adverse possessor must pay taxes on the land in order to

diction has at least one statute of limitations that sets the period beyond which the record owner of the land "can no longer bring an action, or undertake self-help [to recover the] land from another person in possession."[13] In most jurisdictions, the state statute provides the limitations period while the state's body of common law sets forth the nature of possession required to cause the statutory period to run against the record owner and transfer title to the adverse possessor.[14] Adverse possession can arise in a variety of situations, including boundary line encroachments, an informal relationship that then leads to adverse possession, or adverse possession of personal property.[15]

While the elements needed for adverse possession are easy to state, they are not always easy to apply. With regard to the first element, it is generally said that the actual and exclusive possession must be use of the property in a manner "that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion."[16] Thus, the activities necessary for actual and exclusive possession will be different depending on whether the property is residential, commercial, agricultural or wild in nature.[17] Moreover, the possession must be "exclusive" in that it must not be concurrent with that of the true owner.[18]

The "actual and exclusive" element overlaps with the second element, that the possession be open and notorious, in that open and notorious merely means that the claimant's actions must be of a nature sufficient to put the owner on actual or constructive notice of an adverse claim to the property so that the owner is in a position to take legal action or self-help to eject the claimant.[19] Thus, even when the true owner does

---

prevail." This requirement is attributed to the influence of railroad companies on state legislatures in the nineteenth century. *Id.* at n.14.

13. 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[1].

14. *Id.* As soon as the adverse possessor has met the criteria for adverse possession, she holds title to the land and is immune from a suit for ejection and may use or transfer the land as would any owner. The adverse possessor is under no obligation to file a lawsuit to transfer title; title is transferred automatically by operation of law. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 76 & n.1 (David L. Shapiro et al. eds., 1998).

15. *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980), *reprinted in* DUKEMINIER & KRIER, *supra* note 12, at 163–71 ("Adverse Possession of Chattels"); 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[4].

16. DUKEMINIER & KRIER, *supra* note 12, at 140.

17. R.G. Patton, *Other Methods of Acquiring Title to Land*, *in* 3 AMERICAN LAW OF PROPERTY § 15.3, at 765–67 (A. James Casner ed., 1952).

18. 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.06 (citations omitted).

19. *Id.* § 91.02. *See also* Patton, *supra note* 17, § 15.3(a), at 769. ("In most of the cases this requirement [open and notorious] can be regarded as nothing more than a requirement of possession in fact and therefore of legal possession.").

not in fact know of the possession, the true owner can still be charged with knowing what an alert owner would have known under the circumstances.[20]

Although the use of the term "hostile" in the third element appears to imply some requirement of bad faith on the part of the adverse possessor, this is not the case. In most jurisdictions, "hostile" merely means that the possession is in opposition to the ownership rights of the true owner.[21] The requirement is met if the adverse possessor has the intent to possess the land, whether or not she knows that the land belongs to another.[22] In other words, it does not matter if the adverse possessor knows the land is not hers, or whether she is possessing the land under a mistaken belief that it belongs to her (such as with a boundary encroachment).[23] Similarly, the requirement that the possession be under a "claim of right" simply means that the claimant is possessing the land with the intent to hold it as her own, and with that intent manifested by open and visible acts and/or declarations as to her purpose.[24]

Finally, the requirement that the possession be "continuous for the statutory period" is also dependent on the nature of the specific property, in that to adversely possess a year-round residence requires year-round possession, while to adversely possess a summer cabin requires only possession during the summer months.[25]

B. Policy Justifications for Adverse Possession

Although law students and lay people are often familiar with the term "adverse possession," they are sometimes shocked to learn what the legal doctrine actually means. A claimant can essentially obtain "title by

---

20. 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.04[2].

21. *Id.* § 91.05[1].

22. *Id.*

23. *Id.* § 91.05[3]. Some jurisdictions still require the claimant to act in good faith (i.e., be under a mistaken belief that she owns the property) to succeed on a claim for adverse possession while other jurisdictions require the claimant to act in bad faith (i.e., know that the property does not belong to her). However, the majority of courts use an objective standard that does not attempt to delve into the state of mind of the claimant. *See* Manillo v. Gorski, 255 A.2d 258 (N.J. 1969) (discussing good faith, bad faith, and objective standard for "hostile possession" element and adopting objective standard); DUKEMINIER & KRIER, *supra* note 12, at 142–43; DWYER & MENELL, *supra* note 14, at 78 (most states use objective standard while a few still require the possessor to act in "good faith"). *But see* R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983) (arguing that even when courts say they are using an objective standard they almost exclusively award land to claimants who can show evidence of acting in good faith).

24. 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.05[4].

25. *Id.* § 91.07[1].

theft"[26] if the possession is of a sufficient nature and duration (state law varies on the required duration, but generally ranges from five years to twenty years).[27] As one textbook puts it, "[a]dverse possession is a strange and wonderful system" whereby one gains title to another's land *only* if the occupation is wrongful.[28] One might wonder what policy justifications underlie a long-standing legal doctrine that allows a person with no claim to land to wrest good title away from the true owner. Textbooks generally cite to three policy rationales for adverse possession, all of them being utilitarian in nature, in that the doctrine seeks to maximize societal happiness in its broadest sense even at the expense of the individual owner.[29] These rationales are often termed: (1) the limitations model; (2) the administrative model; and (3) the personhood model.

With regard to the "limitations model," most authorities describe adverse possession as an elaborate statute of limitations for claims to recover possession of land.[30] According to this theory, the requirements that the possession be actual and exclusive, open and notorious, hostile and continuous simply determine when the cause of action accrues and the limitations period begins. Once the true owner is given actual or constructive notice that someone is making a claim for her land, the true owner has a legal obligation to assert her rights within the statutory period or forego such a claim. The justification for this model is that after a certain amount of time, memories fade, witnesses die, and documentary evidence is lost or destroyed, and thus, the possibility of judicial error in resolving such claims increases. As the possibility of correct judicial

---

26. Adverse possession has been referred to over the years as "title by theft" because the adverse possessor obtains legal title to the land by operation of law without paying for it. *See* Ackerman & Johnson, *supra* note 5, at 94 & n.117 (citing Jeffrey M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT'L REV. L. & ECON. 217 (1986)).

27. *See* Ackerman & Johnson, *supra* note 5, at app. 2 (fifty-state survey of adverse possession statutes by state). In many states, the statutory period is shorter if the claimant is possessing under "color of title" (i.e., an invalid deed). In other states, the statutory period is shorter if the claimant has paid property taxes or is acting in good faith. *Id.*

28. WILLIAM B. STOEBUCK & DALE E. WHITMAN, PROPERTY § 11.7, at 853 (3d ed. 2000) (citations omitted).

29. *See, e.g.*, DWYER & MENELL, *supra* note 14, at 82–83 (discussing justifications for adverse possession); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 449–51 (2000); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 725–34 (1986) (arguing that adverse possession is based on utilitarian themes).

30. *See, e.g.*, DUKEMINIER & KRIER, *supra* note 12, at 125–29; 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[1]; SPRANKLING, *supra* note 29, at 449–50; STOEBUCK & WHITMAN, *supra* note 28, § 11.7, at 860 ("Adverse possession is best explained as a doctrine of repose."); Sprankling, *supra* note 5, at 818–19 (citing to numerous treatises, law review articles and judicial decisions relying on the limitations model as the basis for adverse possession).

resolution decreases, it may be more justified to place the blame for delay on the true owner and allow possession to remain with the person who has been in actual possession for what has now been a significant amount of time.[31]

The "administrative model" views adverse possession as a method for curing minor title defects, thus protecting the title of the possessor.[32] In a past era where deeds were recorded inaccurately or land records were often erroneous, the common law stepped in to allow the actual possessor of law to cement his title and avoid future uncertainties. Transferring title by adverse possession thus allows those in possession of land to make investments in the property and improve the land without fear that the land will be taken away after a certain amount of time had passed.[33]

Oliver Wendell Holmes proposed a third justification for adverse possession described by some as the "personhood model."[34] This theory recognizes that after a lengthy period of time the person in possession of land forms a personal attachment to it that is likely much stronger than the attachment of the true owner, who presumably has become increasingly detached from the land. Because the true owner has essentially abandoned the land while the adverse possessor has embraced it through his possession, it becomes appropriate as a matter of law to transfer title to the person with the strongest attachment to the land.[35]

---

31. *See* DWYER & MENELL, *supra* note 14, at 82–83 (citations omitted); SPRANKLING, *supra* note 29, at 450 (the limitations model is based in part on minimizing risk of judicial error in determining title); STOEBUCK & WHITMAN, *supra* note 28, § 11.7, at 860 ("[A]fter a long time uncertain boundaries should be stabilized [and] persons who have taken interests in the land or dealt with the adverse possessor in reliance upon his or her apparent ownership should be protected . . . .").

32. *See* 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[4] ("Adverse possession is also a useful device to cure defects in record title arising from conveyancing errors and mistakes in legal descriptions, because record owners can rely on their possession and that of their predecessors in order to show title.") (citing Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918)); Netter et al., *supra* note 26); SPRANKLING, *supra* note 29, at 451.

33. *See, e.g.*, Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2441–42 (2001) (time-honored rationale for adverse possession is to quiet titles which in turn facilitates market transfers, reduces disincentives to investment, makes it easier to obtain credit, and helps owners feel secure).

34. *See* DUKEMINIER & KRIER, *supra* note 12, at 128–29; DWYER & MENELL, *supra* note 14, at 82–83 (citations omitted); SPRANKLING, *supra* note 29, at 451; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476–77 (1897); Margaret Jane Radin, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 739, 748–49 (1986) (The possessor's interest becomes more personal as time passes and the "titleholder's interest fades from personal to fungible and finally to nothingness.").

35. *See* Holmes, *supra* note 34, at 476–77.

Do these rationales continue to justify the adverse possession doctrine in modern times? Professor Jeffrey Evans Stake recently evaluated the various rationales stated above supporting adverse possession. He also evaluated other potential rationales including motivating record owners to monitor their land, encouraging litigation, flushing out offers to purchase, providing psychological cover for true owners who wish to assert their rights, facilitating market transfers, eliminating barriers to development by protecting investments, protecting true owners in the case of old evidence, and simply because adverse possession has been around for a long time (described as "path dependence and transitional problems").[36] After discussing the various justifications for adverse possession, Stake concludes that the only policy rationale that provides even limited justification for the doctrine in modern times is a variation on Justice Holmes's personhood model.[37]

Stake argues that the limitations model does not justify the doctrine because the benefit of bringing disputes before the court in a timely manner is outweighed by the nature of adverse possession litigation which requires an inquiry into "fuzzy" actions that are easy to dispute.[38] As for the administrative model, Stake argues that modern developments in title insurance and marketable title acts have replaced any need for adverse possession to quiet titles, and that adverse possession never did quiet titles completely in the first place.[39] By contrast, Stake concludes there may still be support for Justice Holmes's personhood model for adverse possession, based on psychological studies illustrating the phenomenon of loss aversion and the existence of an "endowment effect."[40] However, even though many of the historic rationales for adverse possession may no longer justify the doctrine, statutory change in this area does not appear imminent. As Stake notes, "[p]roperty law moves very slowly" and "[r]ules can endure for centuries after losing all reason for being."[41]

---

36. *See* Stake, *supra* note 33, at 2449.

37. *Id.* at 2473.

38. *Id.* at 2438.

39. *Id.* at 2441–42.

40. *Id.* at 2473. The "endowment effect" is a pattern of behavior where people demand more to give up an object than they would offer to acquire it, and loss aversion describes a studied phenomenon where the loss of an asset has more impact on utility than does the gain of the same asset. *Id.* at 2459–60.

41. Stake, *supra* note 33, at 2473.

C. Adverse Possession of "Wild Lands"

Most property law treatises and case books note that there are special rules that apply to adverse possession of "wild" or undeveloped lands.[42] Because the law states that the nature of "actual and exclusive" possession necessary to satisfy the doctrine depends on the character of the land, a large body of case law has developed holding that when it comes to undeveloped lands, very little in the way of possession is in fact necessary to obtain such land by adverse possession.[43] For instance, while putting up fences or occasional harvesting would never be enough to adversely possess residential, agricultural, or commercial property, there are numerous cases holding that such actions are sufficient to adversely possess undeveloped lands.[44] Examples abound where courts have awarded property to a claimant who has engaged in hunting and hiking;[45] limited clear cutting, picnicking, and removal of leaf mold;[46] hunting, occasional cattle grazing, and limited timber cutting;[47] fishing;[48] harvesting natural hay;[49] seasonal stock grazing;[50] and gathering firewood.[51]

---

42. *See, e.g.*, 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[2] (citation omitted):

> The character of disputed property is crucial in determining what degree of control and what character of possession are required to establish adverse possession. For example, wild and undeveloped land that is not readily susceptible to habitation, cultivation, or improvement does not require the same quality of possession as residential or arable land, because the usual acts of ownership are infeasible or inappropriate.

See also Patton, *supra* note 17, § 15.3, at 766–67:

> Wild, undeveloped lands so situated and of such character that they cannot be readily improved, cultivated or resided upon involve a very different degree of control evidenced by much less actual exercise of ownership by affirmative acts to establish possession, since the usual acts of ownership by making improvements, cultivation of the soil and residing on it are impossible or unreasonable.

See also DUKEMINIER & KRIER, *supra* note 12, at 140.

43. *See* Sprankling, *supra* note 5, at 831–33.

44. *See, e.g.*, Ewing v. Burnett, 36 U.S. (11 Pet.) 41, 49, 52–53 (1837) (upholding adverse possession of unimproved lot in Cincinnati based on paying taxes and occasional digging of sand and gravel and allowing others to do so); DUKEMINIER & KRIER, *supra* note 12, at 139–40; Sprankling, *supra* note 5, at 831–33 (collecting cases).

45. Kline v. Bourbon Woods, Inc., 684 S.W.2d 938, 940 (Mo. Ct. App. 1988).

46. Knecht v. Spake, 346 P.2d 98, 102–03 (Or. 1959).

47. Pierson v. Case, 133 So. 2d 239, 242 (Ala. 1961).

48. Le Sourd v. Edwards, 86 N.E. 212, 213–14 (Ill. 1908) (upholding adverse possession of 15 acres of wetland based on seasonal, underwater fish trapping).

49. Weiss v. Meyer, 303 N.W.2d 765, 770 (Neb. 1981); Evans v. Lux, 201 N.Y.S. 161, 167 (N.Y. Sup. Ct. 1923); Thompson v. Hayslip, 600 N.E.2d 756,759 (Ohio Ct. App. 1991).

This relaxed standard with regard to wild lands has been justified on the theory that "normal" acts of possession on such inhospitable lands such as establishing a residence, farming the land, or "improving" the land are impossible or unreasonable.[52] Thus, lesser and more sporadic activities are deemed sufficient to transfer title to a person engaging in those activities. However, one might wonder how courts could arrive at this result in light of the requirement that the possession be "open and notorious" and provide constructive or actual notice to the true owner for the limitations period to begin to run. Surely, such sporadic activities on land would not put the true owner on notice of the claimant's existence. If such lands are wild and inaccessible, it does not seem reasonable to require the true owner to reside on the property and thus be on constructive notice of occasional timber cutting or fishing on the property sufficient to start the running of the statute of limitations.

While this disconnect was rarely explained or reconciled as an historic matter, the reasons were articulated quite persuasively by Professor John Sprankling in a 1994 article in the Cornell Law Review, followed by a related article in 1996 in the University of Chicago Law Review.[53] Professor Sprankling argues that there is a fourth policy basis for adverse possession (beyond the traditional limitations model, administrative model, and personhood model), which he terms the "development model."[54] This model is based upon the theory that the law should reallocate land to productive, economic users of the land.[55] Because most of adverse possession law in this country evolved during the nineteenth century, judges were influenced by the push for economic development prevalent at that time.[56] Thus, they were inclined to see forests, wetlands, deserts, and other undeveloped land as worthless, and were able to promote rapid development of these lands by transferring them to settlers and other possessors through the doctrine of adverse possession.[57]

---

50. Cleveland v. Dow Chem. Co., 451 P.2d 741, 742 (Colo. 1962); Griswold v. Lagge, 313 P.2d 1013, 1013–14 (Mont. 1957); Quarles v. Arcega, 841 P.2d 550, 561 (N.M. Ct. App. 1992).

51. Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990); Johnson v. Town of Dedham, 490 A.2d 1187, 1190 (Me. 1985); Gurwit v. Kannatzer, 788 S.W.2d 293, 295–96 (Mo. Ct. App. 1990); Sleboda v. Heirs at Law of Harris, 508 A.2d 652, 657 (R.I. 1986); Derryberry v. Ledford, 506 S.W.2d 152, 154–55 (Tenn. Ct. App. 1973).

52. 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[2]; Patton, *supra* note 17, § 15.3, at 766–77.

53. Sprankling, *supra* note 5; John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

54. Sprankling, *supra* note 5, at 840.

55. *Id.* at 840.

56. *Id.* at 843–49.

57. *Id.*

Professor Sprankling explains that this anti-environmental bias in adverse possession law, which was originally fueled by a pro-development nineteenth century ideology, has no place in today's world where society values conservation and preservation of undeveloped lands.[58] He also argues that the more relaxed standard for adverse possession of wild lands "motivates and facilitates exploitative use" and destruction of such lands, results in the true owner never having certain title to those lands (because they can be adversely possessed so easily), and even threatens lands enrolled in formal conservation easements.[59] As a practical matter, the doctrine leads to: (1) title transfer of wild lands to claimants who engage in economic development of the land despite the existence of important natural resources; (2) continued alteration of land through economic development once title is transferred; and (3) economic development of lands by the true owner that would not otherwise occur in order to minimize the risk of adverse possession.[60]

Sprankling then argues that because modern society values the preservation of land for moral and utilitarian reasons, the law of adverse possession should be reformed by excluding privately-owned wild lands from the doctrine entirely by statute.[61] Just as federal lands and many state-owned lands are exempt from adverse possession,[62] Sprankling proposes that state legislatures in the United States amend their adverse

58. *Id.* at 816. *See also* Stake, *supra* note 33, at 2435–36 (arguing that many of the policy arguments in favor of adverse possession are difficult to justify today, and that leaving land idle and undeveloped may serve a beneficial purpose of holding it until the best use becomes clear).

59. Sprankling, *supra* note 5, at 851, 854–56.

60. *Id.* at 858–62.

61. *Id.* at 862–67. *See also* Ackerman & Johnson, *supra* note 5, at 104–05 (arguing for the abolition by statute of the doctrines of adverse possession and prescription because they are based on outdated policies, encourage land development at the expense of conservation, create uncertainty in land titles, and produce a chilling effect on the real estate market).

62. Federally-owned lands are immune from adverse possession and the same is true for state-owned land in many states by statute. Sprankling, *supra* note 5, at 854. *See also* United States v. Vasarajs, 908 F.2d 443, 446 n.4 (9th Cir. 1990) ("[A]dverse possession cannot be achieved against the federal government."); DUKEMINIER & KRIER, *supra* note 12, at 162; 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.11[2] (stating that many jurisdictions have statutes barring adverse possession of government-owned land, although some states have allowed adverse possession of government property not used for a "public" purpose, or allowed adverse possession under a longer statute of limitations); Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 945–74, 976–77 (1996) (describing various state statutes governing adverse possession of state lands and arguing that given development pressures and limited state enforcement budgets, state legislatures should protect completely all state land from adverse possession); Walter Quentin Impert, Comment, *Whose Land Is It Anyway?: It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 451, 464, 468 (2001) (arguing accountability and equity require that the government, which may take title to land by adverse possession, should also be subject to adverse possession).

possession statutes to add an exemption for privately-owned wild lands.[63] However, at the time of Sprankling's article in 1994, only two states, New York and Massachusetts, had provided conservation lands even limited protection from adverse possession and only Connecticut and, to a lesser extent, Washington, have done so since that time.[64] Sprankling also suggested that courts refine the common law element of exclusivity to hold that nonconsumptive recreational uses by the claimant such as hiking, camping, birdwatching or similar activities cannot constitute "exclusive" use and to recognize the benefits conferred by wild lands as a "use" of land by the true owner sufficient to preclude adverse possession.[65]

The question for this article then is whether, more than ten years after Sprankling's article, developments in statutory law, case law, and/or conservation practices have reduced the risk posed by the doctrine of adverse possession to wild lands in general and/or wild lands enrolled in formal conservation easements. In order to explore this issue, a more detailed discussion of conservation easements is necessary, followed by an analysis of further efforts that may be needed to provide additional protection for certain categories of wild lands.

---

63. Sprankling, *supra* note 5, at 863.

64. Massachusetts amended its adverse possession statute in 1991 to exempt from adverse possession "land held for conservation, parks, recreation, water protection or wildlife protection purposes" by a nonprofit conservation organization, and New York also exempted holders of certain conservation easements from the doctrine. *Id.* at 865; MASS. ANN. LAWS ch. 260, § 21 (LexisNexis 2005); N.Y. ENVTL. CONSERV. LAW § 49-0305 (McKinney 2005). In 1999, Connecticut amended its laws governing adverse possession to prevent adverse possession of lands held by a nonprofit landholding organization by statute, thus protecting conservation land owned by land trusts but not conservation land held by private owners. It is also unclear whether the law protects lands where the conservation group holds an easement rather than full title in fee. *See* CONN. GEN. STAT. ANN. § 47-27(b) (West 2005); Ventres v. Goodspeed Airport, Nos. X07CV010076812S, X07CV020080540S, 2004 WL 1245908, at *11 (Conn. Super. Ct., May 21, 2004) (lands held by local land trust and The Nature Conservancy immune from claims of adverse possession and prescriptive easements) (citing Dalton Enters. v. Boston & Me. Corp., 707 A.2d 347, 348–49 (Conn. App. Ct. 1998)). The State of Washington provided more limited protection for some conservation lands in 1997 when it enacted a provision stating that a party may not acquire by adverse possession property that is designated as a "plat greenbelt or open space area" or that is dedicated as open space to a public agency or bona fide homeowner's association. WASH. REV. CODE ANN. § 36.70A.165 (West 2005).

65. Sprankling, *supra* note 5, at 865–66.

II. THE RISE OF CONSERVATION EASEMENTS AND THE DECLINE OF OBSTACLES POSED BY COMMON LAW PROPERTY DOCTRINES

According to government statistics, "between 1982 and 2001, about 34 million acres—an area the size of the state of Illinois—were converted" from forestland, cropland or pasture land to developed land.[66] This development "sprawl" consumed 2.2 million acres of land in the United States each year between 1997 and 2001, up from 1.4 million acres per year between 1982 and 1992.[67] Similar statistics reveal that more than eight square miles of natural lands are lost in the United States each day.[68] At the same time, however, survey research indicates that a vast majority of Americans believe there should be stronger policies protecting open space, that it is everyone's obligation to protect open space, that everyone should have access to outdoor recreation areas, and that more lands should be set aside for rare or endangered species, national parks, and protection of historical landscapes.[69] For example, in 2001, 137 of 196 local and state ballot proposals promoting open space were approved by voters, providing nearly $1.7 billion in funding for open space conservation and parks.[70]

However, apart from these targeted ballot measures, current budget deficits have severely hampered the efforts of local, state, and federal governments to conserve new land through creation of parks or wildlife

---

66. NATURAL RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., NATURAL RESOURCES INVENTORY (2001), *available at* http://www.nrcs.usda.gov/technical/land/nri01/nri01dev.html.

67. *See id.*; Land Trust Census, *supra* note 2.

68. Adam E. Draper, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 253 & n.51 (2004) (citing RAND WENTWORTH, LAND TRUST ALLIANCE, EDITORIAL VIEWPOINT: MAKING THE NATURAL CONNECTION (2002), *available at* http://www.lta.org/newsroom/oped0802.htm) (noting natural lands include "wilderness, farms and natural areas").

69. *See* Gustanski, *supra* note 2, at 13 (citing 1996 survey mailed to random sampling of 2,000 individuals across the U.S. with equal distribution by gender, location, and socioeconomic profiles indicating 77.7% agreed or strongly agreed that policies protecting open space could be stronger, 86.5% agreed or strongly agreed that everyone should look after open space, 81.7% agreed or strongly agreed that everyone should have access to outdoor recreational areas, 71.2% agreed or strongly agreed that policies protecting farmland from development should be stronger, 54.4% agreed or strongly agreed that lands providing habitat for rare or endangered species are the most important lands to protect, 70.7% agreed or strongly agreed that more areas should be set aside as national parks so they are protected from development, and 57.1% agreed or strongly agreed that more emphasis should be placed on protecting historical landscapes).

70. *See* Draper, *supra* note 68, at 254 (citing TRUST FOR PUB. LAND & LAND TRUST ALLIANCE, LANDVOTE 2001: AMERICANS INVEST IN PARKS & OPEN SPACE 1 (2002), http://www.lta.org/publicpolicy/LandVote2001.pdf).

and natural areas.[71] Likewise, many believe that government agencies are too bureaucratic and subject to changing political tides to act as the primary engine for land conservation in today's world.[72] As a result, efforts have turned since the 1980s to the creation of land trusts and the placement of land in conservation easements held by these trusts to protect farmland and open space from permanent destruction. This section discusses developments in historic, common law property doctrines in the context of conservation easements for the purpose of determining whether these common law doctrines remain a significant threat to wild lands.

A. History of Legal Protection for Conservation Easements

A conservation easement is a legally binding agreement that permanently restricts the development and future use of land to ensure protection of the land's conservation values.[73] Since 1998, acreage preserved by conservation easements has increased 266 percent from 1,385,000 acres to 5,067,929 in 2003. Local and regional land trusts now protect more than 9 million acres of natural lands, an area four times the size of Yellowstone National Park.[74] This does not include the more than fifteen million acres protected by national land trusts such as The Nature Conservancy and Ducks Unlimited.[75] During the same time period, the number of land trusts has increased 26 percent from 1,213 to 1,527, with these organizations being formed at a rate of two per week.[76] Nearly all states now have statutes expressly allowing for the creation of conservation easements, and the state and federal tax benefits associated with those easements have increased.[77]

There are many reasons for the meteoric rise in lands donated or sold in fee to land trusts or placed in conservation easements. As stated earlier, there is increasing concern that developmental sprawl will destroy what natural and undeveloped areas are left in this country and

71. *See* Land Trust Census, *supra* note 2.

72. *See generally* SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 6–14 (2001).

73. Gustanski, *supra* note 2, at 9.

74. Land Trust Census, *supra* note 2; Land Trust Alliance, Land Trust Census, http://www.lta.org/census/index.shtml (last visited Nov. 26, 2005).

75. *See* Parker, *supra* note 2, at 487 & n.22; The Nature Conservancy, Answers to Frequently Asked Questions, http://www.nature.org/pressroom/files/faqs.pdf (last visited Jan. 10, 2006) ("As of September 2003, The Nature Conservancy has protected 15 million acres in the United States and an additional 102 million acres worldwide.").

76. Land Trust Census, *supra* note 2.

77. *See infra* Part II.A.2–3.

many feel an obligation to preserve what we can for future generations.[78] This concern resulted in Congress establishing the National Park System in 1872,[79] and the formation of the Massachusetts Trust for Preservation and similar societies in other northeastern states in the late nineteenth and early twentieth centuries.[80] Until the latter part of the twentieth century, however, land was preserved for the most part by the government or another entity acquiring a fee simple absolute interest, or total ownership, of the property. This method of preserving land had significant limits; for example, obtaining fee ownership of land is expensive and is often beyond what is necessary to preserve undeveloped land. Many of the goals of land preservation can be met while allowing limited grazing, agricultural use, hunting, bird watching, or other recreational activities on the land while it remains in private ownership. Moreover, for the many individuals who wished to preserve their land but maintain ownership, holding the land in fee simple did nothing to protect the land after their deaths.[81]

For these reasons, a mechanism that protected the land "forever" but allowed ownership to remain in private hands was necessary. This mechanism was the "conservation easement," which is "a legally binding agreement that permanently restricts the development and future use of land to ensure protection of its conservation values."[82] In this way, the landowner can permanently protect the land for conservation purposes while allowing, if the landowner wishes, continued or future use for hunting, agricultural, mining, or recreational activities on the land that are nondestructive and otherwise consistent with protecting the resource itself.[83] Conservation easements are created by the landowner donating

78. *See, e.g.*, *supra* note 69 and accompanying text. *See also* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (1967) (documenting changing attitudes toward wilderness in the United States).

79. "The National Park System encompasses approximately 83.6 million acres, of which more than 4.3 million acres is in private ownership." National Park Service, The National Park System Acreage, http://www.nps.gov/legacy/acreage.html (last visited Jan. 10, 2006).

80. Parker, *supra* note 2, at 486 (referencing the formation of The Block Island Land Trust in Rhode Island in 1896 and The Society for Protection of New Hampshire Forests in 1901). Early conservation easements were used in Boston in the late 1880s to protect parkways designed by Frederick Law Olmstead. 4 POWELL ON REAL PROPERTY, *supra* note 10, § 34A.02[1].

81. *See, e.g.*, Draper, *supra* note 68, at 254–56 (citing as benefits of conservation easements that the landowner retains ownership and obtains a tax benefit, the easement holder avoids cost of purchasing the land outright, land use restrictions can be tailored to owner and conservation organization desires and needs, and the landowner can be assured of protecting the land beyond his or her lifetime).

82. Gustanski, *supra* note 2, at 9.

83. *See id.* at 14–15. *But see* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 425, 428 (2005) (noting confusion

or selling the easement (in exchange for a lump sum payment or periodic payments over time) to a government entity or a conservation organization. In this way, conservation easements preserve land without the need for government regulation or the significant government acquisition costs necessary for fee simple land acquisition.[84]

Until approximately the last twenty years, however, conservation easements were risky ventures because of numerous common law property doctrines that prohibited or discouraged permanent restrictions on land use and prevented contractual agreements restricting development to "run with the land" and apply to future owners. More recently, as discussed below, state statutes and related tax benefits have stepped in to override these common law obstacles and promote the use of conservation easements to protect land.

1. Common Law Barriers to Conservation Easements

A conservation easement (or conservation servitude)[85] is a nonpossessory interest in land in favor of a third party (usually a land trust or government agency) that imposes limitations or affirmative obligations on the use of the land for the purpose of protecting its natural, scenic, or open space values or assuring its preservation for natural, recreational, or agricultural uses.[86] It has also been defined as a legal agreement a property owner makes to restrict the type or amount of development on the

---

and uncertainty regarding the "perpetual" nature of conservation easements when modifications are needed to respond to changed conditions and proposing that the rules of charitable trusts should apply to donated conservation easements).

84. *See generally* John D. Echeverria, *Regulating Versus Paying to Achieve Conservation Purposes*, 2004 A.L.I.-A.B.A. 1141, 1146–51 (discussing the following four alternative models for land conservation: (1) traditional regulation; (2) free-market environmentalism; (3) land acquisition by or for the public; and (4) periodic payments).

85. There has been variation for years over the correct legal term to use for development restrictions created by contract on private land (as opposed to restrictions imposed by governmental entities through zoning or other regulation) because, as explained below, these contractual restrictions on land contain aspects applicable to the law of easements, real covenants and equitable servitudes. *Compare* UNIF. CONSERVATION EASEMENT ACT, Prefatory Note, 12 U.L.A. 165 (1981) (using the term "easements" because lawyers and courts are more comfortable and familiar with the law of easements than the law of real covenants and equitable servitudes and because the law of servitudes was applicable only because of "now outdated, limitations of easement doctrine"), *with* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.1, 1.4, 1.6 (2005) (defining easements, profits and covenants all under the umbrella of "servitudes," dropping the distinction between equitable servitudes and real covenants, and labeling development restrictions on land as "conservation servitudes").

86. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170; Parker, *supra* note 2, at 489–90.

property that is tailored to the property and interests of the individual owner.[87]

Such easement agreements, of course, are only valuable if they are enforceable against future owners of the property who were not parties to the original agreement. The problem with enforcement of conservation easements at common law is multifaceted. As an initial matter, there has been a historic mistrust of allowing living owners to exert "dead hand" control over future use of land that may frustrate later efforts to put land to optimal use under circumstances that may not have been contemplated by the preservationist owner.[88] This mistrust manifests itself in several doctrines that limit the enforceability of conservation easements and their ability to bind successive landowners. First, a conservation easement functions like a negative easement in gross in that it restricts the use of the property burdened by the easement and does not benefit other land that can function as the dominant estate.[89] Instead, the easement benefits the holder of the easement (a land trust or other organization) in its personal capacity rather than benefiting specific land owned by the easement holder. This raises problems for enforcement against future owners because the common law, with a few exceptions, has generally refused to enforce negative easements in gross against subsequent owners of land.[90]

---

87. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 14 (2d ed. 2005).

88. *See, e.g.*, Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1282–83 (1981) (attributing common law mistrust of long-term land use restrictions to concerns over economic productivity and fairness based on reasonable expectations of future owners); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 440 (1984) (allowing conservation servitudes promotes conservation of the environment but frustrates other social values and allows "perpetual veto" power).

89. An easement appurtenant benefits the owner of the easement in his or her capacity as a landowner. The land owned by the easement owner is called the "dominant tenement" while the land burdened by the easement is called the "servient tenement." The benefits and burdens of an easement appurtenant generally run to successive owners of the dominant and servient estates. By contrast, an easement in gross does not benefit the owner of the easement in his or her capacity as a landowner, but in his or her personal capacity. *See generally* DUKEMINIER & KRIER, *supra* note 12, at 789–90.

90. *See* 4 POWELL ON REAL PROPERTY, *supra* note 10, § 34A.01; French, *supra* note 88, at 1267–68 (discussing easements in gross in British and American law); Peter M. Morisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 381 & n.34 (2001) (noting that easements in gross are generally restricted to affirmative commercial activities such as an easement for a right-of-way or a utility line). At common law, the only negative easements that were traditionally recognized were easements created to protect the flow of air, to protect the flow of light, to ensure the support of buildings or structures, and to provide the flow of streams. Notably, all of these exceptions are in the context of negative easements appurtenant in that they are for the benefit of land, rather than an individual or organization. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.6 cmt. a (1998) ("Early law prohibited the creation of servitude benefits [in-

Because of the limitations on negative easements generally (putting aside the problems specific to negative easements in gross), the common law developed a separate body of law governing real covenants and equitable servitudes.[91] A real covenant is a formal agreement between two parties regarding the use of land (such as an agreement regarding the size, design, or color of a house, or the activities allowed on the property) that can "run with the land" at law to bind successive owners.[92] Likewise, an equitable servitude is a restriction on the use of land enforced in equity by way of an injunction instead of at law by way of damages.[93] Although the development restrictions associated with conservation easements would appear to fit nicely into the law of covenants and equitable servitudes, courts have generally held that promises relating to real property will not run with the land to bind successive purchasers as either a real covenant or an equitable servitude if they do not "touch and concern" land.[94] With a conservation easement of course, the benefit of the

---

cluding easement benefits] in gross and the creation of servitude benefits in persons who were not immediate parties to the transaction."); DUKEMINIER & KRIER, *supra* note 12, at 855–57 (explaining history behind restrictions on negative easements in England that were then applied by U.S. courts); SPRANKLING, *supra* note 21, § 32.10[B] (detailing three stages regulating transfer of easements in gross starting with early courts' refusal to allow such transfers, moving to the First Restatement's allowance of transfer of commercial easements in gross, and ending with the Third Restatement's broad provision that any easement in gross is transferable); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 327 (1997) (some courts do not allow the burden of an easement to run with the land if the burden is held in gross); Tapik, *supra* note 2, at 267–68 (same).

91. DUKEMINIER & KRIER, *supra* note 12, at 858–59. Because of the explosion of "common interest communities" such as townhome and condominium developments and "gated communities" governed by a homeowners' association charged with, among other things, enforcing real covenants relating to the look and use of property above and beyond local zoning restrictions, the law of servitudes plays a central role in today's society. *See, e.g.*, *id.* at 925–26 (citing statistics showing that in 1998 there were ten million homes in common interest communities); WAYNE S. HYATT & SUSAN FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES (1988); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENTS (1994).

92. *See* DUKEMINIER & KRIER, *supra* note 12, at 860; 9 POWELL ON REAL PROPERTY, *supra* note 10, § 60.01[2] (explaining covenants as an agreement or promise of two or more parties that something is done, will be done, or will not be done concerning real property).

93. 9 POWELL ON REAL PROPERTY, *supra* note 10, § 60.01[5] (explaining the difference between a real covenant and an equitable servitude, noting the mass confusion in this area of the law, and stating that suits at equity have almost completely replaced actions at law for breach of covenants because most covenants today regulate residential subdivisions which are best preserved by injunctive relief). *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.4 (dropping the use of terms "real covenant" and "equitable servitude" except to describe the evolution of servitudes law and replacing both with the term "servitude"); *id.* § 1.1 (defining "servitude" to include easements, profits, and covenants).

94. *See generally* DUKEMINIER & KRIER, *supra* note 12, at 882–86 (discussing "touch and concern" requirement for real covenants to run with the land). For a covenant to run with

restriction does not touch or concern any particular land but instead is intended to benefit and be enforced by an individual or organization. As a result, courts historically could not be counted on to enforce conservation easements against successive owners of land under common law rules relating to real covenants and equitable servitudes. Although the Restatement (Third) of Property removes the restrictions on creation and transferability of benefits in gross and expressly provides for the use of conservation easements,[95] its reforms have come only recently and have not been uniformly adopted.[96] Thus, as shown below, lawyers and property scholars pushed for additional legal protections to preserve land encumbered by conservation easements.

2. Statutory and Law Reform Efforts to Create and Promote Conservation Easements

As a result of the common law barriers to conservation easements described above, there has been a wave of law reform and statutory activity to allow the creation of conservation easements to protect land from development. Although conservation easements were used as early as the 1880s in Massachusetts to protect Boston parkways designed by Frederick Law Olmstead, Sr. and in the 1930s and 1940s to protect scenic views along federal and state highways, the first state statutes to expressly allow nonpossessory easements in gross for a broad range of conservation and preservation objectives were enacted in California and New York in the late 1950s and early 1960s.[97] It is important to note that unlike other environmental protection laws that are implemented through mandatory government prohibitions or requirements, conservation easements are completely voluntary and are donated or sold by landowners at their election.[98] In 1981, the National Conference of

---

the land at law (i.e., to support a claim for damages for breach of the covenant), most courts require at least an enforceable promise, intent that the covenant bind successors in interest, some form of horizontal and vertical privity of estate, and that the burden and the benefit touch and concern the land. *See id.* at 860–61, 882–86; 9 POWELL ON REAL PROPERTY, *supra* note 10, §§ 60.04[2]–[3]. The requirements for an equitable servitude to run with the land are somewhat lessened, but still include the requirement that the promise touch and concern the land. 9 POWELL ON REAL PROPERTY, *supra* note 10, § 60.01[5].

95. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.6 (Conservation Servitude and Conservation Organization Defined), 2.6 (Creation of Benefits in Gross and Third Party Beneficiaries), 4.6 (Transferability of Servitude Benefits), 7.11 (Modification and Termination of Conservation Servitudes Because of Changed Conditions).

96. *See* 9 POWELL ON REAL PROPERTY, *supra* note 10, § 60.01[6] (stating that some of the Third Restatement's departures from the past have not been universally adopted).

97. 4 POWELL ON REAL PROPERTY, *supra* note 10, § 34A.02.

98. Gustanski, *supra* note 2, at 15.

Commissioners on Uniform State Laws sparked a significant growth in state conservation easement statutes when it published the Uniform Conservation Easement Act ("UCEA").[99] The stated purpose of the UCEA was to allow parties to impose perpetual restrictions on development of land for the purpose of protecting natural and historic resources without the obstacles posed by historic, common law property doctrines.[100] Currently, the District of Columbia and all the states except North Dakota have specific statutes facilitating the creation of conservation easements.[101]

The stated purpose of the UCEA is to enable "durable restrictions and affirmative obligations to be attached to real property to protect natural resources" and to ensure that these restrictions and obligations "are immune from certain common law impediments which might otherwise be raised."[102] The UCEA defines a "conservation easement" as a nonpossessory interest in land owned by a "holder" that imposes limitations or obligations on the use of land for the following purposes: (1) to retain or protect natural, scenic, or open-space values of property; (2) to ensure the availability of real property for agricultural, forest, recreational, or open-space use; (3) to protect natural resources; (4) to maintain or enhance air or water quality; or (5) to preserve the historical, architectural, archeological, or cultural aspects of real property.[103] Any government body or charitable organization with the purpose of protecting and promoting the principles stated above is entitled to "hold" a conservation easement.[104]

The UCEA further provides that except as modified by a court in equity, a conservation easement is unlimited in duration and is valid even

---

99. UNIF. CONSERVATION EASEMENT ACT (1981).

100. *See id.* § 1(1), 12 U.L.A. 170.

101. 4 POWELL ON REAL PROPERTY, *supra* note 10, §§ 34A.01, 34A.02[3] (noting that only Wyoming lacks a statute on the subject). Wyoming enacted an easement-enabling statute in February 2005 to take effect on July 1, 2005. *See* Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127, http://legisweb.state.wy.us/2005/enroll/SF0149.pdf (providing for conservation easements generally consistent with the UCEA) (codified at WYO. STAT. ANN. §§ 34-1-201 to -207 (2005)). *See also* McLaughlin, *supra* note 83, at 426 n.13 (describing state conservation easements laws); Frederico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10225 (2004). Although North Dakota has a statute addressing conservation easements, the statute itself does not eliminate common law problems to the creation of such easements as is the case in other states. *See* N.D. CENT. CODE § 47-05-02.1.

102. UNIF. CONSERVATION EASEMENT ACT, Prefatory Note, 12 U.L.A. 164 (1981).

103. *Id.* § 1, 12 U.L.A. 170–71; Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements, in* PROTECTING THE LAND, *supra* note 2, at 26, 27.

104. UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 170. *See also id.* § 1(3), 12 U.L.A. 171 (allowing for creation of third-party rights of enforcement by a governmental body or charitable organization eligible to hold the easement but which does not hold the easement).

though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or contract.[105] The UCEA recognizes (as does the Restatement (Third) of Property) that a restriction burdening real property in perpetuity can fail in its purpose because of changed conditions affecting the property or its environs, or other reasons not anticipated at the time of the easement's creation.[106] Thus, the UCEA leaves intact the existing case law and statutory law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts such as the doctrines of cy pres and changed conditions.[107]

Many states have enacted the UCEA provisions verbatim while others have enacted alternative provisions, including additional restrictions on the organizations allowed to hold conservation easements, more limited conservation easement purposes, less flexibility in the duration of the easement, or a government approval process for eligible conservation easements.[108] Thus, states have made great strides since the 1980s to encourage the placement of land in conservation easements by using statutory authority to protect such lands from common law property doctrines that would otherwise pose obstacles to future enforcement of the easement agreements.

3. Tax Incentives to Promote the Use of Conservation Easements

Another reason for the explosion of conservation easements in recent years is favorable tax treatment. Since 1980, under Section 170(h) of the Internal Revenue Code, a landowner who donates "a qualified real property interest"[109] to a government entity or a qualified charitable con-

105. *Id.* §§ 2(c), 3(b), 4, 12 U.L.A. 173, 177, 179.

106. *Id.* § 3 cmt., 12 U.L.A. 178. *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (allowing for modification or termination of conservation servitude, accompanied by damages or restitution if appropriate, if purpose of the servitude becomes impracticable or can no longer be used to accomplish any conservation purpose).

107. UNIF. CONSERVATION EASEMENT ACT § 3 cmt., 12 U.L.A. 178 (1981).

108. *See* 4 POWELL ON REAL PROPERTY, *supra* note 10, § 34A.01 n.1 (listing states); Mayo, *supra* note 103, at 27–30 (chart showing which states follow UCEA and which have alternate formulations).

109. A "qualified real property interest" includes a restriction granted in perpetuity on the use that may be made of the real property for the purpose of protecting natural habitat of fish,

servation organization[110] is eligible for an income tax deduction equal to the value of the easement.[111] The landowner who donates an easement also removes the value of the easement from his or her estate free of transfer tax under Section 2522(d) of the Code and, since 1997, may potentially exclude up to another forty percent of the value of the easement from the estate for estate tax purposes under Section 2031(c) of the Code.[112] Many states also provide significant incentives for donating conservation easements by allowing income tax deductions and credits against state income tax.[113]

Although favorable tax treatment for donation of conservation easements was first recognized in the 1960s,[114] there was significant uncertainty in the legal community regarding the precise circumstances under which tax deductions were available until the mid-1980s, which brought the issuance of several favorable private letter rulings and Tax Court cases.[115] This new comfort (along with the UCEA approval in 1981 and increasing public support for conservation) correlates with the significant rise in the number of conservation easements and land trusts

---

wildlife or plants; preservation of open space, including farmland and forest land; or for the scenic enjoyment of the general public or pursuant to delineated government conservation policy. *See generally* I.R.C. §§ 170(a)(1), 170(f)(3)(B)(iii), 170(h) (2000); 26 C.F.R. § 1.170A-14 (2005).

110. There are approximately 1,300 state, local, and regional land trusts that are considered qualified charitable conservation organizations. *See* Land Trust Census, *supra* note 2 and accompanying text.

111. *See* I.R.C. § 170(h); 26 C.F.R. § 1.170A-14; BYERS & PONTE, *supra* note 87, at 23; Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, PROB. & PROP., Sept.–Oct. 2004, at 40.

112. *See* I.R.C. §§ 2522(d), 2031(c); Pub. L. No. 99-514, § 1422, 100 Stat. 2716 (1986); Pub. L. 105-34, § 508, 111 Stat. 857-60 (1997); McLaughlin, *supra* note 111; Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations*, 31 ECOLOGY L.Q. 1, 16–17 (2004). Under Section 2031(c) of the Internal Revenue Code, up to forty percent of the value of land encumbered by a conservation easement can be excluded from a decedent's estate for tax purposes so long as the easement was donated rather than sold and the donation met the requirements for the charitable income tax donation under Section 170(h) of the Code. *See also* Roderick H. Squires, *Introduction to Legal Analysis, in* PROTECTING THE LAND, *supra* note 2, at 69–77.

113. *See* C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 4 (2005).

114. In 1964, the Internal Revenue Service ("IRS") first allowed a charitable income tax deduction for the donation of a conservation easement in a revenue ruling involving a taxpayer who donated a perpetual conservation easement to the United States to preserve the scenic view from a highway. The IRS found that the taxpayer was entitled to a tax deduction equal to the fair market value of the easement, which restricted the type and height of buildings that could be constructed on the land and placed affirmative upkeep obligations on the landowner. Rev. Rul. 64-205, 1964-2 C.B. 62. For a detailed history of the federal tax incentives for conservation easements, see McLaughlin, *supra* note 111, at 10–17.

115. McLaughlin, *supra* note 111, at 19–20.

in the United States.[116] Although there has been recent criticism and Congressional inquiry regarding some questionable tax deductions for large easement transactions,[117] Congressional support of tax deductions for conservation easements in general appears to remain strong because conservation easements promote protection of natural resources without government regulation or public land acquisition.[118] This history shows how the public's interest in conservation has driven significant changes in state statutory law and federal tax policy and provided significant protection for wild lands in conservation easements. When it comes to the doctrine of adverse possession, however, the role of on-the-ground enforcement and monitoring of wild lands enrolled in conservation easements described in the next section is perhaps even more important than the statutory developments just described.

B. Formal and Informal Practices that Promote and Protect Conservation Easements

Although favorable tax treatment, the UCEA, and state statutory developments have promoted the creation of conservation easements and erased many of the common law obstacles to their creation, the success of conservation easements is dependent in large part on how conservation organizations enforce and monitor those easements after their creation. Simply because a conservation easement exists does not mean the land cannot be subject to adverse possession or despoilment by a third party who enters upon the land and engages in precisely the type of de-

116. *See id.* at 21–23 (charts and figures showing that more than sixty percent of the 1,263 local, state and regional land trusts in existence as of December 31, 2000 were created after 1985 and approximately eighty-eight percent of the acreage protected by conservation easements held by such land trusts as of December 31, 2000, was protected after 1988).

117. In May 2003, the *Washington Post* published a three-part series criticizing The Nature Conservancy, a large, national land trust, for participating in questionable conservation easement transactions that led to large tax deductions for donors. *See* Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, WASH. POST, May 6, 2003, at A1; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1; McLaughlin, *supra* note 111, at 41. This led to a Senate Finance Committee investigation of The Nature Conservancy and activities where taxpayers allegedly claimed inappropriate charitable contribution deductions for cash payments or easement transfers to charitable organizations in connection with the taxpayers' purchases of real property. On June 30, 2004, the IRS issued a Notice indicating that it was aware of certain improper deductions for conservation easement donations and that it would impose excise taxes and penalties where appropriate. *See* I.R.S. Notice 2004-41, I.R.B. 2004-28; Press Release, IRS, Treasury and IRS Issue Notice Regarding Improper Deductions for Conservation Easement Donations (June 30, 2004), *available at* http://www.irs.gov./newsroom/article/0,,id=124485,00.html.

118. *See* Lindstrom, *supra* note 113, at 4–5.

velopment activities the easement was created to prevent. Thus, a review of conservation organization practices used to monitor and enforce conservation easements is in order.

As an initial matter, a typical conservation easement agreement will contain the following provisions: (1) a granting deed of conservation; (2) "whereas clauses" setting forth, among other things, the specific conservation values of the land based on a baseline study conducted in advance; (3) the purpose of the easement to protect natural, scenic, historic, agricultural, forest, or open space values; (4) rights of the grantee to preserve and protect the easement, enter on the property for monitoring purposes, and prevent activity on the land inconsistent with the easement purposes; (5) a statement of prohibited uses, which may (but need not) include subdivision and development, commercial uses, alteration of land surface, mineral development, timber harvesting, signs, utility lines, or interference with natural resources such as wetlands, ponds, streams, wildlife, and wildlife habitat;[119] (6) reserved rights (such as the right to reside on the property or engage in agricultural uses of the property); (7) right of enforcement by the grantee with remedies of injunction, restoration, and/or damages; and (8) provisions relating to extinguishment, valuation, assignment to a third party, insurance, liability and grantee entitlement to recovery of enforcement and monitoring costs.[120] Significantly, many of the provisions relating to describing the conservation values, baseline documentation, right of entry for inspection and monitoring, right of enforcement to obtain restoration and damages, and assignment are requirements of the Internal Revenue Code and Treasury Regulations for the value of the easement to be deductible for income and estate tax purposes.[121] Thus, there are significant incentives beyond the good will of the parties to include these provisions in the conservation easement itself and ensure they are enforced.

With regard to monitoring and enforcement of conservation easement terms, these obligations are a significant undertaking for a conservation organization. According to one land trust, "[a]fter the deal is done, the ribbon cut, and the celebration is over, the marathon begins.

---

119. Some conservation easements prevent all economic use of the property while others allow limited farming and grazing or creation of specified residential buildings. The extent of the limitations are specific to each easement and based on the natural resources and open-space values present on the property and the desires of the landowner and conservation organizations. *See* BYERS & PONTE, *supra* note 87, at 293–97.

120. *See id.* at 385–475 (commentary on provisions of model conservation easement document), 476–79 (boilerplate conservation easement document).

121. *See* I.R.C. §§ 2703, 170(h), 2055(f), 2522(d) (2000); Treas. Reg. §§ 1.170A-14 (1980); Treas. Reg. 25.2703-1(a)(4) (1992); BYERS & PONTE, *supra* note 87, at 81–99 (detailing IRS requirements).

We've promised to look after the land forever, and that promise outlives us."[122] IRS Regulations state that an eligible donee of a conservation easement must have the resources to enforce the restrictions of the easement.[123] As a result, most organizations set aside funds for monitoring and enforcement raised through donations by easement donors or from other fundraising sources.[124] Experts in the field recommend that conservation organizations visit the easement property at least once per year, develop a good relationship with the property owner, take photographs during the monitoring visit, note any changes to the property, and keep copies of all inspection forms.[125] The existence of a good baseline report of property conditions allows the organization to watch for any changes during the life of the easement.[126] Conservation organizations are also encouraged to be in contact with realtors and title companies in the area to watch for conveyances, and encourage the neighbors to be watchdogs for the organization to help preserve protected property.[127]

Are wild lands encumbered by conservation easements at risk of adverse possession? Although the source of many potential easement violations comes from the owner of the underlying fee property, interference with easement values can arise from neighbors or other third parties engaging in development, fencing, harvesting or other prohibited activities on the property. In theory, such activities could result in acquisition of some or all of the property by adverse possession as that doctrine is applied to wild lands. However, because the conservation organization has taken on the obligation of monitoring what might be remote and relatively inaccessible property, the conservation organization is in a position to prevent adverse possession of the property and thus minimize the risk of this common law doctrine to lands enrolled in conservation easements. Notably, in conversations with attorneys at two prominent conservation organizations—the Minnesota Land Trust and The Nature Conservancy—the attorneys indicated that although adverse possession was one of the many concerns they attempted to address through inspection and

122. BYERS & PONTE, *supra* note 87, at 143 (quoting Darby Bradley, President of Vt. Land Trust).

123. Treas. Reg. § 1.170A-14(c)(1) (1980). In some cases, multiple government agencies and/or land trusts will have enforcement rights in order to create additional protection for the conservation easement values. *See* BYERS & PONTE, *supra* note 87, at 169 (noting that many entities with smaller easement programs partner with larger organizations to share responsibility for easements and serve as a backup for enforcement and other purposes).

124. BYERS & PONTE, *supra* note 87, at 131–33.

125. *See id.* at 87–99.

126. *Id.* at 71.

127. *See id.*

monitoring, none of them were aware of any case where a conservation easement had been taken by adverse possession.[128]

These observations are supported by the lack of case law indicating a successful adverse possession claim against a true owner who had placed land in a formal conservation easement. This stands in contrast to the numerous published appellate decisions since 1994 (when the Sprankling article was published) involving adverse possession of wild lands not enrolled in conservation easements.[129] Accordingly, one can posit that the baseline studies, along with the monitoring and enforcement obligations that conservation organizations have taken on to comply with tax law requirements and to ensure preservation of easement values, may also be preventing acquisition of conservation lands through adverse possession. Thus, although adverse possession may have posed a threat to conservation easements in the past, the formalized practices conservation groups implement on a day-to-day basis have served to place conservation easements in a different category from other wild lands when it comes to the doctrine of adverse possession.

However, these developments do nothing to protect the millions of acres of wild lands in private ownership that are not currently encumbered by conservation easements. In light of the number of published decisions on this topic and the failure of state legislatures to exempt wild lands from adverse possession,[130] a judicial reworking of the adverse possession doctrine is necessary to modernize concepts of what constitutes "use" and "possession" to reflect current conservation values.

III. MODERNIZING ADVERSE POSSESSION DOCTRINE TO PROTECT WILD LANDS

What is clear from the above discussion is that at least as of the publication of Professor Sprankling's article in 1994, nineteenth-century pro-development notions continued to exist in our jurisprudence on adverse possession of wild lands. What is also true is that there are only three states today (one more than in 1994) that have exempted conservation lands held by nonprofit land organizations from adverse possession and

128. Interview with Jane Prohaska, Minnesota Land Trust (Apr. 14, 2005); Interview with Susan Gretz & Gail Lewellan, The Nature Conservancy of Minnesota (May 10, 2005).

129. A Westlaw search of the "allstates" database revealed fifty-one cases (mostly appellate decision) since 1994 involving adverse possession and wild lands. The search conducted was: "adverse possession" w/30 "wild" & da (aft 1993). *See also supra* note 119 and accompanying text.

130. *See supra* note 129 (discussing a Westlaw search of published decisions since 1994 on adverse possession of wild lands); *supra* note 64 and accompanying text (discussing the failure of states to statutorily exempt wild lands from the doctrine).

that no states have exempted privately-owned wild lands from the doctrine.[131] Moreover, while nonprofit practices relating to land encumbered by conservation easements described earlier appear to have reduced some of the risk adverse possession poses to such lands, there are still millions of acres of private, undeveloped lands that are not encumbered by formal conservation easements and thus remain threatened by the doctrine. Thus, this section looks at judicial trends in this area since 1994 and proposes ways in which lawyers and the judiciary can deal with adverse possession law in a manner that reflects our present-day conservation ethic.[132]

A. Recent Judicial Trends

As noted in Professor Sprankling's article, as of 1994, promising trends had emerged in Wisconsin, Florida, and California in that courts in those states recognized the benefits of preserving lands and refused to find adverse possession on that basis.[133] Over the last ten years, courts in a few other jurisdictions have followed this trend, but there are still a significant number of appellate decisions that adhere to old common law doctrines, mechanically apply a relaxed standard for adverse possession of wild lands, and award the property to the adverse possessor.[134]

---

131. As noted by Professor Sprankling, Massachusetts and New York have statutes that exempt lands enrolled in formal conservation easements from adverse possession, but not land held for preservation purposes by private owners. Sprankling, *supra* note 5, at 865 & n.233. In 1999, Connecticut amended its laws governing adverse possession to prevent by statute adverse possession of lands held by a nonprofit landholding organization, thus protecting conservation land owned by land trusts but not conservation land held by private owners. It is also unclear whether the law protects lands where the conservation group holds an easement rather than full title in fee. *See* CONN. GEN. STAT. ANN. § 47-27(b) (West 2005); Ventres v. Goodspeed Airport, Nos. X07CV010076812S, X07CV020080540S, 2004 WL 1245908, at *11 (Conn. Super. Ct. May 21, 2004) (lands held by local land trust and The Nature Conservancy immune from claims of adverse possession and prescriptive easements) (citing Dalton Enters. v. Boston & Me. Corp., 707 A.2d 347, 348–49 (Conn. App. Ct. 1998)). *See also supra* note 64 and accompanying text (discussing Washington law).

132. *See., e.g.*, ALDO LEOPOLD, *The Land Ethic, in* A SAND COUNTY ALMANAC 217, 219 (Ballantine Books 1970) (1949) ("A land ethic of course cannot prevent the alteration, management, and use of these 'resources' [water, soil, plants, animals], but it does affirm their right to continued existence . . . in a natural state.").

133. *See, e.g.*, Finley v. Yuba County Water Dist., 160 Cal. Rptr. 423, 427 (Cal. Dist. Ct. App. 1979); Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973) (holding claimant to strict standard of adverse possession, because public policy and stability should encourage preservation of land in today's modern world); Pierz v. Gorski, 276 N.W.2d 352, 356 (Wis. Ct. App. 1979) (public policy should encourage owners to leave wild lands open to the public and should not encourage owners to feel the need to fence and post wild land to prevent loss of title); Sprankling, *supra* note 5, at 871.

134. The author surveyed appellate decisions nationwide since 1994 involving adverse possession of wild lands that did not deal with run-of-the-mill border disputes or cases where

With regard to the cases declining to find adverse possession, the decisions impose a heightened standard for "open and notorious" actions on the grounds that it is more difficult for the true owner to discover the acts of the adverse possessor on wild and undeveloped lands. For instance, a South Dakota Supreme Court decision in 2005 refused to award permanent use of a roadway to the adverse possessor on the grounds that "passageway over unenclosed and unimproved land is deemed permissive" because the law "assumes the owner of such land in many instances will not be in position to readily detect [the intrusion] or prevent others from crossing over his land."[135] In addition, cases from Wisconsin have continued to hold that certain improvements and developments on wild lands may not be obvious to the true owner and thus do not meet the open and notorious element of adverse possession.[136] This analysis has been followed in other jurisdictions as well.[137] Moreover, in Maine and a minority of other states, the use of wild and uncultivated land is presumed to be permissive, making adverse possession of such lands more difficult than developed lands.[138] As a result, these cases impose a higher standard rather than a lower standard for adverse possession of wild land, at least when it comes to the element that the possession be open and notorious.[139]

---

the court failed to find the land at issue was "wild." *See supra* note 129. Of those cases, the land was awarded to the adverse possessor in seventeen of the cases and remained with the true owner in eleven of the cases. At least fifty other cases mention the doctrine of adverse possession as applied to wild lands but either declined to find that the land was "wild" or involved fence line disputes between neighbors where the issue of whether the possession was open and notorious was diminished. *Id.*

135. Rancour v. Golden Reward Mining Co., 694 N.W.2d 51, 54 (S.D. 2005).

136. *See, e.g.*, Morse v. Kloss, No. 00-CV-24, 2001 WL 1609339, at *4 (Wis. Ct. App. Dec. 18, 2001) (holding creation of footpath and clearing of marginal road not sufficient to show visible, notorious, and open use and thus not sufficient to obtain adverse possession); Day v. Hanson, No. 98-1218, 1999 WL 216572, at *7 (Wis. Ct. App. Apr. 15, 1999) (holding evidence of occasional recreational use, pasturing of cattle, and installation of fence at earlier time that fell into disrepair insufficient to put title holder on notice and "wave the flag of hostility"); Stupar v. Township of Presque Isle, No. 96-0034, 1996 WL 635924, at *1 (Wis. Ct. App. Nov. 5, 1996) (holding installation of flower bed, steps, a path and periodic mowing and short-term erection of a privy insufficient for adverse possession of wild lands).

137. *See, e.g.*, Porter v. Schaffer, 728 A.2d 755, 774–75 (Md. Ct. Spec. App. 1999) (erecting no trespassing signs and including property in a woodland management program insufficient to obtain adverse possession); Moore v. Dudley, 904 S.W.2d 496, 497 (Mo. Ct. App. 1995) (posting signs, blazing and painting trees, clearing underbrush, riding horses and driving vehicles on the property insufficient actions to be open and notorious).

138. *See* D'Angelo v. McNutt, 868 A.2d 239, 243 (Me. 2005) (citing rule).

139. *See, e.g.*, Flowers v. Roberts, 979 S.W.2d 465, 471 (Mo. Ct. App. 1998) (citing Moore v. Dudley, 904 S.W.2d 496, 498 (Mo. Ct. App. 1995) ("The fact that the land in question is wild, undeveloped and covered in woods and hills in no way lessens what is required to satisfy the element of possession being 'open and notorious' and, indeed, may very well increase it.")). *But see* Luttrell v. Stokes, 77 S.W.3d 745, 749–50 (Mo. Ct. App. 2002) (citing

However, many cases since 1994 still allow adverse possession of wild lands based on minor activities on the land that would be difficult for the owner to ascertain if the land is truly wild and the owner is not present on the property on a regular basis. For instance, several cases since 1994 found adverse possession of wild lands based on hunting and fishing;[140] cutting trees and clearing roads;[141] erecting a fence along with mowing and planting;[142] marking boundaries;[143] weekly mowing and clearing of brush;[144] and seasonal camping, paying taxes and building enclosures for recreational purposes despite the true owner's use of the property for hunting, fishing, and berry picking.[145] Indeed, the Rhode Island Supreme Court held in 2003 that it was irrelevant that the true owner had no knowledge of the acts of the adverse possessor because of the remote character of the land.[146] Instead, the true owner is always chargeable with knowledge of adverse uses of the property as if

---

Whiteside v. Rottger, 913 S.W.2d 114, 120 (Mo. Ct. App. 1995)) (recognizing heightened standard in Missouri for "open and notorious" element of adverse possession for wild lands but stating that the "actual possession" element is lower than "for developed land, because the nature, location, and possible uses for the property may restrict the type of affirmative acts of ownership that may be appropriate for the land").

140. *Whiteside*, 913 S.W.2d at 120 (holding hunting, fishing, pasturing livestock, and cutting firewood on land "not fit for cultivation or building" and subject to flooding sufficient to accomplish adverse possession).

141. *See* Yeatman v. Stoneland Realty, Inc., No. 990126B, 2001 WL 292828, at *4 (Mass. Super. Ct. Feb. 7, 2001) (holding installing drainage pipe, placing chain across road to block access, dumping excess fill, cutting down trees, and paying taxes sufficient to accomplish adverse possession).

142. *See* McVey v. Shepler Dev., L.L.C., No. 232384, 2002 WL 31450533, at *1 (Mich. Ct. App. Nov. 1, 2002) (holding putting up fence, planting trees, maintaining, and replacing sheds and family activities in disputed areas sufficient for adverse possession).

143. *See* Johnson v. Mayne, No. 2002-CA-001557-MR, 2004 WL 690807, at *3–*4 (Ky. Ct. App. Apr. 2, 2004) (finding adverse possession where claimant used a fence to mark a boundary enclosing a wild, uncultivated, and vacant area of land).

144. *See* Blackburn v. Unknown Heirs of Samuel Hugh Rogers, No. 19019, 2000 WL 511655, at *2 (Va. Cir. Ct. Feb. 23, 2000) (discussing adverse possessor who cleared underbrush, mowed weekly during grass-growing season, used a portion for a vegetable garden, and used land for sporting events and outdoor games).

145. Guenther v. Allen, 702 N.Y.S.2d 678, 678–79 (N.Y. App. Div. 2000) (holding paying taxes, camping and vacationing at least annually, erecting barriers across old logging roads, posting the property, and attempting to improve a barn enough for adverse possession where true owner had knowledge of plaintiffs' payment of taxes and defendant had used property for recreational purposes such as fishing, hunting and berry picking).

146. Tavares v. Beck, 814 A.2d 346, 353 (R.I. 2003) (stating that trial court erred in finding true owner's residence out of state "was a factor to be considered in deciding what quantum and intensity of use would be necessary to establish adverse possession" and that such factors were irrelevant).

he were physically present on a daily basis.[147] Thus, in these cases, not only is the actual possession standard relaxed, but there is no acknowledgement that actions on wild lands may be less observable to a reasonable owner of the wild land (as opposed to a reasonable owner of developed land who is present on the property on a regular basis).

Although the cases mentioned above show a continuation of the pro-development policies of earlier eras, conservation principles are starting to creep into some decisions released since the publication of Sprankling's article, albeit in some unusual factual circumstances that sometimes lead to surprising and ironic results. For instance, in a 2004 opinion from the Minnesota Court of Appeals, the property in dispute consisted of two areas of unmaintained woods, one adjacent to the lake and the other inland.[148] The trial court found that the respondent had adversely possessed the entirety of one of the areas despite the fact that "she left the shorefront woods unmaintained to block the sight lines and sunlight from the lake."[149] On appeal, the appellants contended that failure to maintain the woods precluded actual and open possession, citing the oft-cited rule that "one who leaves land in a wild and natural state cannot acquire title by adverse possession."[150] The court of appeals disagreed, stating that:

> [R]espondent's affirmative and intentional act of leaving the shorefront woods unmaintained for the specific purposes of shielding the cabin from view and controlling pollution constituted actual possession. We do not believe that an individual's affirmative choice to leave land in its natural state per se precludes actual possession when, as here, the choice is motivated by a desire to further the land's intended purpose and to comply with land-use policies.[151]

The court went on to hold, however, that another unmaintained area of woods away from the lake was not subject to adverse possession because the respondent's failure to maintain the woods "reflected no affirmative act on her part."[152] Thus, the court specifically condoned pres-

147. *Id.* at 352 ("[The record owner] was still chargeable with knowing whatever was done openly on the land he owned—whether or not it could be observed from the road or from the boundary of the property.").

148. Fife v. Andersen-Nielsen, No. A03-1990, 2004 WL 2094541, at *1 (Minn. Ct. App. Sept. 21, 2004).

149. *Id.* at *3.

150. *Id.* (quoting Nash v. Mahan, 377 N.W.2d 56, 58 (Minn. Ct. App. 1985)).

151. *Id.* (citing primarily the Bay Lake Property Owners Association land use policy to maintain a natural barrier between maintained lawns and the lake to reduce runoff of fertilizer pollutants).

152. *Id.*

ervationist motives and decided the case based on the intent of one of the parties to maintain the property in its natural state.

The Alaska Supreme Court reached a similar decision in 2001, when it awarded title to undeveloped bluff property based on adverse possession.[153] In that case, the adverse possessor built a home and cultivated sections of the property, but left other sections of the property in a natural state. The supreme court affirmed a finding of adverse possession for the majority of the property, reasoning that even though the respondent's use of the property was seasonal and sometimes sporadic, her use was appropriate based on the character of the property.[154] In affirming the district court's award of one of the undeveloped portions of the property to the respondent, the supreme court noted that she had "objected vehemently" during the district court proceedings to a legal standard that "means you possess something because you totally destroy it."[155] In response to that point, the supreme court stated that respondent's "conservation-oriented" uses of the property, including planting indigenous rather than non-native plants and thinning, rather than clearing, trees and undergrowth "have the same legal weight as would more transformative or destructive uses" and were legally significant so long as they should have alerted the record owner to the adverse possession.[156]

These recent cases from Alaska and Minnesota present somewhat of an irony in that they express conservationist values and allow "possession" and "use" that does not alter or destroy the natural landscape, but it is the conservationist intent of the adverse possessor rather than the true owner that is important. What is missing from these cases and others involving adverse possession of wild lands is whether it can be, and should be, relevant to consider the conservationist intent or effect of the true owner and whether that intent or effect can be used to rebut claims for adverse possession.

B. Conservation as "Use" and "Possession" of Land

Although there is some evidence that courts are willing to move away from the development model of adverse possession and recognize conservation values, the doctrine in its existing form still poses problems. This section of the article presents ideas and theories courts, landowners and lawyers can look to in modernizing certain aspects of the adverse

153. Vezey v. Green, 35 P.3d 14 (Alaska 2001).
154. *Id.* at 21.
155. *Id.* at 25 n.39.
156. *Id.*

possession doctrine to better reflect a modern view of what it is to "use" and "possess" land based on developments in related areas of the law and evidence of the true owner's conservation intent or effect.

1. Theoretical Groundings for Historic Conceptions of "Use" and "Possession"

One need only look as far as 1823 and the signature case of *Johnson v. M'Intosh*[157] to find the judicial underpinnings of a longstanding legal theory that defines "use" and "possession" to be limited only to those activities on land that alter the land for economic benefit. In *Johnson*, Chief Justice Marshall held that Indian tribes in Illinois did not have title to native lands that they could convey to private individuals because the country's European predecessors "discovered" those lands and then transferred them to the U.S. Government. Although Chief Justice Marshall recognized the right of the native tribes to "occupy" the lands, they had no "title" to the lands and thus could not transfer them. While Justice Marshall was clearly not comfortable with the decision in the case, he noted that the tribes were "fierce savages . . . whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."[158]

Justice Marshall stated that at that time, "[t]he measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them."[159] This decision is often presented in Property Law casebooks with a discussion of philosopher John Locke's "labor theory," namely, that "[w]hatsoever [man] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."[160] Thus, the native tribes had no property interest in the land because they did nothing to "improve" it and only left it in a natural state; conversely, however, the European settlers that came later were entitled to a property interest in that same land when they tilled, cultivated and "developed" the land for economic gain.[161]

---

157. 21 U.S. (8 Wheat.) 543 (1823).

158. *Id.* at 590.

159. *Id.* at 569 (citing GROTIUS, LIB. 2, C. 11; BARBERYR; PUFFENDORF, LIB. 4, C. 4, § 2, 4; 2 BL. COM. 2; PUFFENDORF, LIB. 4, C. 6, § 3; LOCKE ON GOVERNMENT, B. 2, C. 5, § 26, 34–40).

160. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

161. *See* DUKEMINIER & KRIER, *supra* note 12, at 17.

Likewise, the common law property doctrine of capture is based on the same principles in that early American courts endorsed a rule whereby title to wild animals, oil and gas, and even water vested in the first person who trapped, extracted, or appropriated the resource.[162] In other words, capture and exploitation of resources and land is necessary to acquire possession and ownership of resources and land.[163]

While these principles of ownership historically have been justified on various grounds, including just rewards for labor theory, consent theory, and possession or occupancy theory, Carol Rose has argued that possession is a form of communication.[164] Thus, in order to obtain and maintain title, the owner must assert her right publicly by taking actions to apprise the community of her intent to maintain ownership.[165] As applied in the adverse possession context, the true owner of land is required to engage in useful and productive acts on the property to provide notice to the world that the land is hers and to avoid mistaken beliefs on the part of others that the land is open, abandoned and/or is there for the taking.[166] Rose acknowledges that although "[w]e may admire nature and enjoy wildness," this principle finds little support in doctrines of possession that use the language of "cultivation, manufacture, and development" to communicate what we intend to "possess" to the outside world.[167]

As we have seen, conservation organizations have created their own forms of "communication" of conservation-based possession through the creation of baseline studies, monitoring and a continuing dialogue with fee owners and neighbors.[168] In the same vein, we should explore ways in which a private landowner can communicate possession of land apart from cultivation or development activities. Before proposing a model to accomplish this, an example from a related area of the law, instream flow, is instructive.

2. Instream Flow as a Model

Legal developments in the context of water rights and instream flow of water show courts modifying historic conceptions of the "use" of

---

162. *See, e.g.*, Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76–77 (1985); Sprankling, *supra* note 5, at 857.

163. *See* Rose, *supra* note 162, at 76–77; Sprankling, *supra* note 5, at 857.

164. Rose, *supra* note 162, at 78–80.

165. *Id.*

166. *See id.* at 81–82.

167. *Id.* at 88.

168. *See supra* Part II.B.

property to include conservation purposes in a manner that is instructive for adverse possession of wild lands. In the United States, there are two different legal doctrines governing the use of surface waters—the law of riparian rights and the law of prior appropriation. Some states recognize only one or the other although a hybrid now exists in many states.[169] Riparian rights, which arose mainly in the eastern and midwestern states[170] where water is more plentiful, give each owner of land bordering on a stream the right to make reasonable use of the water and impose liability on upper riparian owners who unreasonably interfere with that use. Conversely, under the prior appropriation doctrine adopted in most western states,[171] water rights are akin to a state administrative grant that allows the use of water for a specific beneficial purpose if water is available after satisfying the claims of others with earlier appropriations. The right to water arises from a permit that the user applies for and the place of use is not limited to riparian land or the watershed. The right to water may be sold and its place of use may be changed.[172]

Prior appropriation works under a "first in time, first in right" rule where appropriators are senior and junior to one another from the first user to the most recent. When water is short, the senior appropriators have preference over the junior appropriators.[173] Historically, the right to use water under the prior appropriation doctrine was extinguished if it was not continually "diverted" for the designated "beneficial use" that justified the original grant of the permit. Beneficial use was often defined in a limited manner to include primarily domestic, agricultural,

---

169. *See generally* GEORGE A. GOULD ET AL., CASES AND MATERIALS ON WATER LAW 8 (7th ed. 2005).

170. Approximately thirty-two states have some form of common law riparian rights, although many of those states use an administrative permit process for new uses of water or have a significant statutory overlay that controls, among other things, dams and municipal water use. *Id.* at 9–10.

171. Nine western states (Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) have pure appropriation law and nine other states began with some aspects of riparian rights but have now moved almost exclusively to appropriation law. Of those, in California, Nebraska, and Oklahoma, some new uses may be initiated by riparian rights while in Kansas, North Dakota, Oregon, South Dakota, Texas, and Washington riparian rights form "the historical basis of some uses, but all new uses must be appropriative." *Id.* at 9. Prior appropriation doctrine sustained development in the West because, unlike riparian rights, appropriation law allows rights to water that can be transported and used miles away from the source, rather than limiting water use to adjoining lands. *See, e.g.*, MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 84–90 (rev. ed. 1993) (discussing the 223-mile Los Angeles aqueduct that was completed in 1913 and transported water from Owens Valley in the Sierra Nevada Mountains through the San Fernando Valley into Los Angeles).

172. GOULD ET AL., *supra* note 169, at 9.

173. *Id.*

mining, manufacturing, and power uses.[174] However, in the latter part of the twentieth century, several prior appropriation states began to recognize instream appropriation of water[175] for recreation and fishing purposes. In some states, this was accomplished through express instream appropriation programs and in others through judicial recognition.[176] Today, "[i]nstream flow rights are established by new appropriations of water rights . . . where the flows are not [yet] fully allocated and by transferring existing water rights to instream flow purposes."[177]

Although some states limit instream appropriations to designated public agencies, others have more recently allowed private, nonprofit organizations to acquire water rights by sale, donation, or lease for the purpose of maintaining minimum instream flows for conservation pur-

---

174. *See, e.g.*, IDAHO CONST. art. XV, § 3 (setting forth priority of water rights and naming only domestic, agricultural, manufacturing, mining, and milling); A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 160, 178 (5th ed. 2002) (noting long list of beneficial uses, stating that instream flow to protect environmental values has been "the most dramatic innovation," and explaining that state constitutions first enshrined historic beneficial uses but that legislative actions or judicial interpretation was then needed in the mid-twentieth century to add recreation to the list of beneficial uses to protect instream flows); Joseph W. Dellapenna, *Adapting Riparian Rights to the Twenty-First Century*, 106 W. VA. L. REV. 539, 571 (2004); Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 500–01 (2004) (noting that historically, beneficial use referred to physical diversion of water for consumptive or out-of-stream agricultural, domestic, and mining uses and did not include habitat and species protection or instream flows); Jack Sterne, *Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 205–06 (1997) (stating that "when the prior appropriation doctrine first came into use in the mid-1800s, the needs of fish and wildlife were far from the minds of most lawmakers" in determining "beneficial" uses and, moreover, custom only recognized "those water rights that required a physical diversion of water"); A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 772 (2001) (noting main principle of prior appropriation doctrine is that "perpetual 'use it or lose it rights' lock too much water into marginal agriculture and generally encourage inefficient off-stream consumptive uses to the detriment of aquatic ecosystem values and the needs of growing urban areas.").

175. Instream flow can be defined as "any nondiversionary, in-place use of water with little or no resulting consumptive use." James D. Crammond, *Leasing Water Rights for Instream Flow Uses: A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest*, 26 ENVTL. L. 225, 226 (1996). The "use" is thus recognized without the "diversion" normally required to establish a water right under appropriation law. *See id.*

176. Nine of the eleven states from the Rocky Mountains to the Pacific Ocean (Arizona, California, Colorado, Idaho, Montana, Oregon, Utah, Washington, and Wyoming) rely on statutes to administer their instream flow programs while Nevada's instream flow program is based primarily on a Nevada Supreme Court holding that "water used instream for fish and wildlife is a beneficial use and that diversion is not necessary [to create] a valid water right." Jesse A. Boyd, Note, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RESOURCES J. 1151, 1152–53 (2003); *see also* State v. Morros, 766 P.2d 263, 266, 268 (Nev. 1988).

177. Lynne Marie Paretchan, *Choreographing NGO Strategies to Protect Instream Flows*, 42 NAT. RESOURCES J. 33, 35 (2002).

poses.[178] Notably, these organizations are modeled after land trusts and thus do with water what the land trusts have done with land.[179] These laws also allow individuals to make a temporary change in their consumptive rights to instream flows for the benefit of fishery resources. As a result, nonprofit organizations such as Trout Unlimited as well as newly formed water trusts have been able to lease water rights to restore wildlife habitat.[180]

Clearly, statutory developments in this area have made significant progress in recognizing conservation and fishery values as within the realm of beneficial use.[181] However, prior to many of these statutory developments, courts recognized independently that use of water for conservation purposes could be "beneficial" on the same level as traditional economic uses, and thus interpreted their statutes, common law, and/or constitutions to reflect modern-day conservation values.[182] In some cases, courts justified the use of water for conservation purposes based on the "public trust doctrine"—the idea that the public possesses inalienable rights in certain natural resources that are held by the sovereign in trust for the public.[183] In many of these cases, courts relied on the public

178. *See* King, *supra* note 174, at 504–06 (documenting statutory changes in various western states recognizing instream flow for conservation purposes, allowing state agencies to acquire water rights through purchase, lease or donation, and allowing private organizations (i.e., water trusts) to acquire water rights through sale, donation, and lease for the purpose of transferring them to the state for conservation purposes).

179. Indeed, commentators have urged Congress to amend I.R.C. § 170 (2000) to expressly allow holders of water rights to obtain the same tax benefits for donating their rights to instream flow that are currently given to donors of land conservation easements. *See, e.g.*, Kelly A. Cole, *A Market-Based Approach to the Protection of Instream Flow: Allowing a Charitable Contribution Deduction for the Donation of a Conservation Easement in Water Rights*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 325, 325 (2000).

180. *See* TARLOCK ET AL., *supra* note 175, at 355–57 (describing water trusts as private, nonprofit organizations that, like land trusts, acquire water rights through market transactions for conservation purposes); King, *supra* note 174, at 495–96 (same).

181. Conservation values are, of course, not divorced from economic values in that fishing, birding, and other recreational pursuits now form the foundation of the economy of many of the western states that have implemented instream flow programs.

182. *See, e.g.*, Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924 (Idaho 1974) (upholding appropriation permit granted to state department of parks for use of water for scenic, beauty, and recreational purposes and rejecting argument that state constitution limited "beneficial use" of water to the domestic, mining, agricultural, and manufacturing uses listed expressly in the state constitution). *But see* Colo. River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965) (holding water was not "appropriated" if left instream for fishing and recreational purposes and thus water rights claimed for those uses were invalid) (decision later superseded by statute).

183. *See, e.g.*, GOULD ET AL., *supra* note 169, at 541–45; JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 528–29 (3d ed. 2000); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986) ("The public trust doctrine is based on an amorphous notion that has been with us since the days of Justinian—the notion that the public possesses

trust doctrine to preserve water for conservation purposes despite statutory directives to the contrary.[184]

These developments in water law provide a model that can support a similar transformation in adverse possession doctrine. In the context of prior appropriation, scholars note that "[t]o the nineteenth century mind . . . leaving water in place was simply not a use" but "[s]ocietal values changed . . . and with them changed the interpretation of 'beneficial use.'"[185] Likewise, courts were willing to change with the times and modernize water law to protect contemporary values. As one textbook puts it:

---

inviolable rights in certain natural resources."). According to Professor Sax, the doctrine provides a legal approach to resolving resource management problems so long as it meets three criteria: (1) the legal right has to be vested in the general public; (2) the right has to be enforceable against the government; and (3) the right must be capable of an interpretation consistent with modern concerns for environmental quality. *See also* Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (articulating and relying on public trust doctrine to prevent state from transferring title to submerged lands in Chicago harbor to railroad company on grounds that state holds lands under navigable water in trust for the people of the state); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004) (examining historical circumstances of *Illinois Central* case); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (urging courts to utilize the public trust doctrine to counter legislative and administrative actions harmful to the environment).

184. *See, e.g.*, Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709 (Cal. 1983) (refusing to allow the city of Los Angeles to continue to divert large amounts of water from tributaries to Mono Lake for consumptive use based on concern regarding effect of drop in lake levels on wildlife, scenic beauty, and ecological values); *In re* Water Use Permit Application, 9 P.3d 409 (Haw. 2000) (applying public trust doctrine to water rights); Idaho Conservation League v. State, 911 P.2d 748 (Idaho 1995) (recognizing that public trust doctrine takes precedence over vested water rights, but holding that public trust doctrine is not an element of determining competing water rights claims in Snake River Basin); Shokal v. Dunn, 707 P.2d 441, 447 n.2 (Idaho 1985) (holding that reviewing courts must take a "close look" at the action of the state legislatures and agencies to determine whether it complies with the public trust doctrine and not merely rubber stamp such action) (citations omitted); Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1094–95 (Idaho 1984) (holding that a state holds all waters in trust for benefit of the public, the trust doctrine takes precedence even over vested water rights, a state does not have power to abdicate its role as trustee, and trust interests include navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality); United Plainsmen Ass'n v. N.D. State Water Conservation Doctrine, 247 N.W.2d 457 (N.D. 1976) (holding that the trust doctrine prevented state from granting water rights to coal plants in absence of comprehensive environmental planning). *But see* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 726–27 (1995) (stating that North Dakota has never applied *United Plainsmen* to existing water rights so the doctrine may be prospective only). The Idaho legislature has attempted to abrogate judicial decisions regarding the public trust doctrine's application to water appropriation by statute stating that the public trust doctrine is "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters." IDAHO CODE ANN. § 58-1203 (1996).

185. TARLOCK ET AL., *supra* note 175, at 178.

> Whereas water traditionally has been seen as a resource to be harnessed for agriculture, commerce, power generation, and transportation, a growing awareness of the role of water resources in the sustainability of critical ecosystems has more recently channeled water law in new directions. Particularly in the past decade, water law and policy have shifted from an exclusive focus on direct human uses toward the inclusion of watershed and habitat protection in the balance.[186]

The early judicial protection for instream flow prior to legislative protection can serve as a model for rethinking conceptions of "use" and "possession" in the context of adverse possession. The development of modern water law doctrine by courts is particularly instructive because it shows how courts can update common law doctrines while still working within an existing historical framework. While many may argue that it is for legislatures, not courts, to create new policy as a result of changing times, our common law tradition provides ample authority for courts to give new life to constitutional and/or common law principles to reflect changing mores.[187] Courts can use these same principles to modernize adverse possession doctrine in the absence of state legislation exempting conservation lands from the doctrine.

3. Recognizing Conservation Intent and Conservation Effect

Turning now to the doctrine of adverse possession itself, the question is whether there is any precedent courts can draw on from within the doctrine itself to modernize it to reflect current conservation values. One promising angle is the role of conservation intent and conservation effect in the doctrine.

a. Conservation Intent

The role of state-of-mind or intent in the law of adverse possession has long been debated. Some jurisdictions have required that the adverse possessor act with "good" intent (i.e., be possessing under a good faith

---

186. DWYER & MENELL, *supra* note 14, at 102.

187. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 152 (1921) ("If judges have wofully [sic] misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."); *id.* at 150 ("I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in . . . full abandonment."); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 36–37 (1988).

belief that she owns the property), others required that the adverse possessor have "bad" intent (i.e., have knowledge that she does not own the property), while the majority of jurisdictions now use an objective standard to avoid the intent issue altogether.[188] What is uniform through these jurisdictions when it comes to intent, however, is that the only intent that is ever discussed and is ever relevant is the intent of the adverse possessor. No one ever talks about the intent of the true owner in using or not using his land. While this presumably is a function of the burden being on the adverse possessor to prove each element of the claim, the lack of information regarding the activities, the mindset or the motives of the true owner is notable in its absence from judicial opinions.

Indeed, the true owner is a "black box" in traditional adverse possession opinions that focus on the wants, desires, and activities of the adverse possessor. Sprankling has attributed the lack of any discussion of preservationist motive by true owners in adverse possession cases to the fact that "under existing law, an owner's motivation to preserve [land] is both irrelevant and counterproductive. To defeat an otherwise valid adverse possession claim, the owner must rely on his own exploitative acts to preclude exclusivity."[189]

Courts and commentators generally justify use of the objective standard for "hostility" and "claim of right" in adverse possession cases on grounds that it is better to focus attention on verifiable facts relating to the use of property rather than delving into the adverse possessor's state of mind.[190] However, as Professor Helmholz has argued, even when courts say they are applying an objective standard, they often award title only to good faith possessors and thus rely on subjective intent in reaching their decision.[191] Helmholz concludes by stating that even though courts are in fact considering evidence of the claimant's in-

188. *See* 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.05[1]–[3] (discussing objective standard, good faith standard and bad faith standard); Helmholz, *supra* note 23, at 332; *see also supra* note 23 and accompanying text.

189. Sprankling, *supra* note 5, at 858 n.203.

190. *See* 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.05[2]; Helmholz, *supra* note 23, at 331–32.

191. *See* Helmholz, *supra* note 23, at 332 (stating that even though courts disavow a good faith requirement in favor of a stated objective standard, such statements are contradicted by the case law results which reveal that the trespasser who knows he is trespassing "stands lower in the eyes of the law" and is less likely to acquire title by adverse possession than the claimant acting under a good faith belief that he owned the property). *But see* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986) (disputing that courts are in fact applying a good faith standard to adverse possession cases); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986); Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986).

tent in deciding adverse possession cases, the law should not expressly require such proof because in many cases there is no evidence of the possessor's intent. Thus, to require such a showing in all cases would encourage speculation and perhaps perjury. Instead, Helmholz suggests that where there is in fact actual evidence of intent, courts and juries do take it into account and we should at least acknowledge that fact.[192]

So is there anything productive we can take from this discussion of subjective, good faith intent to apply in the context of conservation lands? As an initial matter, as noted above, courts in Minnesota and Alaska have recently relied on the conservation intent of the adverse possessor to allow adverse possession without transforming or developing the land.[193] However, once again, the focus is only on the intent of the adverse possessor, not the intent of the true owner.

Assuming that Helmholz is correct that motive and intent have been creeping into adverse possession law for a long time, it appears that the only intent courts have focused on is that of the adverse possessor. As stated above, this can lead to unjust and absurd results in cases involving wild lands. Indeed, if we consider the conservation intent of the adverse possessor, in theory, an adverse possessor could engage in even more sporadic activities without the awareness of the true owner and argue that her intent was to "possess" the land but to leave it in its natural state for conservation purposes. Thus, by focusing on the intent of the adverse possessor, as between two claimants wishing to preserve the land, we allow the adverse possessor to prevail over the record owner for engaging in no more exclusive use and possession of the land than the record owner. This turns the burden of establishing adverse possession on its head.

Certainly, there are protections against such a result. Most jurisdictions require that the adverse possessor do more than merely occupy the property or leave the land in its natural state to accomplish adverse possession.[194] However, if leaving land in its natural state is not enough for adverse possession, it also is not enough to stave off a claim for adverse possession based on minimal cultivation or development, as Sprankling has shown. Thus, we are back where we started.

I propose that evidence of conservation intent on the part of the true owner should "count" as both use and actual possession of land, thus serving to thwart the efforts of an adverse possessor to obtain title through minimal cultivation or development of land. As a result, even if

192. Helmholz, *supra* note 23, at 357–58.
193. *See supra* notes 148–56 and accompanying text.
194. *See* 16 POWELL ON REAL PROPERTY, *supra* note 10, § 91.01[2].

such development or cultivation does occur, it would be insufficient to transfer title. This is because adverse possession requires "exclusive" possession of land.[195] If courts recognize conservation as a legitimate use and possession of land, and a record owner can prove such use and possession through evidence of conservation intent, the adverse possessor cannot establish "exclusive" possession.

How would this work in practice? First, private owners could, without significant hassle or cost, engage in a more abbreviated documentation of the conservation values of the land that conservation organizations conduct today with regard to land encumbered by a conservation easement. This documentation could consist of photographs, observations, maps or other documentation tending to show intent to leave land in its natural state for conservation purposes. Another option would be for the landowner to file an affidavit with the county recorder's office expressing her intent to leave the land in its natural state for conservation purposes. Unlike a conservation easement, the affidavit could be drafted to allow the owner to revoke it at any time. Finally, a state or local government could create a registry for conservation lands that has no legal effect other than to act as an expression of the true owner's intent with regard to the land.

Some might argue that such minimal actions allow landowners to ignore their land and abandon their obligations with regard to the land to the detriment of society. It is important to remember, however, that the true owner is just that—the true owner—a person with good title to the property who should prevail over all others barring creation of a nuisance or other hazard on the land or extraordinary circumstances leading to adverse possession.[196] Moreover, courts could apply the doctrine in a way to require some affirmative expression of "conservation intent;" in the absence of such expression, the traditional interpretation of "exclusive use and actual possession" would apply.[197] The main point is that in today's world, where promoting development for development's sake is no

195. *See supra* note 12 and accompanying text.

196. *See* 16 POWELL ON REAL PROPERTY, *supra* note 13, § 91.13 (noting that the adverse possessor bears the burden of proof on all issues and some states apply a "clear and convincing" evidentiary standard because acquisition of another's property based on adverse possession is disfavored under the law).

197. Other alternatives that would provide more protection to the record owner but create additional evidentiary and policy problems would be to: (1) create a presumption that the record owner had conservationist intent even in the absence of affirmative expressions of such intent and allowing the adverse possessor to rebut the presumption; or (2) create an irrebuttable presumption that the record owner had conservationist intent even in the absence of affirmative expressions of such intent. These alternative are problematic because they either require the adverse possessor to testify as to the state of mind of the record owner (option one) or limit the authority of the courts to balance the equities in any particular case (option two).

longer a paramount value, allowing some additional private lands to stay "wild" until they can be either placed in a conservation easement or used productively (if not economically) at a later date may be a good thing.

b. Conservation Effect

While conservation intent will go a long way to protecting many undeveloped lands from adverse possession, what about those lands where the owner is not preserving land expressly for a conservation purpose but the effect of the owner's management of the land results in it possessing significant conservation values that we wish to preserve? One example would be a mining company or paper company that owns a huge expanse of forest land or grazing land. The company may engage in mining or harvesting activities on a portion of the land but maintain the remainder of the property in a pristine condition with public access for fishing, hunting, hiking and other activities.[198] In such a circumstance, the company might not file an affidavit of conservation intent but the actions of the landowner have nevertheless resulted in the land containing significant conservation values that benefit the public and/or the environment. In such a case, the company (or members of the public that enjoy the public access) would have the opportunity to defend against an adverse possession claim by introducing evidence of the beneficial conservation "effect" of the land, thus allowing the land to remain in its natural state without risk of an adverse possession claim. Just like the situation with conservation intent, this would allow undeveloped land with established conservation effect to remain wild until the owner wishes to do something else with it or place it in a conservation easement for long-term protection.

4. Judicial Creation of a "Special Case" for Adverse Possession of Wild Lands

Some courts may be reluctant to expand the concepts of "use" and "possession" across the board in adverse possession cases, under the the-

198. For examples of large corporate landowners taking advantage of programs to protect their lands for the benefit of conservation values or the public, see The Nature Conservancy, *International Paper Enrolls in Safe Harbor Program,* http://nature.org/wherewework/northamerica/states/virginia/news/news686.html (last visited Jan. 10, 2005) (reporting that International Paper formally protected land in Virginia in 2001 to protect species); The Nature Conservancy, *240,000-Acre Deal Protects Jobs and the Environment,* Aug. 27, 2002, *available at* http://nature.org/pressroom/press/press742.html (reporting that Great Northern Paper agreed to conservation easement and public access for large forestland area in Maine).

ory that even if it presents problems for wild lands, there is no need for a wholesale reworking of a doctrine that has been in place for so long. Regardless of the merits of such an argument, there is another alternative—creating a "special case" for adverse possession of wild lands in recognition of the fact that the doctrine no longer works for such properties in a society that places more emphasis on conservation values. This option would recognize the expanded conception of "use" and "possession" discussed above, but make clear that this expansion would only apply in the context of adverse possession of wild lands.

Notably, there is precedent that exists for judicial creation of such special case status. Although courts may have ignored the state of mind of the true owner as a general matter in adverse possession law, New Jersey and other jurisdictions have created a special case for adverse possession of personal property, placing a renewed emphasis on the state of mind of the true owner rather than the actions of the possessor.[199] As shown below, the court's recognition that adverse possession law no longer "worked" for personal property, as opposed to real property, can be applied equally in the context of wild lands.

New Jersey's judicial creation of a special case for personal property came about in the well-known case of *O'Keeffe v. Snyder*.[200] In that case, the New Jersey Supreme Court was called upon to determine whether the artist Georgia O'Keeffe could maintain a replevin action against the defendant who was in possession of several of her paintings which were allegedly stolen from her thirty years earlier.[201] The defendant argued that title to the paintings had transferred to him by adverse possession because he was a bona fide purchaser for value and he ob-

---

199. *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288–89 (7th Cir. 1990) (applying discovery rule to stolen mosaics); Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd., 450 So. 2d 1157, 1162–63 (Fla. Dist. Ct. App. 1984) (applying discovery rule to stolen money); O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (rejecting application of the doctrine of adverse possession when it comes to personal property and replacing doctrine with a discovery rule that focuses on due diligence of the true owner).

200. 416 A.2d 862 (N.J. 1980). The *O'Keeffe* case and the problem of applying the doctrine of adverse possession to stolen art and other personal property has been the subject of much academic commentary. *See, e.g.*, Paula A. Franzese, *"Georgia on My Mind"—Reflections on* O'Keeffe v. Snyder, 19 SETON HALL L. REV. 1 (1989); Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1988); Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995); R. H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 N.W. U. L. REV. 1221 (1986); Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225 (1997); Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994).

201. *O'Keefe*, 416 A.2d at 864–65.

tained the paintings from a person who had maintained continuous possession of them for thirty years, well beyond the six-year statute of limitations applicable to actions for replevin.[202]

The trial court acknowledged that the defendant and his predecessors may not have met all the requirements for adverse possession (namely, that the possession be open and notorious), but granted the defendant's motion for summary judgment on the grounds that O'Keeffe's replevin action was not brought within the six-year statute of limitations for such claims.[203] The New Jersey Court of Appeals reversed on the grounds that the paintings were stolen, the defense of expiration of the statute of limitations and title by adverse possession were identical, and the defendant had not proven all of the elements of adverse possession, namely, that the possession be open and notorious and provide notice to the true owner and the world of the adverse possessor's claim.[204]

In reversing the court of appeals, the state supreme court began by stating that factual disputes concerning whether the paintings were in fact stolen and the circumstances surrounding the acquisition of the paintings by the various parties warranted a remand for evidentiary hearing.[205] However, the court went on to resolve certain questions of law to "aid" the trial court on remand.[206] Although the court devoted a significant portion of the opinion to discussing the circumstances under which a bona fide purchaser for value can obtain good title to property from a thief, the court determined that the critical legal question was when O'Keeffe's cause of action accrued—at the time the paintings were taken, at the time she learned where the paintings were located, or at some other point in time.[207] The court held that the discovery rule applied to an action for replevin of a painting under New Jersey law and that the cause of action accrued when O'Keeffe first knew, or reasonably

202. *Id.* at 864–66.

203. *Id.* at 865. *See also* O'Keeffe v. Snyder, 405 A.2d 840, 843 (N.J. Ct. App. 1979), *rev'd and remanded*, 416 A.2d 862 (N.J. 1980).

204. *O'Keeffe*, 416 A.2d at 865; *O'Keeffe*, 405 A.2d at 844–45. The court of appeals also held that the elements of adverse possession were "part and parcel" of the statute of limitations governing replevin and therefore the defendant could not take advantage of the statute of limitations for replevin without also independently meeting all of the elements of adverse possession. The court recognized that this would result in very few cases where the person in possession of chattels could ever establish ownership of the item by adverse possession, because chattels are generally not openly visible to the public in the same way as real property, but that when faced with a choice between two "innocent" parties, the court chose to err on the side of placing the item with the true owner. *O'Keeffe*, 405 A.2d at 845, 847–48.

205. *O'Keeffe*, 416 A.2d at 867–68.

206. *Id.* at 867.

207. *See id.* at 868. The trial court had found the cause of action accrued at the time of the theft, while the court of appeals found the action did not accrue until the defendant established all the elements of adverse possession. *Id.* at 868.

should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.[208] The court then turned to the problem of how the doctrine of adverse possession, which had historically applied to personal property as well as real property in New Jersey, should impact the case.[209]

Under New Jersey law, to establish title by adverse possession to personal property or "chattels," the possession must be hostile, actual, visible, exclusive and continuous.[210] However, the court recognized the "inherent problem" with application of the doctrine to many kinds of personal property. As an example, the court posited that if jewelry was stolen in one town and was worn in another town, it would be unlikely the true owner would learn that someone was openly wearing the jewelry in the other town and thus the open use of the property would be insufficient to put the true owner on actual or constructive notice of the identity of the possessor.[211] The court then stated that the problem was even more acute with regard to stolen art, because such property is readily moved and concealed and is often not on public display for a continuous period of time.[212] If the court were to require continuous public display in order to alert the true owner to the running of the limitations period, that would impose a heavy burden on bona fide purchasers of paintings who wished to enjoy the paintings in their own homes.[213]

After presenting the problem, the court concluded "that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession."[214] The court reasoned that the discovery rule "shifts the emphasis from the conduct of the possessor to the conduct of the owner."[215] As a result, the focus of the inquiry on remand and in future cases would "no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property."[216] "Under the discovery rule, if an artist [or other owner] diligently seeks the recovery of a lost or stolen painting but cannot find it or discover [it], the limitations period will not begin to

208. *Id.* at 870.
209. *Id.*at 870–71.
210. *Id.* (citing Redmond v. N.J. Historical Soc'y, 28 A.2d 189 (N.J. 1942)); Joseph v. Lesnevich, 153 A.2d 349 (N.J. Super. Ct. App. Div. 1959).
211. *Id.* at 871.
212. *Id.*
213. *Id.*
214. *Id.* at 872.
215. *Id.*
216. *Id.*

run."[217] Thus, the rule "permits an [owner] who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession."[218] The court then overruled its prior decisions that had focused on the conduct of the possessor under the elements of adverse possession as applied to recovery of personal property.[219] The court was clear that its decision "not only changes the requirements for acquiring title to personal property . . . but also shifts the burden of proof . . . [to] the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations."[220]

Although there certainly are differences between adverse possession of personal property and adverse possession of wild lands, the *O'Keeffe* case is instructive nonetheless. First, it provides an example where a state supreme court made a determination that the mechanical application of the doctrine of adverse possession simply does not "fit" cases involving disputes over ownership of personal property. Thus, the court modified the law of adverse possession in New Jersey to create "special case" status excluding personal property from the doctrine entirely, and shifting the focus from the conduct of the possessor to the conduct of the true owner.

In the same way, it is within the authority of the courts to determine that the mechanical application of the doctrine of adverse possession no longer "fits" properly in the context of wild lands in light of the societal interest in conserving land. Then, as was done in *O'Keeffe*, courts can shift the focus away from the acts of the adverse possessor and focus instead on the intent or effect of the actions of the true owner to preserve his land through baseline studies, monitoring activities, filing a property affidavit, registering the property as conservation land, creating conservation or open space values, or through other evidence of intent or effect to preserve the land in an undeveloped state.

Indeed, in *O'Keeffe*, the court suggested that art registries would better serve the interests of owners and possessors than the doctrine of adverse possession and crafted its holding to encourage those in the art world to use whatever means possible to show due diligence.[221] In the same way, courts could place the focus on the activities of the true owner as discussed above to determine whether the owner had been acting with the intent to preserve the land in its natural state or whether his actions resulted in promoting conservation values. If the true owner made such a

217. *Id.*
218. *Id.*
219. *Id.* at 873.
220. *Id.*
221. *Id.* at 872–73.

showing, that would suffice for "use" and "possession" of land and would thus preclude the adverse possession of such land because the possessor's activities would not constitute "exclusive use."

5. Using Ecosystem Services Valuation to Justify Abandoning Current Standards for Adverse Possession of Wild Lands

In order to justify a judicial departure from many years of disparate treatment for adverse possession of wild lands, it may be helpful to base such a development not only on changes in public sentiment regarding conservation, but also on an ecological and economic framework that attempts to quantify those values. That framework is the growing field of "ecosystem services." Ecosystem services are defined as "the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life."[222] Ecosystems are a key component of our natural capital, but historically have not been recognized and given monetary value by society because they are "free."[223] For instance, while markets place dollar figures on "ecosystem goods" such as timber, natural medicinal products, agricultural products and fish, they do not value the soil, nutrients, open space and other natural components that are necessary to produce these goods.[224]

A growing body of literature presents the case for valuing and thus increasing protection for wetlands, anti-soil erosion efforts, improved water quality through water purification, species diversity protection, climate stability, healthy forests, and clean air.[225] This work aims not

---

222. Gretchen C. Daily, *Introduction: What are Ecosystem Services?*, *in* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 1, 3 (Gretchen C. Daily ed., 1997). Ecosystem services support "ecosystem goods" such a seafood, forage, timber, biomass fuels, natural fiber, and pharmaceutical and industrial products. *Id.*

223. Geoffrey Heal et al., *Protecting Natural Capital Through Ecosystem Service Districts*, 20 STAN. ENVTL. L.J. 333, 341 (2001).

224. *See id.* at 341. Examples of ecosystem services that have historically been taken for granted are purification of air and water, mitigation of floods and droughts, detoxification and decomposition of wastes, generation and renewal of soil and soil fertility, pollination of crops and vegetation, control of agricultural pests, maintenance of biodiversity, climate stabilization, support of diverse cultures and providing aesthetic beauty and intellectual stimulation. Daily, *supra* note 222, at 3–4.

225. *See, e.g.*, NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, *supra* note 222 (collection of articles on economic and ecological issues surrounding ecosystem services); J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47 (2003) (arguing that ecosystem services values should be used to fashion interstate water allocation policy); James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U. L. REV. 870 (2005) (discussing developments in research on ecosystem services and reviewing initiatives around the world which have sought to create markets for natural capital); James Salzman & J.B. Ruhl, *Curren-*

only to create political and policy arguments to justify why habitat preservation and biodiversity are vital to our world, but also to provide a mechanism to capture the value of ecosystem services and create institutional and market mechanisms to quantify and promote service values.[226] New instances of valuation of ecosystem services include government payment programs in various countries for forest service ecosystems and the U.S. Environmental Protection Agency's Science Advisory Board on Valuing the Protection of Ecological Systems and Services.[227]

Preservation of undeveloped land is yet another example of an ecosystem service that is undervalued (and sometimes not valued at all) in the marketplace because historically it was viewed as merely a precursor for a "good" that is valued in the marketplace—namely, land developed for commercial, agricultural, residential or industrial purposes. Indeed, our entire property valuation system, based on the land's "highest and best use," values the land based on its capacity for development and has difficulty valuing land used for its ecosystem service value.[228] This valuation problem is at the heart of the separate standard for adverse possession of wild lands. Because undeveloped land historically was not given any value apart from its development potential, and indeed was perceived as impeding value and economic development, courts readily transferred it by adverse possession to non-record owners who were more likely to add "value" to the land through even minimal agricultural or residential development.

---

cies and the Commodification of Environmental Law, 53 STAN. L. REV. 607 (2000) (analyzing environmental trading markets ("ETMs") such as wetland banking programs, air pollution trading programs, and species habitat programs and suggesting modifications to such programs to more accurately capture the value of nonfungible resources); James Salzman, *Valuing Ecosystem Services*, 24 ECOLOGY L.Q. 887 (1997) (discussing developments in ecosystem services) (reviewing NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, *supra* note 222); Barton H. Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 261 (2000) (discussing use of markets and economic incentives to protect the environment); Symposium, *Ecosystem Services*, 20 STAN. ENVTL. L.J. 309 (2001).

226. *See* James Salzman et al., *Protecting Ecosystem Services: Science, Economics and the Law*, 20 STAN. ENVTL. L.J. 309, 312–13 (2001). *See also* Lawrence H. Goulder & Donald Kennedy, *Valuing Ecosystem Services: Philosophical Bases and Empirical Methods*, *in* NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS, *supra* note 222, at 23, 33–35 (discussing methods for valuing non-use and non-consumptive values from ecosystems).

227. *See* Salzman, *supra* note 226, at 873 (citing Sci. Advisory Bd., Request for Nominations for Experts for a Panel on Valuing the Protection of Ecological Systems and Services, 68 Fed. Reg. 11,082 (Mar. 7, 2003)).

228. "Highest and best use" is "[a]n appraisal term meaning that reasonable use . . . that is most likely to produce the greatest net return to the land." *See* JOHN W. REILLY, THE LANGUAGE OF REAL ESTATE 197 (5th ed. 2000).

However, the growing body of scientific, policy and legal thought and data surrounding ecosystem services presents a framework for valuing undeveloped land in its own right (i.e., apart from its development potential), thus upsetting the calculus that was relied upon to create special rules for adverse possession of wild lands. Once "value" is placed on undeveloped land in its own right, it becomes an easier case to justify abandoning the special standard for adverse possession of wild lands.

The ability of ecosystem services to actually influence policy and transform markets in a way that provides greater protection for natural resources certainly faces many hurdles because of the difficulty in valuing and creating market exchanges for nonfungible resources such as wetlands and species diversity.[229] However, such difficulties do not impede the use of ecosystem services in the adverse possession context. The lesser standard for adverse possession of wild lands is based on the idea that undeveloped lands have little or even negative value. Whether or not the field of ecosystem services can capture the precise market value of any particular piece of undeveloped land is beside the point. Because ecosystem services provides a theoretical and economic framework for justifying that such lands have *some* value (and in many cases, significant, quantifiable value for clean air, clean water, open space, aquifer recharge and wildlife habitat),[230] it provides a concrete basis for abandoning an outdated legal standard for adverse possession of wild lands. In this way, the science of ecosystem services can work in tandem with modern-day public sentiments regarding protection of undeveloped land to justify a modification of current doctrine.

CONCLUSION

In reviewing recent developments in adverse possession law as it applies to wild lands, it becomes clear that while lands in formal conservation easements or held in fee by land trusts now have significant protection from the doctrine of adverse possession, the doctrine continues to pose a threat to wild lands in private ownership. In light of society's interest in preserving open space and undeveloped land, the historic policy reasons that underlie the development model and other grounds for adverse possession no longer justify a strict application of the doctrine to

229. *See, e.g.*, James Salzman & J.B. Ruhl, *supra* note 226 (discussing environmental trading markets such as regulatory programs for air pollution trading, wetland banking and species habitat, and concluding that in cases where the resource is nonfungible, such as a wetland or species habitat, the current market programs rarely capture the full value of the resources).

230. *See* Salzman, *supra* note 226, at 872 & nn.3–4 (discussing financial impact of land and forest development on water purity and flood control).

wild lands. While a statutory fix to exempt wild lands from the doctrine is certainly the most straightforward solution, such relief does not appear forthcoming.

In the meantime, the fact that there has been at least some positive movement in the judicial treatment of adverse possession of wild lands allows one to suggest that there is increasing judicial recognition of conservation values through considering evidence of conservation intent or effect. If the minimal "transforming" activities of the adverse possessor have been enough through the years to "communicate" the intent of the adverse possessor sufficiently to obtain title, courts should also recognize the true owner's potential expressions of conservation intent and effect as a similar form of communication with regard to use and possession of the land. Courts could do this by expanding notions of "use" and "possession" across the board or, more narrowly, by placing the focus on the true owner only in cases involving wild lands in recognition of the fact that the wooden application of adverse possession no longer "fits" for wild lands in our modern society. In this way, we can inject contemporary values regarding conservation and preservation into the doctrine of adverse possession until state legislatures turn their attention to the matter and perhaps statutorily exclude wild lands from adverse possession entirely.