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A landowner can acquire a prescriptive easement over surface water coming from a neighboring property

By Ronald L. Richman

In a recent case, the California Court of Appeal, recognizing that the issue was raised but never decided by the California Supreme Court, held that an owner of a lower (downhill) parcel of private property who diverts surface water coming from an adjacent uphill property can acquire a *prescriptive easement* over the surface water, i.e., a right to divert and use the surface water. Brewer v. Murphy (2008)Cal. Rptr. 3d....

In Brewer, the downhill property owners' only source of water came from a water line connected to a spring located on the upper landowner's property. The upper landowner tapped into the water line, cutting off the source of water to the lower landowners' property. The lower landowners filed suit, claiming that they acquired a prescriptive easement over the surface water. The Court of Appeal agreed with the lower landowners, affirming their prescriptive easement over the surface water.

A prescriptive easement is a *right* to use the land of another; it does not create title to the land of another. In order to acquire a prescriptive easement over another's property, the following elements must be met: (1) actual use of the property; (2) open and notorious use of the property; (3) use that is hostile and adverse to the original owner; (4) continuous and uninterrupted use of the property; (5) use of the property under a claim of right to the property; and (6) use for the statutory period of five years.

The issue of what constitutes "*hostile and adverse*" use is a topic often addressed by the courts and this case was no exception. In addressing what constitutes "*hostile and adverse use*," the Court noted that this element does not mean that the parties must have an *ongoing* dispute as to title during the five-year period required by law. Instead, the use of the neighboring property must be adverse to the true owner's use and *without recognition of the true owner's rights to his or her property*, although, the court acknowledges that a claimant's use of the neighboring property can still be "*hostile and adverse*" even if the claimant acknowledges that the true owner of the property has *some, but lesser*, rights to the property.

What constitutes "*hostile and adverse*" use will always be decided on a case-by-case basis because it depends on the specific acts and relationship between the party seeking to acquire the easement and the party trying to preserve the rights to his or her own property.

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