

# WHOSE LAND IS IT ANYWAY?: IT'S TIME TO RECONSIDER SOVEREIGN IMMUNITY FROM ADVERSE POSSESSION

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*The topic of sovereign immunity from adverse possession is largely unexplored. This Comment addresses the issue, specifically focusing on whether such sovereign immunity is justified by public policy, and conversely, whether the traditional justifications for adverse possession apply with equal force in the context of government-owned land. First, government land is not sufficiently different from privately held land to justify its sovereign immunity from adverse possession. The traditional judicial arguments for sovereign immunity of certain municipal land, as well as the arguments that government-owned environmental land and land held as an investment deserve special protection from adverse possession, are examined and rejected. Next, considering the realities of government administration, the threat of adverse possession could actually motivate government to use its land more efficiently. The substantial benefits, including accountability for the effective use of government-owned land, are contrasted with the low costs of subjecting government land to adverse possession. These costs include land lost to adverse possession and the costs of monitoring government land that the threat of adverse possession would require. Finally, equity requires that the government, which may take title to privately owned land under doctrines akin to adverse possession, subject its own land to adverse possession.*

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## INTRODUCTION

People are often surprised to learn that a trespasser may take title to land from a true owner under certain conditions<sup>1</sup> and that such theft is authorized by the government under laws of adverse possession. One of the justifications for adverse possession is the policy of encouraging efficient land use. This argument asserts that the threat of having land adversely possessed encourages landowners to make productive use of the land, or at the very least keep a watchful eye over it. Along the same lines, the adverse possessor is rewarded, in the form of receiving title to the property, for productively using land that has been abandoned by the true owner.

Recently, the City of Seattle attempted to make use of long-ignored, narrow strips of land that run from city streets to dead ends at the Lake Washington waterfront.<sup>2</sup> These so-called "street ends" typically lie between residential waterfront properties. In most cases this land had been ignored by the city, and in many cases it has been used for years by adjacent landowners. About one-third of the 149 shoreline street ends have become overgrown and unusable, while another third have been "absorbed by neighboring property owners . . ."<sup>3</sup> In at least one case, a resident adjacent to a street end has used it for nineteen years.<sup>4</sup> Were it not for restrictions

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1. Use of land by a nonowner must be actual, open and notorious, hostile, exclusive, and continuous in order to constitute adverse possession. See GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 77 (1996).

2. See Lisa Stiffler, *Search for More Parks May Rest in Dead Ends*, SEATTLE POST-INTELLIGENCER, Sept. 27, 1999, at B1.

3. *Id.*

4. See *id.*

on adverse possession against the City of Seattle, this land would now belong to the people who have tended to and cared for it over many years.<sup>5</sup>

## I. A BRIEF OVERVIEW OF SOVEREIGN IMMUNITY FROM ADVERSE POSSESSION

### A. *Nullum Tempus Occurrit Regi* and Sovereign Immunity

Although the government authorizes adverse possession, it exempts itself from these statutes under the doctrine of sovereign immunity.<sup>6</sup> The doctrine that the sovereign was immune from the tolling of statutes of limitations, termed *nullum tempus occurrit regi*, or sovereign immunity, originated in England as a means of protecting the king,<sup>7</sup> who was too busy acting for the benefit of his subjects to look after his land.<sup>8</sup> Sovereign immunity was further justified under the dramatic yet questionable policy that "might makes right," or to put it another way, "the King established his own rules for litigation."<sup>9</sup>

Though widely accepted in the United States as a rule of statutory construction,<sup>10</sup> the doctrine of sovereign immunity has not been free from attack. Legal scholars have argued that the consequences of delaying a cause of action are no less prejudicial when the delay can be attributed to the government rather than to a private citizen. Although the government, acting in the best interest of the people, may not be as likely to intentionally defer a cause of action as a private citizen might be, the sovereign immunity exception encourages administrative delay and inefficiency.<sup>11</sup> Furthermore, "the argument that statutes of limitation should not be applied to busy government officials is not consistent with the burden placed on the same officials through tax and penal laws."<sup>12</sup> More recently, sovereign immunity from tort liability has come under attack by both courts

5. See *State v. Scott*, 89 Wash. 63 (1916).

6. See NELSON ET AL., *supra* note 1, at 82.

7. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*243-49.

8. See, e.g., *Devins v. Borough of Bogota*, 592 A.2d 199, 202 (N.J. 1991); Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1251 (1950) (citing 1 BLACKSTONE COMMENTARIES \*247; ROBERT DORSEY WATKINS, THE STATE AS A PARTY LITIGANT 33 (1927)).

9. *Devins*, 592 A.2d at 202.

10. See Note, *supra* note 8, at 1251.

11. See *id.*

12. Carl C. Risch, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197, 200 n.24 (1994) (citing Note, *supra* note 8, at 1252-53).

and commentators.<sup>13</sup> Despite these attacks, sovereign immunity from adverse possession, with a few exceptions, has largely survived.

## B. The Current State of Adverse Possession Against the Sovereign

Although federal and state land is almost universally protected from adverse possession, municipal land is not immune in many jurisdictions.<sup>14</sup> These jurisdictions usually allow adverse possession under one of two lines of analysis. Municipalities either create an additional element of adverse possession—public use—or they distinguish between land held in a proprietary, versus a governmental, capacity,<sup>15</sup> protecting land held in a governmental capacity.

In some jurisdictions that apply the public use approach, a municipality may defeat a claim of adverse possession by proving that the land in question was put to an actual public use. Other jurisdictions require the adverse possessor to prove that the land in question was not dedicated to a present or future public use.<sup>16</sup> The Supreme Court of Vermont, for example, upheld a claim of adverse possession against a parcel of land that a municipality had acquired for the settlement of debt because it had not been dedicated to a public use. The court explained that the “parcel was not used by the public [throughout the fifty-one years] the town had title, and by conveying the parcel to defendant, a private individual, the town manifested that it had no intention of ever using the parcel for a public use.”<sup>17</sup>

The public use and governmental/proprietary distinctions, as they relate to adverse possession, have recently come under attack. The primary objection is that these distinctions are difficult to make in practice and have not been applied consistently.<sup>18</sup> In addition, they allow adverse possession of the government’s most vulnerable land. Land that has been taken by the government for failure to pay property taxes is especially vulnerable, as it is often considered to be held by the municipality in a proprietary, or a nonpublic, capacity. This recently acquired land is easily overlooked by the government and becomes susceptible to adverse pos-

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13. See Paula R. Latovick, *Adverse Possession of Municipal Land: It's Time to Protect this Valuable Asset*, 31 U. MICH. J.L. REFORM 475, 482–83 (1998).

14. See Risch, *supra* note 12, at 197. But see Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939 (1996) (explaining that in certain circumstances state land is not immune from adverse possession).

15. See Risch, *supra* note 12, at 200, 205, 209.

16. See *id.* at 200, 209.

17. *Jarvis v. Gillespie*, 587 A.2d 981, 988 (Vt. 1991).

18. See *Austin v. City of Baltimore*, 405 A.2d 255, 273 (Md. 1979); Latovick, *supra* note 13, at 479–81; Risch, *supra* note 12, at 200.

session.<sup>19</sup> Meanwhile, government land that has been put to productive public use is immune. Although there is some consensus that the governmental/proprietary distinction should be abandoned, authors disagree on whether sovereign immunity is justified at all.<sup>20</sup>

This Comment argues that adverse possession should be allowed against all forms of government. If adverse possession against land held by municipalities can be justified, then what reason is there for exempting state and federal government land? This Comment first focuses on whether there is something about government land that is sufficiently different from private land to justify sovereign immunity. The arguments courts have used to exempt certain municipal land from adverse possession are examined to determine if they justify complete sovereign immunity for all government owned land. Next, this Comment takes a close look at the sovereign itself and argues that though there are some significant differences between government and private landowners, these differences strengthen rather than weaken the case for adverse possession against the sovereign.

## II. WHY NOT ALLOW ADVERSE POSSESSION AGAINST THE GOVERNMENT?

Two related questions must be answered to determine if sovereign immunity from adverse possession is justified. The first is whether there is something special about government land that warrants extra protection. If government land is held in some unique capacity, or if government-held land is unique in and of itself, then perhaps government land should be exempt from adverse possession even though similar privately held land is not immune. This Comment suggests that government land should not be treated differently from land held by private landowners.

The second question is whether there is something unique about government that justifies the exemption of its land from adverse possession when other land owned by individuals and associations does not receive this same protection. For example, the government may not have the proper accountability to prevent unwanted adverse possession.

This Comment suggests that the benefits of adverse possession against the government outweigh the costs. Furthermore, the government may be

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19. See Latovick, *supra* note 13, at 488.

20. See Latovick, *supra* note 13, at 512–13 (arguing that the governmental/proprietary distinction should be abandoned in favor of complete sovereign immunity for municipal land); Risch, *supra* note 12, at 218 (arguing that the governmental/proprietary distinction should be abandoned in favor of a public use approach).

especially well-suited to take advantage of the incentive to make productive use of land provided by the threat of adverse possession.

## A. Government Land Is Unique in and of Itself

### 1. Judicial Justifications for the Sovereign Immunity of Municipal Land

Because the sovereign is exempt from adverse possession in most cases, courts have not had many opportunities to discuss the justifications for this exemption. Nevertheless, some courts have wrestled with the doctrine of sovereign immunity in the context of the distinction between municipal land held in a governmental capacity and that held in a proprietary capacity. These courts have articulated several justifications for sovereign immunity of land held in a governmental capacity.<sup>21</sup> If these arguments were applicable to all government land, then they would justify complete sovereign immunity.<sup>22</sup> This part of the Comment sets forth and tests all such arguments in favor of sovereign immunity.

Some courts have decided that because government land held in a public trust is inalienable, its title cannot pass through adverse possession.<sup>23</sup> Others have held that certain types of unauthorized use of government land constitute a nuisance and that no amount of time can legalize a nuisance.<sup>24</sup> Finally, at least one court has held that adverse use of government land is permissive until such time as the government asserts its right to the

21. Many courts cite the doctrine of sovereign immunity without giving an explanation beyond noting that the land is held by the government for the public benefit. See, e.g., *Thurston v. City of Forest Park*, 89 S.E.2d 509, 511 (Ga. 1955) (holding that time does not run against the sovereign when it holds land "for the benefit of the public"); *Town of Chouteau v. Blankenship*, 152 P.2d 379, 383 (Okla. 1944) (concluding that land held by the government "in trust for the public" is immune from adverse possession). The fact that the government holds land for the benefit of its citizens is less a justification for sovereign immunity than a factor in determining why a particular piece of government land is held in a governmental rather than a proprietary capacity. See *Sisson v. Koelle*, 520 P.2d 1380, 1382 (Wash. App. 1974) (explaining that land is held in a governmental capacity, in contrast to a proprietary capacity, when held for public purposes). Furthermore, private landowners who hold land for the benefit of the public, such as land trusts, are subject to adverse possession. See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 854-56 (1994).

22. At least one court has recognized that "[s]ince counties and municipalities are instrumentalities of the State, created by the State to carry on some of the State's governmental functions," there is little reason to distinguish them "for purposes of immunity." *Austin*, 405 A.2d at 265.

23. See, e.g., *Messersmith v. Mayor & Common Council of Riverdale*, 164 A.2d 523, 525 (Md. 1960); *Latovick*, *supra* note 13, at 483-84.

24. See *infra* note 25.

land.<sup>25</sup> These justifications, however, do not withstand scrutiny and do not overcome the rationale that justifies adverse possession in the first place.

Restrictions on the alienation of land held by the government do not justify sovereign immunity for such land. First, government-held land is not inalienable under all circumstances. Although a municipal corporation may be limited in its ability to alienate such land, the land itself may be freely conveyed by the proper authority, that is, the legislature or other government body with ultimate responsibility for the land.<sup>26</sup> Second, land subject to restrictions on its alienability that is held by a private party does not become immune from adverse possession. For example, a private landowner would not become immune from adverse possession merely because she had rented or leased land to a third party and included restrictions on the transfer of the third party's interest in the land. Finally, restrictions on the alienability of land imply no guarantee that the land will be used productively, and it is this concern for the productive use of land that undergirds most justifications for adverse possession.

Other courts have argued that in cases in which unauthorized use of government land constitutes a nuisance, such use cannot constitute adverse possession. This argument asserts that "[t]here can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment. Each day's continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription."<sup>27</sup>

As applied to municipally owned streets specifically, and to all government land in general, this argument is weak in several respects. Practically speaking, use of government land that satisfies adverse possession, though possibly "an indictable offense," could not fairly be described as a "nuisance."<sup>28</sup> The fact that someone has managed to use government land openly and notoriously, exclusive of the general public, and for the statutory period demonstrates that in all likelihood no one noticed or cared about the obstruction or use. For example, the Seattle street ends mentioned above have been used and encumbered for nineteen years or more

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25. See *McClelland v. Miller*, 28 Ohio St. 488, 502 (1876); see also Latovick, *supra* note 13, at 484-85.

26. See *Messersmith*, 164 A.2d at 525-26 (explaining that the legislature has the ultimate authority to convey the land or grant this authority to the municipality).

27. BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *A TREATISE ON THE LAW OF ROADS AND STREETS* 968 (2d ed. 1900).

28. *Black's Law Dictionary* defines a nuisance as "that activity which arises from . . . working obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." BLACK'S LAW DICTIONARY 1065 (6th ed. 1990).

without anyone noticing, let alone complaining.<sup>29</sup> In contrast, overgrown street ends untended by the government are more likely to constitute a nuisance than those meticulously maintained by private individuals.

Furthermore, inherent in the doctrine of adverse possession, is the requirement that the use be unlawful. All adverse possession constitutes the unlawful offense of trespass. In fact, use of land with permission of the true owner, a lawful use of land, is not "adverse" and thus defeats a claim of adverse possession.<sup>30</sup> If the mere fact that adverse use of land is an unlawful offense justifies immunity, then all land would be immune from adverse possession.

Finally, the court in *McClelland v. Miller*<sup>31</sup> found that in some cases adverse use of public roadway is "merely a matter of sufferance, from which rights can not accrue."<sup>32</sup> The court, however, did not find that all adverse use of all public land is a matter of sufferance. Rather, the court found that under the circumstances of the case, where no permanent improvements were made to the land in question, a claim of adverse possession did not arise.<sup>33</sup> Specifically, because the adverse possessor's use of a portion of the roadway did not interfere or conflict with the public's use, it was not sufficiently adverse.<sup>34</sup> The *McClelland* court was simply requiring a higher degree of adverse use for government land than would be required against a private party.

The court would have reached the same result if it had framed the issue in terms of permission. Government land that is open to the public cannot normally be adversely possessed because, by the very nature of the land being public, its use by a member of the public occurs with the government's permission and is therefore not adverse. Likewise, an encroachment on private land where the encroacher has permission can be expressed as a matter of sufferance. The difference in the two cases is that the government can more easily defeat a claim of adverse possession based on implied permission than can an individual. For the government, implied permission is always satisfied by the fact that the land is open to public use, whereas a private party must show either actual permission or show the conditions under which permission was implied.<sup>35</sup>

29. See *supra* text accompanying notes 2–4.

30. See NELSON ET AL., *supra* note 1, at 92. Intent of the adverse possessor is irrelevant. As long as the use of land is without permission, it is adverse for the purposes of adverse possession.

31. 28 Ohio St. 488 (1876).

32. *Id.* at 502.

33. See *id.*

34. See *id.*

35. Permission may be implied in the absence of explicit communication regarding the conditions of use,

If the disseised owner knows of the adverse possessor's presence and gives him permission to be on the land, clearly the possession is not hostile. Usually this means they have communicated about it, though in some cases permission may be implied if the possessor



## 2. Land Held in an Environmental Capacity

Concern for the environment has recently been raised to defend sovereign immunity from adverse possession.<sup>36</sup> The notion that land must be actively used in order to maximize social welfare is no longer defensible to those with a concern for the environment. As unused, unspoiled land becomes more scarce, the value of land left in a natural state increases.<sup>37</sup>

As noted earlier a key rationale underlying the doctrine of adverse possession is that people should be rewarded for the productive use of land. The community benefits when an adverse possessor puts otherwise vacant land to productive use because a scarce and valuable resource is no longer left unused.<sup>38</sup> Conversely, the true owner is punished for ignoring his land for a significant amount of time.

In modern thinking, however, leaving land undeveloped may itself be a laudable use.<sup>39</sup> Arguably, no reward should be given to one who spoils this scarce environmental resource by using undeveloped land.<sup>40</sup> In short, why should the government be penalized for leaving land in a natural state and the adverse possessor rewarded for using the land for a less valuable non-environmental purpose? This question is especially salient to the issue of adverse possession against the sovereign because a significant portion of the government's land is held in an environmental capacity. Governmental agencies hold land as national parks and forests, as state parks and forests, as green belts, and as other nature preserves. Furthermore, unimproved or wild land is a primary target of adverse possession.<sup>41</sup>

While society is clearly justified in protecting land in its natural, undeveloped state, sovereign immunity from adverse possession does not advance this goal. Sovereign immunity provides the government with no

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is on the land under conditions in which owners would normally permit it as a friendly accommodation.

NELSON ET AL., *supra* note 1, at 92.

36. See Latovick, *supra* note 13, at 495; see also Sprankling, *supra* note 21, at 851–57 (critiquing the traditional view that environmentally conscious use is not considered productive for the purposes of adverse possession).

37. See Sprankling, *supra* note 21, at 857–58.

38. See NELSON ET AL., *supra* note 1, at 79.

39. See Latovick, *supra* note 13, at 494; see also *Am. Trading Real Estate Props., Inc. v. Town of Trumbull*, 574 A.2d 796, 800–02 (Conn. 1990) (finding that the definition of public use must include land set aside for environmental purposes such as greenbelts, open spaces, and protected wildlife or wetland areas).

40. Adverse possession puts the environmentally minded owner in a double bind. They may either put the land to a less important nonenvironmental use and avoid its potential loss, or leave the land in its natural condition and risk the environmental damage that would occur if the land is lost to an adverse possessor. See Sprankling, *supra* note 21, at 862.

41. See *id.*

incentive to ensure that its land remains unused and unspoiled. Under the current state of the law, government land that cannot be taken by adverse possession may be utilized by third parties for years for purposes other than those intended by the government.<sup>42</sup> During this time, the land will not remain in the natural state the government presumably desired. Without the threat of adverse possession it is uncertain when, if ever, the government will ensure its land is actually being used for an environmental purpose.

Moreover, use of land for an environmental purpose requires effort and vigilance. Land will only serve an environmentally beneficial purpose if it is not only designated for such use, but regularly monitored as well.<sup>43</sup> This is especially true of the most fragile areas, such as wetlands, which are in greatest need of protection. In addition, polluted areas should not simply be left alone. They require positive acts of cleanup and maintenance before they can serve any environmental purpose. Thus, environmental concerns can justify governmental action as well as inaction, and the threat of adverse possession can spur governmental responsibility in both cases.

Monitoring, however, poses two problems when the land in question is held for an environmental purpose. First, monitoring is expensive, especially in the context of large, open tracts of land.<sup>44</sup> Of course this expense, though significant for private environmental landowners, may not be as burdensome for the government, which already enjoys a dedicated staff of forest workers and park rangers who regularly monitor government wild land.

Second, monitoring is not likely to actually apprehend a trespasser on wild land. This problem is exacerbated by the fact that the requirements for adverse possession are often lower in the case of wild land. Even minor and infrequent acts of land use such as collecting firewood, seasonal grazing, or timber removal will often satisfy these lower requirements.<sup>45</sup> These acts often leave little or no visible trace and thereby give the owner no actual or constructive notice of the adverse possession.<sup>46</sup> Under such circumstances, the government owner may never actually discover an adverse possessor despite frequent monitoring. Nevertheless, a solution that preserves the positive incentives provided by adverse possession can still be found.

The common law requirements of adverse possession may themselves provide a mechanism to defeat a claim of adverse possession even though

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42. See Risch, *supra* note 12, at 215.

43. A governmental body that dedicates land to an environmental purpose should be held responsible for "monitor[ing] and maintain[ing]" that environmental purpose. *Id.*

44. See Sprankling, *supra* note 21, at 861 (arguing not only that effective monitoring would require a large dedicated staff, but that monitoring itself could inflict environmental damage in particularly sensitive areas).

45. See *id.* at 827-30.

46. See *id.* at 831.

the adverse possessor is never caught. The adverse possession of land may be defeated if use of the land by the adverse possessor is not exclusive of the owner.<sup>47</sup> Thus, the mere act of governmental monitoring could be interpreted as acts of use by the owner sufficient to defeat the claim of exclusivity and in turn, of adverse possession. (In recent cases, though, courts have required some form of economic use beyond mere monitoring to defeat the requirement of exclusivity.)<sup>48</sup> Although some argue that all lands held in an environmental capacity, whether owned by the government or by private individuals, should be exempt from adverse possession, a solution that preserves the incentive to monitor land would better serve the environmental agenda.<sup>49</sup>

If, for environmental land, the common law requirements were modified to allow acts of monitoring, including low-impact inspection for especially fragile land, to defeat exclusivity, then both the government and the private environmental landowner would have a strong incentive to perform crucial monitoring activities.<sup>50</sup> Under this approach, the monitoring activities would be able to vitiate the most obvious, and consequently most damaging, forms of adverse use without imposing the burden of uncovering the more difficult to detect, low impact, adverse users. Furthermore, under this analysis, the government could use routine acts of visitors, such as hiking and camping, to defeat the requirement of exclusivity.<sup>51</sup> In addition, at least for public environmental land, most types of difficult-to-detect or low-impact use could be deemed permissive, and therefore would not be sufficiently hostile to satisfy the requirements of adverse possession.<sup>52</sup>

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47. See NELSON ET AL., *supra* note 1, at 78.

48. See Sprankling, *supra* note 21, at 852–53.

49. See *id.* at 864.

50. Another possible solution involves requirements that adverse use of wild land include more obvious acts beyond low-impact activities that currently satisfy adverse use. This change would require that the adverse use of wild lands be much more obvious. Environmental owners would thereby have constructive, if not actual, notice of the adverse use, giving them a stronger incentive to monitor their land. The potential problem with this solution is that it gives the would-be adverse possessor an incentive to make more than slight use of environmental land, thus defeating the environmentally beneficial purposes of adverse possession.

51. In the context of implied dedication and public prescriptive easements, the government has successfully gained rights to land based on public use. See NELSON ET AL., *supra* note 1, at 736–37. If the government can gain rights to land through its use by the public, there is no reason why public use should not defeat a claim by adverse possession. The government would not be subject to a claim of adverse possession even by regular or long-term visitors to public land because these visitors would be on the land with permission.

52. See *supra* text accompanying note 30.

In summary, environmental non-use of government land, though important, does not by itself justify sovereign immunity from adverse possession.<sup>53</sup> Moreover, allowing adverse possession against the sovereign would provide another incentive for the government to ensure that its land is being used for its intended environmental purpose.<sup>54</sup>

### 3. Government Land Held as an Investment

Another class of government land that poses special adverse possession problems is land held as an investment for some future purpose.<sup>55</sup> For example, a government may hold land on the border of a city that promises to become valuable when the city expands. The government has no present use for the land, but predicts that the future value of the land is greater than any present value the government could receive through its sale. Furthermore, the government would prefer not to be encumbered with costly monitoring expenses while it waits for the land to become more valuable. If the government were subject to adverse possession, then if the time required to realize a profit on its investment in land were longer than the statute of limitations for adverse possession, the government investor would be forced to monitor its land.<sup>56</sup>

Adverse possession, however, is justified for government land held as an investment. First, "[s]ociety requires confirmation that there is a plan for this property, and that the owner is monitoring local developments . . . on the land."<sup>57</sup> In this regard, the government should be no different than a private investor. Second, the threat of adverse possession spurs the government to make valuable use of land that is held as an investment, even if this amounts to putting the land to an environmental non-use, or some other creative, nonobvious purpose, and monitoring it.<sup>58</sup> For example, a city that owns the vacant land surrounding it will likely want to hold onto the land until the city expands enough to make the land valuable. At that point the city can either use the land for parks, schools, police stations, or other public purposes and sell the remainder for a substantial gain. While

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53. At most, this environmental concern would justify immunity for government land held in an environmental capacity, not all government land.

54. See Risch, *supra* note 12, at 215–16.

55. See Howard Gensler, *Property Law as an Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 55–56 (1995).

56. In his article, Howard Gensler imagines a piece of property outside of Phoenix, Arizona that is expected to increase in value in thirty years while the statute of limitations on adverse possession is seven years. See *id.* at 55–56.

57. *Id.* at 55.

58. See *supra* text accompanying notes 32–43.

the city waits for the land to become valuable, it is reasonable to expect that the city devote the land to a purpose that benefits the public, such as an environmental greenbelt.

In addition, because the statute of limitations on the recovery of land is measured in lengths of years, monitoring costs should be low. The government investor need not ensure that the land is never adversely used, but merely that it is not used continuously for the entire length of the applicable statute of limitations.

In summary, there is nothing about government land that sufficiently distinguishes it from private land to render it immune from adverse possession. Whether land is held for an environmental or investment purpose, the threat of adverse possession would give the government a greater incentive, at a relatively low cost, to ensure that the land is used in its designated capacity.

## B. Is There Something Special About the Government?

Is there something unique about the government itself that justifies its exemption from adverse possession? If the government is sufficiently different from private landowners, whether individuals, businesses, or nonprofit organizations, and if such differences defeat the very purpose of adverse possession, then sovereign immunity may be justified. Conversely, if the government is uniquely suited to take advantage of the benefits that adverse possession provides, then the government should be subject to it.

### 1. The Government Can Be Distinguished from Individuals

One court justified sovereign immunity on the grounds that the government is significantly different from individual landowners. In *Commonwealth v. Alburger*,<sup>59</sup> the court asserted that limiting the time period in which individuals may assert their rights against an adverse possessor is reasonable, but that imposing such a time limit on the government is not. Individuals have a strong incentive to be vigilant because loss of even a small portion of their land has a direct effect on their personal well-being. Government, on the other hand, represents the aggregate of the citizens in a community. Because the interest in public land is divided among so many, each individual will tolerate losing a significant amount of government land before engaging in a dispute to prevent such loss.<sup>60</sup> Similarly, no one

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59. See *Commonwealth v. Alburger*, 1 Whart. 469 (Pa. 1836).

60. See *id.* at 488; Latovick, *supra* note 13, at 485. See generally 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 723 (R.H. Campbell et

individual has a strong incentive to be a vigilant monitor of government land.

This argument, though, proves too much. If the showing required to obtain immunity from adverse possession is that large numbers of people have an interest in land, then corporations and nonprofit organizations should also be immune. In the United States, businesses and nonprofit organizations have significant land holdings that are not protected from adverse possession. For example, the lumber company Weyerhaeuser currently owns 5.9 million acres of forest land in the United States.<sup>61</sup> Similarly, many nonprofit land trusts have rights to vast amounts of wild land. In 1998, land trusts owned 828,000 acres of wild land and had conservation easements on another 1,385,000 acres.<sup>62</sup> Although the impact of the loss of such land on the business or organization may be large, the impact on any one member or shareholder will be small.<sup>63</sup> The government, as well as corporations and nonprofit organizations, faces this problem of separation of ownership from control. Like citizens, corporate shareholders and members of nonprofit organizations do not directly exercise control in the organization in which their interest lies.<sup>64</sup> Individual shareholders and members of nonprofit organizations not only lack the incentive to protect

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al. eds., 1976) (1776) (discussing the duty of government to erect and maintain those public projects that no individual would have the motivation to erect or maintain).

61. See The Industry Standard, *Weyerhaeuser Company*, at <http://www.thestandard.com/companies/dossier/0,1922,271952,00.html> (last visited Sept. 4, 2001).

62. See Land Trust Alliance, *Summary of Data from the National Land Trust Census*, at <http://www.lta.org/aboutlt/censum.htm> (last visited Sept. 4, 2001).

63. Citizens may have a greater incentive to make sure that their managers are competent than shareholders of a large corporation. Shareholders are likely to have investments in many different corporations while citizens have a stake in only one government. Although their interest may be small, citizens are not faced with having to look after a large number of investments. Nevertheless, the issues facing citizens are often numerous and individual citizens may have to sacrifice on land use issues in order to vote for a candidate with whom they agree on issues they consider more important.

64. In 1932, Adolf Berle and Gardiner Means observed that in modern corporations "ownership is so widely distributed that no individual or small group has even a minority interest large enough to dominate the affairs of the company." ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 78 (rev. ed. 1968); see also ROBERT CHARLES CLARK, *CORPORATE LAW* 389-94 (1986) (describing the rational apathy problem facing shareholders whose ownership interest is separated from control of the corporation); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 102 (1989) (explain-

ing that shareholders in a large corporation rarely have the incentive to exercise their legal rights). Nonprofit organizations often have many members with little direct involvement in the organization. See Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327, 344 (1983). For example, one prominent land trust, the Nature Conservancy, which currently manages 1340 nature preserves, has more than one million members. See *Nature Conservancy Website*, at <http://nature.org> (last visited Sept. 4, 2001).

their organization's land, but they are most likely unaware of the organization's specific land holdings. Therefore, they also lack the information necessary to monitor the land directly or to commence an action to recover the land.

Businesses and nonprofit organizations, like the government, hire managers to ensure that their assets are used productively. The mere fact that an organization's constituency is large does not prevent it from ensuring that competent managers are making good use of its assets. The issue then is not whether the government's individual constituents have a sufficient interest in protecting the government land, but rather whether there is something unique about the government that justifies its immunity from adverse possession when other large organizations with significant land holdings are not similarly immune.

## 2. The Efficiency Rationale for Adverse Possession as Applied to the Government

Sovereign immunity would be justified if there is something different about the way that government operates that would prevent it from taking advantage of the efficiency incentives that adverse possession provides to corporations and to other large private landowners. First, as discussed above, the government has much in common with corporations like Weyerhaeuser and with nonprofit land trusts. All face the same separation of interest and control. In addition, both corporations and the government use a voting process to provide their constituency with some influence on how the organization operates: the government through citizen voting, and corporations through shareholder voting.<sup>65</sup> Still, there are significant differences between the government and corporations that will influence each one's ability to

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65. The differences between the corporate shareholders and citizens in some cases aggravate and in others mitigate the separation of ownership and control, described above, that makes adverse possession a complicated issue for organizations with a large constituency. A factor that aggravates this problem for corporate shareholders is the proxy voting system, which prevents shareholders from voting directly. Worse yet, this process is organized and controlled by management itself. See LEWIS D. SOLOMON ET AL., *CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS* 558–61 (4th ed. 1998). Furthermore, while each citizen only has one vote, shareholders, including large institutional investors, may control as many votes as they have shares. Those large shareholders have an added incentive to positively influence management through the shareholder voting process. See *id.* at 573–94 (offering excerpts from several articles describing the benefits and unique challenges facing institutional investors that attempt to influence corporate management). Finally, while corporate shareholders may sell their interest in a corporation that is poorly managed at relatively low cost, citizens cannot. It is costly and in some circumstances impossible for citizens to leave a poorly managed government. This provides citizens a greater incentive to take a more active role in government than shareholders, who can easily sell.

respond to the threat of adverse possession. These differences, however, do not justify sovereign immunity, and may actually place the government in a better position to benefit from adverse possession than a corporation.

a. Adverse Possession as an Independent Motivation  
for Productive Land Use

Economists generally agree that the primary goal of business is profit maximization, which provides business an extra incentive to look after its land.<sup>66</sup> The government, on the other hand, is not primarily concerned with maximizing profits.<sup>67</sup> Therefore, the government is not positioned to protect its assets in the same way as a corporation.<sup>68</sup> Absent some special incentive, like the threat of adverse possession, the government does not have the same motivation to use land as productively as a business whose future profitability depends on the productive use of all its assets. Thus, citizens may actually receive a greater benefit from subjecting the government to the threat of adverse possession than do shareholders of a corporation because of the extra incentive it provides the government to use land productively.

As noted earlier, one rationale for adverse possession is to encourage productive land use. This rationale recognizes that society benefits from the productive use of land, regardless of who puts the land to productive use, because a scarce resource would otherwise be wasted.<sup>69</sup> In the context

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66. See, e.g., ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 392 (2d ed. 1994). But see SOLOMON ET AL., *supra* note 65, at 88. Some critics of the traditional business goal of profit maximization argue that corporations "should take account of all the constituencies their operations affect and even that they should assume responsibility for broader societal problems . . . which they affect only tangentially." *Id.*

67. The role of government in society is varied and complicated, and any brief description is likely to be inaccurate and incomplete. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 22 (1957). Although the work of a government, especially a democracy, is hopefully intended to further the interests of its citizens, the goal is not profit maximization in the traditional sense.

68. Corporations use a variety of mechanisms including monitoring; pecuniary incentive structures such as raises, merit-based pay, bonuses, and profit-sharing; as well as nonpecuniary incentives such as promotions, in order to align the interests of its managers and employees with those of the owners. See RONALD G. EHRENBURG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 373-82, 389-90 (5th ed. 1993). Because the government does not realize profits, some of these mechanisms are not available to the government. Nevertheless, the same limitations apply to nonprofit organizations, which are not immune from adverse possession.

69. See *supra* text accompanying notes 38-39. This rationale for adverse possession assumes adverse possession of an entire piece of land. A significant number of adverse possession cases, though, involve border disputes arising from relatively small encroachments. See Sprankling, *supra* note 21, at 826. Adverse possession promotes efficiency in these cases by pro-



of adverse possession against the government, this argument becomes stronger because society at large receives a greater benefit from the productive use of government land than from the productive use of privately owned land. Rather than the vicarious benefit that society receives when a limited resource is not being wasted, if government land is put to a valuable use, society receives a direct and tangible benefit whether in the form of environmental preserves, park land, schools, or other government services such as post offices and fire departments.

In a controversial decision, at least one court recognized the incentive to use land productively that the threat of adverse possession provides the government.<sup>70</sup> That court stated:

Underlying our belief [that municipally owned land not dedicated or used for a public purpose should be subject to adverse possession] is the perception that we are not imposing an undue burden on municipalities by expecting them to discover within the relevant period of limitations what property they own and who possesses it. That expectation will *encourage municipalities to make efficient use of their property*. . . . Conversely, we are reluctant to adopt a policy that would encourage municipalities not to use, dedicate, or even identify their property.<sup>71</sup>

Adverse possession provides not only municipalities, but any government body or agency, an incentive to use its land productively in order to maximize benefit from that land for its citizens. Without immunity from adverse possession, government land that is not put to productive use, or at the very least not regularly monitored, would be under a constant threat of being taken by an adverse possessor. Therefore, from an efficiency perspective, the issue becomes whether the potential costs of adverse possession, both in monitoring costs and lost land, outweigh the benefits of productive land use and of increased awareness of government assets that adverse possession promises.

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viding the encroached-upon party an incentive to discover and correct the encroacher's error in a timely fashion. Furthermore, it benefits the encroaching party by preventing the encroacher from demanding an extra extortion value, beyond the true value of encroached-upon land, when her reliance on the encroachment has reached a certain point. See Thomas J. Miceli & C.F. Sirmons, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. ECON. 161, 164 (1995). As long as these benefits exceed the litigation costs involved in acquiring land by adverse possession, the doctrine is justified in cases of border disputes. Moreover, a government landowner, whether the encroaching or the encroached-upon party, would receive the same benefits from adverse possession in the context of border disputes as a private landowner.

70. See *Devins v. Borough of Bogota*, 592 A.2d 199, 203 (N.J. 1991). For a critique of the *Devins* decision, see Denise Vicente Tighe, Comment, *Devins v. Borough of Bogota: Municipal Property for Sale or Theft*, 45 RUTGERS L. REV. 197 (1992).

71. *Devins*, 592 A.2d at 203 (emphasis added).

b. Adverse Possession as a Form of Government Accountability

In order to realize the benefits of adverse possession, government agents must be accountable for land lost to adverse possession. Without accountability, these agents will have less incentive to put government land to a valuable use. The government does not have the same kind of accountability for its assets as a corporation. Land that is lost to adverse possession is reflected as a decrease in the assets column of a corporation's balance sheet.<sup>72</sup> Such a direct impact on the company's books will signal to management and shareholders that changes are required. Rational owners who do not sell their interest in the company will either pressure managers to become more efficient or find new management for the business.<sup>73</sup>

This same accountability is not present for the government. If government land is lost to adverse possession, no balance sheet adjustments will be required and mailed to voters.<sup>74</sup> Furthermore, the overall effectiveness of government is not as easily measured as that of a business.<sup>75</sup> The government does not have such easily determined indicators of value as earnings or stock price.

Although government agents do not face the same accountability as do managers of a business, they are subject to other controls. For example, aspiring politicians raise issues such as land use in order to argue that they are more deserving of public office than the incumbent.<sup>76</sup> If land is used poorly, and if this misuse is brought to the public's attention, the incumbent political regime will face stronger opposition in a subsequent elec-

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72. Corporate statutes require that corporations "furnish their shareholders with annual balance sheets . . ." SOLOMON ET AL., *supra* note 65, at 191. If those losses are significant, the stock market value of a corporation that loses a significant amount of land to adverse possession will drop.

73. If the loss of land through adverse possession affects the share price of a company, the owners will be signaled that a problem exists, even if they are not informed about the exact nature of the problem. This will give the owners the incentive to inquire into the nature of the problem or put pressure on the company's managers to do so. Citizens of a government cannot register their dissatisfaction with their government as easily as those with an interest in a corporation can by selling their shares.

74. Similarly, if citizens do move to an area with a different government, this dissatisfaction is not registered the same way as the sale of corporate stock, which exerts downward pressure on the stock's price.

75. Measuring government effectiveness can occur when citizens can observe government performance. This is often difficult and can only be achieved at great cost. See generally BERNARD MANIN ET AL., *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 42 (Adam Przeworski et al. eds., 1999).

76. See *id.* at 36. In the "accountability . . . view, elections serve to hold governments responsible for the results of their past actions" or, in the case of adverse possession, inaction. *Id.* at 29.

tion.<sup>77</sup> Adverse possession thereby creates its own accountability through the political process.<sup>78</sup>

This accountability is similar to that of nonprofit organizations, which are not immune from adverse possession. Such organizations must convince potential donors and current members that their donated money will be used wisely.<sup>79</sup> A nonprofit land trust that loses too much land to adverse possession will face difficulties raising money for environmental protection similar to those confronting an incumbent politician campaigning for votes.

Another mechanism of government accountability is public interest and "watchdog" groups who provide an incentive for the government to use land efficiently above and beyond the political process.<sup>80</sup> This type of accountability asserted itself in connection with the use of the abandoned Seattle street ends when a group called "Friends of Street Ends" drew attention to the need for better public use of the street ends.<sup>81</sup> Although the Friends of Street Ends eventually motivated the city of Seattle to consider some use of its abandoned land, this process might have moved faster under the threat of adverse possession. Allowing adverse possession against the government not only gives politicians, citizens, and interest groups a greater incentive to ensure that government land is being used properly, but also puts them on notice when it is not.

### C. The Costs of Land Lost to Adverse Possession

The most significant cost to the government of adverse possession is the value of land that it would lose. Nevertheless, even when land is lost to adverse possession, it is not a complete loss to the government. In some cases the government may actually receive a net benefit.

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77. See *id.* at 44 (concluding that accountability in the political process "is not sufficient to induce representation when voters have incomplete information").

78. A political regime that loses land to adverse possession may not be entirely to blame for the oversight that resulted in the loss of government land. The terms of office for elected government officials are likely to be far shorter than the statute of limitations for adverse possession. Therefore, some government officials may not be held accountable for the adverse possession of land that took place, at least partly, on their watch. Nevertheless, elected officials who do lose land while they are in office are to blame for allowing the adverse possession to continue during their time in office. In addition, adverse possession creates an incentive for newly elected government officials to ensure that land they are responsible for is not in the process of being adversely possessed.

79. See Fama & Jensen, *supra* note 64, at 344.

80. Public interest groups can capitalize on economies of scale in obtaining such information and realize an advantage in influencing the political process. See Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 47 (1988).

81. See Stiffler, *supra* note 2.

Without adverse possession, public land could be used indefinitely without the government or the public receiving any benefit. For example, if government land is being used long-term by a trespasser, that person will enjoy the exclusive benefit of the land without the tax obligations normally associated with landownership. If that land were lost through adverse possession, the government would have the right to collect taxes on the land.<sup>82</sup> For land that the government would never have put to valuable use, it is better off receiving property taxes than nothing at all. This justification for adverse possession is the return of land to the tax roles.<sup>83</sup>

The government would receive direct and indirect benefits beyond property taxes. Land that is put to productive use will likely generate other tax revenue to the government such as sales taxes from goods or services sold on the land or income taxes on the profits earned by putting the land to productive use.<sup>84</sup> Other benefits include eliminating potential legal liabilities associated with landownership.<sup>85</sup>

Some may argue, however, that even if a government would benefit from having its former land on the tax roles, it should at least be given the value of the land in return for losing a valuable asset without direct compensation.<sup>86</sup> The value of taxes being paid on the land is usually far less than the economic value of the land lost through adverse possession.<sup>87</sup> Yet, the government would have demonstrated that it did not value the land highly by standing idly by while its land was being used by a trespasser. Furthermore, as noted earlier, the government would have received no actual value from the land over the period of time it was being used by a third

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82. This tax benefit of adverse possession, though, is most significant for municipal governments that receive significant revenue from property taxes. The federal government and state governments would not receive the same benefit as they do not typically collect property tax revenue. Nonetheless, they may receive some smaller benefit if the municipal government requires less aid from the state, and the state in turn requires less aid from the federal government because of this increased property tax revenue at the municipal level.

83. See Risch, *supra* note 12, at 213 (citing *Devins v. Borough of Bogota*, 592 A.2d 199, 202 (N.J. 1991)).

84. See Raul Hernandez, *Officials Consider Selling City Properties*, VENTURA COUNTY STAR, Sept. 26, 2000, at B1 (explaining that the sale of government land to private owners would increase sales tax revenues and create new jobs).

85. See Hugo Martin, *L.A. Plans to Beef up Coffers with Land Sales*, L.A. TIMES, July 15, 1996, at A1 (explaining that the sale of public land would eliminate the government's exposure to liability for the land).

86. See Latovick, *supra* note 13, at 488.

87. This is not always the case. For example, the Seattle street ends, long narrow strips of land, had no economic utility to the city except as streets. Once Seattle decided not to develop them as streets because they were not needed for access to homes, they had no apparent alternative use and little economic value to anyone other than adjacent property owners. The city would have benefited by vacating the land and conveying its interest to adjacent property owners, whose property taxes would then have increased to reflect their larger tax areas.

party.<sup>88</sup> Adverse possession, therefore, acts as a default decision that government land is better off on the tax rolls than being ignored indefinitely without providing any government benefit.

Finally, the argument that government should have discretion to dispose of its land rather than shifting that decision to an adverse possessor assumes that government can be sufficiently efficient to identify and sell land without the incentive provided by adverse possession. The very fact that governments fear the threat of adverse possession demonstrates that they probably do not use land efficiently. If the government were confident that all land was clearly identified and used, it would be indifferent to the threat of adverse possession. Thus, under the threat of adverse possession the government has a strong motivation to capture the sales value of land by identifying and selling land for which it has no use.<sup>89</sup>

#### D. The Monitoring Cost of Adverse Possession

Apart from the value of land lost to adverse possession, the government's other significant cost is identifying and monitoring its land.<sup>90</sup> This cost, however, is far lower than one might imagine.

First, land must be monitored only to the extent that the government would discover an adverse possessor during the statutory period. As indicated above, because the statute of limitations on the recovery of land requires the passage of a significant amount of time, only occasional monitoring would be necessary and its actual cost would be low.<sup>91</sup> Furthermore, the actual length of a statute of limitations on the recovery of government land can be established taking into account the cost of monitoring.

Second, most government land is not abandoned, but is used productively. Monitoring is not necessary for government land that is being used because the exclusivity requirement of adverse possession would not be

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88. When government land is ignored the "public loses twice" because the idle land provides neither a public benefit nor a source of tax revenue. Risch, *supra* note 12, at 216.

89. At the very least, the government has an incentive to monitor the land so that it is not adversely possessed while it decides what to do with the land, whether to sell it or put it to a productive use.

90. See Jeffrey M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT'L REV. L. ECON. 217, 220 (1986) ("If title can pass easily through adverse possession there are greater risks associated with property ownership and there is a need for increased monitoring of the land by the owner during the time of his possession.").

91. The cost of monitoring is inversely proportional to the length of the statute of limitations. See Netter et al., *supra* note 90, at 222.

satisfied. The cost of monitoring would affect only land that is not currently being used or monitored.<sup>92</sup>

Third, the cost of identifying and monitoring abandoned land would be mitigated by the benefit the new use may provide the public.<sup>93</sup> However, if the benefit the government received by actually using the land was less than the cost of making the land productive, adverse possession would enrich society by transferring the land to a private owner who could make a better, more productive use of the land.<sup>94</sup>

Finally, subjecting the government to the requirement of monitoring its land puts it in no different a position than private landowners. Specifically, nonprofit landowners such as land trusts that, like the government, do not receive profits from their land are nevertheless burdened with monitoring expenses.

### III. FAIRNESS: THE GOVERNMENT MAY TAKE YOUR LAND THROUGH IMPLIED DEDICATION.

Another reason the government should not be immune from adverse possession is not based on efficiency but on fairness. The law of property recognizes the principle that "one who seeks equity must do equity."<sup>95</sup> The public may obtain rights to private property under the theories of public prescriptive easements, implied common law dedication, and public adverse possession.<sup>96</sup>

Under the doctrine of public prescriptive easements, the public obtains a right to use land if it satisfies what are essentially the elements of adverse possession for "the full . . . prescriptive period."<sup>97</sup> Although the public

92. For a discussion on monitoring costs in the context of government-owned wild land, see *supra* text accompanying notes 44–52. Private parties are put on notice of the land they own by the requirement of paying taxes on the land. A governmental landowner, on the other hand, does not pay taxes on its land and therefore does not benefit from this reminder.

93. The monitoring requirement created by adverse possession provides the added benefit that the land will not as likely be forgotten or abandoned while the government considers what to do with it.

94. The one exception is for land held by the government as an investment. See *supra* text accompanying notes 55–58.

95. *Fibelstad v. Grant County*, 474 N.W.2d 54, 62 (N.D. 1991).

96. See NELSON ET AL., *supra* note 1, at 736–37; A.M. Vann, Annotation, *Acquisition of Title to Land by Adverse Possession by State or Other Governmental Unit or Agency*, 18 A.L.R.3d 678 (2000). In addition, city government strives to "promote the highest and best use" of private land. Telephone Interview with Julie Kwon, Senior Auditor, City of Seattle, June 1997–Oct. 1998 (Nov. 24, 2000). In fairness, government should not be immune from a doctrine that promotes the highest and best use of its own land.

97. NELSON ET AL., *supra* note 1, at 736 (quoting *Leu v. Littell*, 513 N.W.2d 24, 32 (Neb. Ct. App. 1993)).

receives only an easement for the use of the land, the land's value to its private owner is clearly diminished.

When the public obtains a right to land under the theory of implied dedication, it does so under highly artificial conditions. The public acquires rights to land despite the lack of any individual's actual intent to possess the land.<sup>98</sup>

Finally, under the doctrine of public adverse possession, "[i]t has generally been held or recognized that the United States, a state, or other governmental body may acquire title to land by adverse possession."<sup>99</sup> In this last analysis, fairness concerns dictate that if the public may acquire rights to private land by doctrines akin to adverse possession, it should reciprocate by allowing its land to be subject to adverse possession.

### CONCLUSION

In a modern democracy, the rule of law should not be based on what English monarchs decided was in their best interest centuries ago. Rather, "the people through their representatives in the legislature, should decide when statutes of limitations will run against the government."<sup>100</sup> In deciding whether the statute of limitations on the recovery of land should run against the sovereign, lawmakers should be guided by the reasoning articulated above.

There is nothing unique about government-owned land that justifies sovereign immunity from adverse possession. First, the arguments most courts have used to rationalize sovereign immunity for municipal land do not address the underlying justification for adverse possession and should not be extended to justifying sovereign immunity for all government land. Second, though the government holds a significant amount of wild land, this land would be better maintained if it were under the threat of adverse possession. Moreover, private environmental landowners are not exempt from adverse possession, thus demonstrating that the government does not find anything inherent in wild land to make it deserving of an exception to

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98. Courts have inferred this intent to possess the land "as a matter of law." *Id.*

99. Vann, *supra* note 96, at 682 ("The facts which must be shown by a governmental unit to establish title by adverse possession are in the main the same as those to be shown by an individual claimant."); see also, e.g., Snouffer v. C.R. & M. City Ry. Co., 118 Iowa 287, 296 (1902) ("The dedication of a street may be accomplished without any deed or formal act by the dedicant, and without any formal declaration of acceptance by the public authorities . . . by . . . silence in the face of known adverse possession by the public . . .").

100. Susan Lillian Holdscrow, *Reviving a Double Standard in Statutes of Limitations and Repose: Rowan County Board of Education v. United States Gypsum Company*, 71 N.C. L. REV. 879, 903 (1993).

adverse possession. Third, the fact that the government holds land as an investment does not justify sovereign immunity. Adverse possession would place the government under the reasonable obligation to monitor this land and even provide the government with an incentive to put the land to productive use while it waits for it to increase in value.

There is nothing different about the government itself that justifies sovereign immunity from adverse possession. Moreover, adverse possession may in fact provide a strong incentive for the government to use its land efficiently when it might otherwise lack such incentive. Because the government is accountable through the political process, adverse possession would provide both politicians, government administrators, and citizens with valuable information when its land is not being used productively. Furthermore, the potential benefits to the government of being subject to the threat of adverse possession are likely higher than the relatively low costs of lost land and of monitoring expenses. In addition, the already low cost of land lost to adverse possession is mitigated by the benefits of returning such land to the tax roles.

Finally, the government itself may acquire land by adverse possession. Fairness dictates that if the government can acquire title to private land through adverse possession, it should be able to lose title under the same circumstances.