



OTTEN JOHNSON ALERT

Colorado Easement Law Update

January 2023 • [Alida Soileau](#)

The Colorado Supreme Court and Colorado Court of Appeals have recently issued several opinions addressing novel issues in easement law. Specifically, they address (i) whether a claimant's acknowledgement of the record owner's title during the asserted prescriptive period for a prescriptive easement interrupts the prescriptive use, thereby defeating the claimed easement; (ii) whether, in addition to conferring rights of access, an easement that arises by necessity may confer a right to install utility lines; and, (iii) whether a utility company that has an easement to maintain a water pipeline over private property may recover expenses incurred in relocating the pipeline after the property owner's unreasonable interference with the easement places the pipeline at risk. Though most easement cases are highly fact-specific, these cases do have notable implications for property owners, developers, associations, and utility providers alike.

Lo Viento Blanco, LLC v. Woodbridge Condo. Ass'n

In *Lo Viento Blanco, LLC v. Woodbridge Condo. Ass'n* the Colorado Supreme Court held that a claimant's acknowledgment of a neighboring property owner's title during the asserted prescriptive period does not interrupt the prescriptive use or otherwise undermine the claimant's adverse use of the neighboring property.

Here, the Woodbridge Condominium Association maintained, used, and improved a neighboring parcel of land from 1975 until at least 2012, "as if it owned that parcel." However, in 1991 the Association asked the record owner of the neighboring parcel for

permission to plant trees and shrubs. The owner said he would grant permission if the Association would agree to certain conditions, but the Association never accepted the conditions and continued using the property. Though the Association recognized the owner of record, its use remained non-permissive. Further, in 1992, the Association offered to purchase the parcel from the record owner but never received a response. These acknowledgements of the title of the owner of record could have been construed as interrupting the prescriptive period if the Association had claimed fee title through adverse possession, but the acknowledgements did not defeat the Association's prescriptive easement claim.

In so holding, the Court reiterated that the requirements for acquiring a prescriptive easement differ from the requirements for acquiring fee title to property through adverse possession. To obtain fee title through adverse possession, a claimant must show that their possession was "hostile." The Colorado Supreme Court has previously held that acknowledgement of the property owner's title during the period of otherwise adverse possession defeats this hostility requirement. However, "unlike a claim of title by adverse possession, a claim to a prescriptive easement does not require a showing of 'hostility' (i.e., a claim to exclusive ownership)" (citing Lobato v. Taylor, 2002). Thus, "a claimant seeking to establish a prescriptive easement need not show that it asserted exclusive ownership of the property during the prescriptive period." Rather, the claimant must merely show that it used the property without permission or authorization, and that such use interfered with the interests of the record title holder. (All quoted language from the Lo Viento opinion.)

Though all claims of adverse possession or prescriptive easements are necessarily fact-intensive inquiries, Lo Viento Blanco underscores that the standard is lower for claims for prescriptive easements than for fee parcel possession. Property owners should be aware that the use of their property by third parties, even when their title ownership is acknowledged, may give rise to prescriptive rights.

Amada Family Ltd. v. Pomeroy

In *Amada Family Ltd. v. Pomeroy*, the Colorado Court of Appeals considered whether an implied easement that arises by necessity may confer a right to install utility lines, in addition to conferring rights of access. The Court of Appeals concluded that an easement by necessity may include the right to install utilities.

An easement by necessity exists where a parcel owner, "grants part of the land to another party, leaving either the part granted or the part retained without access except through the other part." In that instance, "a presumption arises that the grantor has conveyed or retained whatever is necessary to provide for the beneficial use of both properties." However, the scope of an easement by necessity depends upon the purpose for which the landlocked parcel was conveyed. Specifically, the permissible uses of an easement by necessity, "vary according to what rights are necessary to

enable a grantee to use the land as intended and reasonably expected.” (All quoted language from the Amada opinion.)

Though the history of the Amada, Pomeroy, and surrounding properties is long and complex, as is relevant to the Court of Appeals’ interpretation of the scope of an easement by necessity, the Amadas openly acquired a parcel of land for residential use. The adjacent (non-Pomeroy) land was impassable due to topographical and other conditions, without any “feasible” points of ingress or egress, meaning that the Amada parcel was only accessible through adjacent parcels owned by the Pomeroyes. The Amadas claimed an easement by necessity to provide access and utilities to their parcel.

The Court of Appeals adopted the approach of other states in holding, for the first time, that an easement by necessity may include the right to install utilities in addition to access. Because the scope of an easement by necessity is determined by the purpose of the conveyance of the landlocked parcel, and it was reasonable and foreseeable that residential use of the Amada parcel would require the installation of utilities, the Court of Appeals held that the Amada’s easement by necessity across the Pomeroyes’ land included the right to install utilities, in addition to rights of ingress and egress.

Following *Amada*, landlocked parcel owners claiming an easement by necessity should be aware that the scope of the easement could potentially include the right to install utilities if the circumstances surrounding the conveyance of the landlocked parcel make that claim for utilities installation reasonable and foreseeable.

Ute Water v. Fontanari

In *Ute Water v. Fontanari* the Colorado Court of Appeals held that Ute Water Conservancy District, the grantee of express water pipeline utility easements, could recover expenses associated with relocating its water lines because the owners of the burdened property took actions that made relocation “reasonable, necessary and foreseeable.”

Ute Water, a water utility, constructed a water pipeline within an express, perpetual easement over private property in 1981. Subsequently, the owner of the servient estate, the parcel of land burdened by the utility easement, expanded the nearby residence pad, cutting off access points to the pipeline. The servient estate owner also developed the road that ran atop a portion of the pipeline, impacting pipeline access, increasing the likelihood of damage to the line, and making detecting and locating leaks more difficult. According to Ute Water, “the alterations prevented Ute Water from safely and timely accessing the pipeline for routine maintenance or emergency repairs.” After failed settlement attempts, Ute Water built a new section of the pipeline that bypassed the parcel at issue, and filled and plugged the existing, at-risk line. Ute Water then requested damages in the amount of its expenses for relocating the

pipeline.

The Court of Appeals noted that the servient estate owners, “do not dispute that they unreasonably interfered with the easement.” In determining the amount of compensation the Ute Water should receive for such unreasonable interference, the trial court relied on cases that do not expressly state that a court may award relocation damages, but also do not prohibit a court from awarding such damages. The trial court’s decision to award relocation damages was not in error, even though Ute Water utilized self-help measures, which the law generally disfavors.

“[U]nder the circumstances of this case, ‘Ute Water’s only viable alternative was to reroute the pipeline.’” The Court of Appeals noted that the cases the trial court relied on distinguish utility easements as being particularly important, in part because they may affect public safety. Here, the servient estate owner’s actions threatened the water supply of 80,000 Ute Water customers, including hospitals, fire stations, and schools. The Court of Appeals held that the trial court had discretion to award relocation damages because, “the owner of the servient estate breach[ed] the conveyance instrument of a utility easement by unreasonably interfering with the easement,” and the servient estate owner’s actions made relocation “reasonable, necessary, and foreseeable.” (All quoted language from the Ute Water opinion.)

Property owners should be aware that unreasonably interfering with utility easements may put them at risk of footing the bill for relocating utilities. The Colorado Court of Appeals denied a petition for rehearing on January 19, 2023, but this opinion has not been released for publication pending the deadline for filing a petition for writ of certiorari in the Colorado Supreme Court. That deadline is Thursday, February 16, 2023.

Conclusion

Lo Viento confirms that a claim of a prescriptive easement does not require a showing of “hostility” and establishes that a claimant’s acknowledgement of the record owner’s title during the asserted prescriptive period does not interrupt the prescriptive use and does not defeat the prescriptive easement claim. Amada holds that the scope of an easement by necessity may include the right to install utilities if it bears a reasonable and foreseeable relationship to the purpose for which a landlocked parcel is conveyed. Ute Water instructs that the owner of a utility easement may, under certain circumstances, rely on a self-help remedy by relocating the utility easement and improvements when the servient estate owner’s actions unreasonably interfere with the easement, making relocation “reasonable, necessary, and foreseeable,” and collect relocation costs.

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