ity that such interests may not be obtained.[3] Courts assert that recognizing prescriptive profits in gross would create an unqualified interest not limited by the needs of a dominant estate.[4]

Courts rarely recognize an exclusive prescriptive easement.[5] Such an easement would in effect preclude the owner from making any use of the servient estate.[6]

§ 5:5 —No prescriptive easements against government

Research References

West's Key Number Digest, Adverse Possession ⇐7; Easements ⇐10(2)

Absent an enabling statute, no prescriptive easements can be acquired against the federal government[1] or a state.[2] The same

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[3]Platt v. Pietras, 382 So. 2d 414, 417 (Fla. Dist. Ct. App. 5th Dist. 1980); Deseret Livestock Co. v. Sharp, 123 Utah 353, 358, 259 P.2d 607, 610 (1953) (profit of grazing sheep not established on facts). See also sources cited note 1.

[4]Platt v. Pietras, 382 So. 2d 414, 417 (Fla. Dist. Ct. App. 5th Dist. 1980); Deseret Livestock Co. v. Sharp, 123 Utah 353, 358, 259 P.2d 607, 610 (1953).

[5]Silacci v. Abramson, 45 Cal. App. 4th 558, 564, 53 Cal. Rptr. 2d 37, 40 (6th Dist. 1996) ("An exclusive prescriptive easement is . . . a very unusual interest in land.").

[6]See generally §§ 8:17 to 8:29 (discussing use of easement area by servient owner).

[Section 5:5]

[1]Roediger v. Cullen, 26 Wash. 2d 690, 705, 175 P.2d 669, 677 (1946). State statutes of limitations do not apply to the federal government, and thus, a prescriptive easement cannot be acquired against the United States. U.S. v. Vasarajs, 908 F.2d 443, 446 n.3 (9th Cir. 1990); Herbertson v. Iliff, 108 N.M. 552, 553-555, 775 P.2d 754, 755–756 (Ct. App. 1989) (holding that state statutes of limitations do not apply to the federal government absent express consent, and declaring that "prescriptive rights cannot be acquired against the United States"); Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common, 55 A.L.R. 2d 554, 576 - 578.

[2]City of Marietta v. CSX Transp., Inc., 196 F.3d 1300, 1308 (11th Cir. 1999) (noting that under Georgia law "prescription may not run against government landholders, such as the State or municipalities"); Classen v. State, Dept. of Highways, 621 P.2d 15, 17 (Alaska 1980); West v. Smith, 95 Idaho 550, 556, 511 P.2d 1326, 1332 (1973); Mississippi State Highway Commission v. Blackwell, 350 So. 2d 1325, 1328 (Miss. 1977); Kiowa Creek Land & Cattle Co., Inc. v. Nazarian, 5 Neb. App. 1, 3–4, 554 N.W.2d 175, 177, 113 Ed. Law Rep. 445 (1996); Sloat v. Turner, 93 Nev. 263, 266, 563 P.2d 86, 87-88 (1977); Stone v. Rhodes, 107 N.M. 96, 99, 752 P.2d 1112, 1115 (Ct. App. 1988); Rogers v. South Slope Holding Corp., 172 Misc. 2d 33, 656 N.Y.S.2d 169, 175 (Sup 1997) (declaring that no prescriptive easement can be acquired in public waters); Montfort v. Benedict, 199 A.D.2d 923, 925, 605 N.Y.S.2d 548, 549 (3d Dep't 1993); Steiner v. County of Marshall, 1997 SD 109, 568 N.W.2d 627, 632–633 (S.D. 1997) (prescriptive easement cannot be obtained over county road). See generally

rule governs municipal property held for public use.[3] This rule, however, may not apply when another unit of government seeks to acquire prescriptive rights in municipal property.[4]

The no-prescriptive-easements-against-the-government rule reflects the long-established principle nullum tempus occurrit regi, which means literally "time does not run against the king."[5] Moreover, the prescriptive period is interrupted when a governmental unit obtains the servient land before the running of the statute of limitations.[6] A claimant, however, may assert a

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Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common, 55 A.L.R. 2d 554, 598 - 602.

Some jurisdictions have expressly provided by statute that no prescription runs against an interest of the state. E.g., Alaska Stat. § 38.95.010.

[3]City of Oakland v. Burns, 46 Cal. 2d 401, 406–407, 296 P.2d 333, 336 (1956) (Cal. Civ. Code § 1007, barring adverse possession of any property "owned by the state or any public entity," construed to prohibit acquisition of prescriptive easement against land of municipal corporation held for public use); Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238, 240 (Del. Ch. 1978); Kellison v. McIsaac, 131 N.H. 675, 680, 559 A.2d 834, 837 (1989); Firsty v. De Thomasis, 177 A.D.2d 839, 840, 576 N.Y.S.2d 454, 456 (3d Dep't 1991); City of Benton City v. Adrian, 50 Wash. App. 330, 336, 748 P.2d 679, 683 (Div. 3 1988); cf. Siejack v. City of Baltimore, 270 Md. 640, 644, 313 A.2d 843, 846 (1974) (adverse possession); see also 10 McQuillin Law of Municipal Corporations (3d ed.) § 28.55; Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common, 55 A.L.R. 2d 554, 612 - 613.

[4]Highline School Dist. No. 401, King County v. Port of Seattle, 87 Wash. 2d 6, 11–12, 548 P.2d 1085, 1089 (1976).

[5]See Armstrong v. Morrill, 81 U.S. 120, 145, 20 L. Ed. 765 (1871) ("[T]he rule that time does not run against the State has been settled for centuries, and is supported by all courts in all civilized countries."); see generally Note, The Effect of Prescriptive Possession of Land on the Title of a Sovereign, 23 Va. L. Rev. 58 (1936); 3 Powell, Powell on Real Property § 34.10; 4 Tiffany, Law of Real Property (3d ed.), Tiffany, Law of Real Property (3d ed.) § 1192. See Comment, Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession, 31 Land & Water L. Rev. 79, 82 n.20 (1996) (citing this treatise).

[6]Mogren v. A. P. Inv. Co., 102 Ohio App. 388, 394, 2 Ohio Op. 2d 411, 73 Ohio L. Abs. 188, 131 N.E.2d 620, 622 (8th Dist. Cuyahoga County 1956) (no prescriptive easement where property forfeited to state for nonpayment of taxes); Sloat v. Turner, 93 Nev. 263, 266, 563 P.2d 86, 88 (1977); Kellison v. McIsaac, 131 N.H. 675, 680-681, 559 A.2d 834, 837 (1989) (observing that "prescriptive rights cannot be obtained against municipalities holding land for public use," and holding that prescriptive period was interrupted by town ownership of servient land); Cassity v. Castagno, 10 Utah 2d 16, 18, 347 P.2d 834, 839 (1959) (holding that ownership of land by federal government at any time during prescriptive period defeated claim of prescriptive easement); see also Cookston v. Box, 5 Ohio Op. 2d 102, 107, 76 Ohio L. Abs. 516, 146 N.E.2d 171, 178 (C.P. 1957) ("[O]wnership by the state stopped the running of the time of

prescriptive right against another person in possession under the sovereign's title,[7] and although seemingly inconsistent with the view that no prescription runs against the sovereign, it has been suggested that a grantee from the government takes title burdened with a prescriptive easement that ripened during the period of public ownership.[8] A prescriptive easement may be obtained against privately owned land in which a municipality already holds an easement.[9]

Under Vermont law, religious and charitable institutions, as well as the state, are shielded from prescriptive claims.[10] The Supreme Court of Vermont has rejected the argument that the exemption for property owned by religious bodies violates the establishment clause of the Constitution.[11]

§ 5:6 —Prescriptive easements over public utility property

Research References

West's Key Number Digest, Easements ⚿4; Public Utilities ⚿103

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adverse use."), rev'd on other grounds, 109 Ohio App. 531, 12 Ohio Op. 2d 150, 160 N.E.2d 327 (8th Dist. Cuyahoga County 1959).

[7]Kirk v. Schultz, 63 Idaho 278, 286, 119 P.2d 266, 269 (1941) ("One claiming an easement or a private road by adverse possession for the statutory period as against all persons except the United States may assert such adverse possession as against any person in occupancy, while conceding the superior title of the United States."). For instance, suppose that a state granted a long-term lease of a parcel to *X*. *Y* could use the land in such a manner as to establish a prescriptive easement against the tenant *X*. Such a right would terminate upon expiration of the leasehold. See § 2:9 (recognizing that servient estate may be less than fee simple).

[8]Kirk v. Schultz, 63 Idaho 278, 286, 119 P.2d 266, 269 (1941) (easement established while land part of public domain effective against subsequent grantee); Wilson v. Williams, 43 N.M. 173, 176, 87 P.2d 683, 685 (1939) (person taking title by homestead subject to easement that previously matured upon public land). But see Cookston v. Box, 5 Ohio Op. 2d 102, 107, 76 Ohio L. Abs. 516, 146 N.E.2d 171, 178 (C.P. 1957), (purchaser from state received "new and perfect title free from the encumbrance of any easement"), rev'd on other grounds, 109 Ohio App. 531, 12 Ohio Op. 2d 150, 160 N.E.2d 327 (8th Dist. Cuyahoga County 1959); Kiowa Creek Land & Cattle Co., Inc. v. Nazarian, 5 Neb. App. 1, 3–4, 554 N.W.2d 175, 177, 113 Ed. Law Rep. 445 (1996) (concluding that "no use of land while it is owned by the state can be support for a claim of an easement by prescription, either against the state or against anyone who acquires title from the state").

[9]Preshlock v. Brenner, 234 Va. 407, 410–411, 362 S.E.2d 696, 697–698 (1987).

[10]Chittenden v. Waterbury Center Community Church, Inc., 168 Vt. 478, 482–488, 726 A.2d 20, 24-27 (1998) (denying claimed prescriptive easement over church driveway).

[11]Id.