By Wendy Lathrop, LS, CFM

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Land Ethics

Boulder Colorado–home to Celestial Seasonings, the University of Colorado, the National Hazards Center, millionaires–and possibly also land grabbers? I recently shared dinner with a colleague from Colorado, who alerted me to a case of modern day possible ethical lapses and an apparently falsified land rights claim that nailed my attention.

The necessary elements for an adverse claim of title (as opposed to merely a claim of use) require that the adverse claimant bears the burden of proving his or her possession has been open, notorious, hostile, exclusive, and continuous for the statutorily prescribed time in that jurisdiction–a time frame that varies widely across the nation, from less than ten years up to 60 years. "Open" means that the adverse claimant has been occupying the land in a manner that is not hidden, while "notorious" means that the adverse occupation is actually noticed. "Hostile" refers to the fact that the occupation is not permissive, and "exclusive" means that the occupation excludes the true owner from exercising his or her full rights and claims to the land. Continuity does not require the same adverse claimant to occupy the land for the entire time, but instead allows "tacking" under a continued claim of right to create the necessary total time, based on transferring the claim.

A number of states add qualifications. Several require payment of taxes, while elsewhere tax collectors don't care who foots the bill as long as the money comes rolling in. Various states specifically prevent adverse possession claims when there is no ambiguity in the location of the boundary between adjoiners, or prohibit mistaken belief from being the basis of a claim. Many also protect those considered to be "disabled", such as minors or mental incompetents.

Richard McLean, a former Boulder mayor, city councilman, and district court judge, and his attorney wife Edith Stevens live next to a vacant lot owned by Don and Susie Kirlin that separates the McLean/Stevens residential lot from a third lot that bears the Kirlin residence. In 2006, the Kirlins noticed a path across their vacant lot and erected a fence to block the path, resulting in McLean and Stevens filing for (and quickly obtaining with surprising speed) a restraining order. McLean and Stevens then pressed a suit for title by adverse possession in which they claimed that they have been using the path for more than the required 18 years and that the Kirlins never told them not to. In October 2007, the Boulder district court issued its opinion that the McLean/ Stevens use of the semi-circular path for gardening and foot traffic had met all the statutory requirements, and granted then more than a third of the million-dollar Kirlin lot, rendering the remainder sub-code and therefore unbuildable.

The Kirlins have filed their appeal, supplying affidavits that the path was quickly fabricated shortly before McLean and Stevens filed suit against them, even narrowing the presumed emergence of the path down to a particular date. Particularly disturbing to me is an affidavit from a surveyor that he apparently was subjected to extreme duress by his licensed employer to make him swear on a Bible that the path that is the basis for the McLean/Stevens adverse claim did exist, despite the field surveyor's doubts and suspicions. Aside from the accusation of such unprofessional behavior, it certainly paints a bad image of surveyors in general to the public reading the local papers. We never practice in a vacuum, and all of our activities are subject to public scrutiny and judgment, whether or not the State Board or a court steps in. At any rate, on March 31, 2008 the appellate court ordered the district court to review all of the new evidence before it will hear the case.

> **"Land ethics involve both adjoining landowners and surveyors. How we approach the evidence… is part of the moral maze."**

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There has been an overwhelming public display of support for the Kirlins and DK Trust (as the defendants are named in the suit): demonstrations, blogs, and words rewritten to Woody Guthrie's "This Land is Your Land". Even the Colorado legislature is involved. Proposed legislation would prohibit a district court judge from presiding over a case in which another judge or former judge of the same court is a party, sending such cases to the chief justice of the Colorado Supreme Court for appointment of a different presiding judge. Does this really solve any possible temptation to ethical lapse, or does it merely address a single perceived occurrence? A second proposed law would require that each of the common law and statutory elements of an adverse claim is proved by "clear and convincing" evidence, and that adverse claimants demonstrate that they have acted in good faith. This proposal further prohibits adverse claims against charitable organizations.

The pressure for adverse possession claims has manifested itself in various forms over the centuries. It has appeared to promote putting land to its highest and best economic use rather than the less active use applied by the true landowner. Falling in this category is a current client fighting off a neighbor who says my client's forested floodplain has been abandoned, and therefore he (the owner of an adjoining condominium) has a better claim to it. In my mind this falls in the class of "land grabs". We also encounter situations with ambiguously worded deeds, involving adjoiners uncertain of the true location of their boundaries but maintaining good faith occupation of what they believe is their own property. Past clients finding themselves in this situation have sometimes worked together to clarify the location of the line and then formalize it through recorded boundary line agreements, reassuring future landowners and surveyors that the same confusion will not rise again.

Land ethics involve both adjoining landowners and surveyors. How we approach the evidence we find, whether in the field or in the hall of records, choosing to ignore it or report it, also is part of the moral maze. Taking sides or altering evidence is a breach of public trust and of the professionalism expected of us when we are granted the privilege of licensure.

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that legal topic, and fewer still would suggest that the owner consult an attorney for that opinion. So it cannot be the opining on legal topics itself that gives some of us pause. We step on less firm ground when expressing opinions on adverse possession and prescription, and I once thought (and wrote) that those topics were *verboten* to us. No more. Are there potential dangers in our swimming in those waters? Of course. One needs to know the rules of the game, or one can get into trouble quickly. How is that different from any other part of our practice?

The question presented by this discussion is, "Are we ready to serve in this role?" For many of us, sadly, the answer is "No." In the aforementioned trial where area became an issue, the opposing surveyor testified that our state does not have a particular set of rules for choosing between conflicting title elements; he essentially placed boundaries from day to day with no firm rules to guide him. Upon hearing that, I almost fell off my chair. Obviously we have failed in some quarters in educating our surveyors-to-be and in winnowing out the unqualified during the licensing process. If that is the case, we cannot be the solution required by the legal profession's retreat.

Action Items

Two things should happen. First, our understanding of legal doctrines affecting our practice needs to deepen. Frankly, there is no excuse for a licensed surveyor today to opine that there are no particular rules governing boundary retracement. To the extent that this is the case, both the pre-licensure and post-licensure educational experiences for that surveyor have failed. *In fact, the licensing process itself has failed.* I hope we can agree on that.

Second, we should eradicate the false notion that surveyors only identify problems and have no role in rectifying them. That assumption is supported neither by logic nor the market. There is no preclusion to our serving in that capacity, and no one else is focusing on these issues. No other professional deals, for instance, with determining senior and junior rights in a chain of title; why, after detecting a conflict of that sort, would we bail out of the conversation? It makes no sense, and it does a disservice to the parties involved.

Not to mention, us.