

Senate LABOR & COMMERCE Minutes
Mar 05, 2002

SB 309-ADVERSE POSSESSION

SENATOR GENE THERRIAULT, sponsor of SB 309, said he was approached after the session began about this issue. Adverse possession is a doctrine under which a person - even a squatter acting in bad faith - can take another's property without compensation by simply possessing it. Although the doctrine began in the Middle Ages under circumstances that do not apply today, it creates an interesting policy issue so he agreed to introduce the bill.

SB 309 limits the current statute pertaining to adverse possession to two narrow circumstances: (1) where a person has, in good faith, occupied property under color of title for 20 years; and (2) where a property owner occupies property adjacent to his own land under a reasonable, good-faith error over the actual boundaries of his property. After reading about the history of the doctrine, he decided he falls on the side of the private property owner. Arguably, Alaska has the largest private property owners in the nation, those being the Native corporations. The old doctrine that requires a property owner to keep tabs on who might be squatting on the land might put the owner at risk of losing a portion of that property. He said some of his constituents own property in locations that they are unable to visit regularly. Under current doctrine, they must make sure their property has not been encroached upon, otherwise risk losing it.

1:52 p.m.

SENATOR LEMAN asked the significance of increasing the timeframe from seven to 20 years.

SENATOR THERRIAULT told members that 20 years is an arbitrary timeframe that was suggested to him but that he is willing to consider shortening that period.

SENATOR LEMAN said he would like to hear testimony on that question. He believes the other provisions are reasonable and will help limit the application of adverse possession.

CHAIRMAN STEVENS said he shares Senator Leman's concern.

The committee took a brief at-ease.

SENATOR THERRIAULT informed members, regarding the selection of 20 years, as people from England started to purchase land when the country was established, it was often difficult to journey across the ocean to check on the land so the New England states established a 20 year period of time. With the Manifest Destiny movement, the nation wanted land to be put into productive use., The time period was shortened to allow another to take possession of the land if the titleholder was not using it. He noted that circumstances have changed so the shorter time period no longer makes sense. A 20-year time period still exists in a number of the New England states.

CHAIRMAN STEVENS suggested basing the timeframe on Henry VIII's

days when it was 60 years.

SENATOR LEMAN expressed concern about copying what the New England states are doing.

MR. BRYAN MERRELL, state counsel and underwriter for First America Title Insurance Company, informed members that SB 309 is a double-edged sword for First America. For certain types of title insurance policies, title insurers issue coverage against adverse possession to assure policyholders that no one can claim adverse possession to their property. First America does a risk evaluation using surveys and questions directed to the landowners involved in the transaction. In essence, SB 309 is somewhat favorable to First America because it will make it more difficult for someone to raise an issue of adverse possession. However, a cause for concern is clearing or correcting title defects that may have occurred in the past. One of First America's better allies for assisting private landowners who are attempting to insure titled real property is to suggest, in cases where old deeds of records exist but the people who may claim those interests cannot be tracked down or are not interested in clearing the record, to use the doctrine of adverse possession. Likewise, there are times when those interests may have been missed or in which the underwriter decides to take a risk and provide insurance. If they do come up during a title search, the underwriter can use adverse possession as a means to clear the title. The restrictive nature of SB 311 will make that process harder for people with those concerns. In his experience as a title examiner, it is a good tool to use to fix some title problems.

Regarding the timeframe, MR. MERRELL said shortening it from 20 to 10 years would help. Some of the aspects involved in the codification of the statute would be required by the Alaska Supreme Court to claim adverse possession, for example, the concept of having claimed the right in an open and hostile way and notoriously, which is what the Supreme Court has determined. Some of the other aspects, particularly the concept of paying for the property that one is adversely possessing, are unusual. He has not been able to do a survey to figure out where other states fall on this issue. But, in his experience, he cannot recall any other states being this restrictive as to the statute.

MR. MERRELL asked members to consider the need for some folks to be able to clear title in a state like Alaska where there are a lot of old interests, errors and flaws in the recording system that make it difficult to get clear title.

CHAIRMAN STEVENS thanked Mr. Merrell and called Mr. Dick and Mr. Tillinghast.

MR. RUSSELL DICK, Natural Resources Manager for Sealaska Corporation, stated strong support of SB 309. Native corporations established under the Alaska Native Claims Settlement Act (ANCSA) are the largest private landowners in the state of Alaska. Sealaska is the largest private property landowner in the Southeast region. He noted he would address SB 309 from two fronts: ANCSA conveyed lands and non-ANCSA lands.

MR. DICK said that lands conveyed to Native corporations served two purposes: (1) to settle Alaska Natives aboriginal claims; and

(2) to meet the social, cultural and economic needs of Natives. In that sense, these lands are the foundation of existence of Native peoples and Native corporations. Recognizing that, Congress imposed a prohibition of adverse claims against Native lands as long as the lands remained in an undeveloped state. Although that was effective when ANCSA was first enacted, it is inadequate now. He does not believe Congress recognized how expansive these land bases would become. Congress didn't consider the degree of development on these lands nor the burden created by having to actively patrol large remote landholdings. Sealaska Corporation has 290,000 acres of land with an entitlement, which will total upwards of 350,000 acres spread throughout Southeast Alaska. If development is minimal or occurs in specific areas, the cost of patrolling the lands will be burdensome and an economic waste that serves no valid public policy.

MR. DICK informed members that Sealaska Corporation has also purchased non-ANCSA lands. These types of lands do not maintain the same prohibition of adverse claims so that adverse possession can occur regardless of whether or not they are developed. Sealaska purchased a piece of property in Cordova on which a squatter built a house. Sealaska had to spend considerable time and money to evict the squatter. Had Sealaska not known the squatter was there, a tacking issue may have arisen. In other words, if the squatter had lived on the land for six years at the time of the purchase, that time would apply toward the seven years required for adverse possession.

MR. DICK stated that the State of Alaska has always respected private property rights because there is so little private property here. The doctrine of adverse possession seems to be inconsistent with the recognition of the importance of protecting and preserving private property ownership and its associated rights. The only lands subject to adverse possession in Alaska are private property lands. He repeated that Sealaska is very supportive of SB 309 as it goes a long way toward protecting the rights of private property landowners.

MR. JON TILLINGHAST, legal counsel to Sealaska, told committee members that New Hampshire is among the New England states that use or used 20 years. He said in his discussion about adverse possession, he will put two types of claims to the side - the first being claims premised on color of title, meaning a person has a deed with a problem. Those are the claims Mr. Merrell spoke of and SB 309 preserves those claims. The second type of claims he would like to put aside are those involving a boundary dispute, for example when a property owner built a fence in the wrong location 20 years earlier. SB 309 puts new restrictions on bringing those kinds of claims. For example, it says a person must possess the property for 20 years rather than seven.

MR. TILLINGHAST said the heart of the bill is in Section 1, which is aimed at a person one could only call a squatter; a person with no claim to title who is simply there with the hope of staying long enough to acquire the title. He said he will not review the historical reasons for adverse possession, but explained the only justification at this time for a squatter law is that a squatter will make more productive use of the land than the absentee landowner. He noted that modern courts have upheld that doctrine. He finds the concept frightening because the state is saying that if a private landowner is not making a

sufficiently socially valuable use of his or her private property, it will be given to someone else.

MR. TILLINGHAST said the fact that a person cannot get adverse possession from the state or federal government is well established. The state and federal governments have argued that it would be too burdensome to police property they own. In Alaska, ANCSA regional corporations own roughly 80 million acres of land: those corporations have precisely the same problem the state has yet the state wishes to maintain its immunity from adverse possession but maintain its right to squat on private property without paying. That philosophy reflects a different value judgment than Sealaska, as to the relative sanctity of public property ownership and private property ownership. He offered to answer questions.

SENATOR LEMAN asked Mr. Tillinghast to clarify whether there is a difference between ANCSA and non-ANCSA property in the application of adverse possession.

MR. TILLINGHAST explained that ANCSA protects ANCSA property from being divested by adverse possession as long as it remains undeveloped.

SENATOR LEMAN asked if, "...somebody could put that road in adversely?"

MR. TILLINGHAST said he does not know the answer to that question.

MR. DICK said a more likely scenario is that Sealaska might build an advance logging road which would provide a convenient way for a squatter to drive in.

SENATOR LEMAN asked if that ANCSA land would not have the same protection as adjoining state or federal land.

MR. DICK said that is correct.

CHAIRMAN STEVENS asked how many cases of adverse possession have been claimed against ANCSA land in the past.

MR. DICK said he knows of two cases with Sealaska.

CHAIRMAN STEVENS noted no representation from other Native corporations in the room and then asked Mr. Dick if he is aware of positions from any other corporations on this legislation.

MR. DICK said he is not.

CHAIRMAN STEVENS said he would like to get more input from large landowners and discuss the 20-year issue before taking action on the bill.

MR. BILL CUMMINGS, assistant attorney general, Department of Law (DOL), said DOL is not unmindful of the problems with adverse possession that Sealaska and other ANCSA corporations have with lands they acquire and might minimally develop. However, DOL is concerned that SB 309 stands the whole notion of adverse possession on its head. In some situations, it could work to the public's detriment and could be used to commit outrages. DOL's

biggest concern is the large number of highway rights-of-way the state claims under adverse possession. The state is currently embarking on a program called "gravel to paving" in which the state is paving many gravel roads in rural areas. The presumption is that the state has been doing this for 20 to 30 years without any objections so the state is assuming it has title by adverse possession. If SB 309 comes to pass, the state will have to re-examine its presumption and possibly kill the program. Another example is a state program to build roads and put in drainage culverts. The culverts are located within the highway right-of-way and carry water away from the highway. The state has never acquired any easements below the outfall so, if SB 309 was enacted, the state would have to go back and redo engineering decisions that were made up to 50 years ago, render compensation, all after everyone in the chain of title has acquiesced to what the state has been doing to carry off the drainage water. Mr. Cummings said the state needs some way to address these very valid public concerns.

MR. CUMMINGS said DOL's final concern is that SB 309 could be used to the detriment of the public. He cited a case named Veazey (ph) v. Green, (35 P.3d 14) and said under SB 309, the plaintiff would have lost. The facts of the case are as follows: a woman was given a tract of land by her grandmother but the deed was not transferred; the woman spent 10 years building a house, clearing the land and planting on it; then the grandmother advanced in age and lost some of her mental faculties and went into a land transaction with a developer who acquired the property. The woman would have lost her 10 years of labor under this bill. He offered to answer questions.

SENATOR LEMAN asked, regarding the drainage issue, if one goes back 30 or 40 years when some of the engineering decisions were made, whether they would be barred from claim by Section 4 of the bill.

MR. CUMMINGS said it is not clear. The rules that are used now when one combines the 10 years of use along with the rules of inverse condemnation, would imply the state took it a long time ago so nothing can be done about it now. However, under SB 309, particularly Section 1, anyone could bring an action at any time. He noted the need for legislation that is much more precise to protect the state's interests on the culverts.

SENATOR LEMAN suggested that Mr. Cummings work with committee members and the sponsor on ways to find ways to address the issues he has raised.

CHAIRMAN STEVENS asked Mr. Cummings his position on SB 309.

MR. CUMMINGS said DOL is opposed to the bill because of what it does to the state's interests.

CHAIRMAN STEVENS asked about DOL's position on applying adverse protection requirements to protect private landownership.

MR. CUMMINGS replied there is room for improvement as long as the changes are not too burdensome or allow for outrages.

TAPE 02-10, SIDE B

CHAIRMAN STEVENS repeated his desire to hold the bill and request positions from other large landowners.

SENATOR THERRIAULT agreed and said that this is his first time dealing with this area of the statutes. He said he is willing to discuss the matter further and find language to address the issues raised.

SENATOR LEMAN expressed concern that SB 309 not overreach and create unintended difficulties.