NOTES

"When in Nome....": Custom, Culture and the Objective Standard in Alaskan Adverse Possession Law

This note considers the Alaska Supreme Court's apparent standard for resolving adverse possession disputes after the decision in Nome 2000 v. Fagerstrom. *The* Fagerstrom *case presented the court with a distinctly Alaskan fact-pattern involving a claim made by a Native couple to a rural parcel of property. The court held that the Native couple had established title to the land by adverse possession. This note criticizes the court's decision on three grounds: 1) that the lenient objective standard adopted by the court fails to fulfill the purposes underlying the adverse possession doctrine; 2) that the court's use of custom to establish legal title was unsatisfactory; and 3) that the policy ramifications of the* Fagerstrom *decision are undesirable. This note concludes that the court should adopt a more stringent, objective standard for determining adverse possession in order to sufficiently protect the value of legal title.*

I. INTRODUCTION

The doctrine of adverse possession is not usually viewed as one of the more controversial bodies of law. In fact, Professor Epstein has called adverse possession "a problem solved."[1] Underlying this statement is the idea that the modern police force has supplanted self-help and legal action as the dominant form of protection for private property rights.[2] As a result, it has been argued, the doctrine of adverse possession has been increasingly applied to

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1. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 693 (1986).

2. *Id.* at 692.

"insignificant" issues such as backyard boundary disputes and zoning controversies.[3] However, due to such factors as its vast land area and severe and uncertain climate, Alaska has found it difficult to provide many remote areas with adequate law enforcement.[4] Thus, the argument that adverse possession is a "problem solved" may not apply to the peculiar circumstances under which Alaska law develops; self-help and legal action may still be the primary methods for resolving property disputes, especially in rural areas of the state.

In *Nome 2000 v. Fagerstrom*,[5] the Alaska Supreme Court dealt with an adverse possession case in rural Alaska. *Fagerstrom* involved a situation in which a Native couple, the Fagerstroms, occupied and used, during summer months, a rural parcel of land for more than a decade. Their use was confined to recreational and subsistence activities. The land in dispute was owned by a private land-holding partnership, Nome 2000. The Alaska Supreme Court held that the Fagerstroms had established title to the land by adverse possession. Specifically, the court held that (1) the Fagerstroms' use of the parcel was sufficient to establish continuous, notorious and exclusive possession pursuant to the established law in Alaska[6] and (2) what the Fagerstroms believed with respect

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3. *Id.* at 692-93; R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 333 (1983).

4. *See, e.g.*, TERESA W. CARNS ET AL., RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY 18 (1993).

5. 799 P.2d 304 (Alaska 1990).

6. *See, e.g.*, Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1052 (Alaska 1977) (stating that for adverse possession to have occurred "(1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner"). These requirements apply to both of the adverse possession statutes in Alaska. The *Fagerstrom* case was brought pursuant to Alaska Statutes section 09.10.030, which provides:

> No person may bring an action for the recovery of real property, or for the recovery of the possession of it unless commenced within 10 years. No action may be maintained for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

ALASKA STAT. § 09.10.030 (1983).

Alaska's other adverse possession statute differs in that it applies to situations where the claim is brought under color and claim of title. It provides, in relevant part, that: "[t]he uninterrupted adverse notorious possession of real property under

to their ownership of the land was immaterial to the question of hostility.[7] The court stated that "[t]o hold otherwise would be inconsistent with precedent and patently unfair."[8]

The "black letter" law of adverse possession generally supports the Alaska Supreme Court's position that subjective elements do not factor into adverse possession analysis. The pervasive view regarding claims of adverse possession is that "what the possessor believes or intends should have nothing to do with it."[9] The objective test for determining adverse possession is supposed to focus on how an "average owner" would use the land, so as to provide for the greatest degree of societal stability by establishing a workable test for settling title.[10] However, the way in which this proposition has been applied by various courts is a different matter. A 1983 survey conducted by a University of Chicago law professor concludes that courts are often willing to recognize subjective factors in determining whether an adverse possessor has acquired title:[11] the implication is that the law of adverse possession is becoming less objective, and is thus potentially sacrificing the stability that the doctrine was intended to provide to society.

The court's re-affirmance of an objective analysis in *Fagerstrom* stands in contrast to the court's implicit adoption of certain subjective factors. These factors were part of the "objective standard" the court used when it found the Natives' traditional and customary system of land use sufficient to establish title in Alaska. The Native system of land use is not a matter of ownership, but all members of a particular social group in an area have equal access to the land.[12] This recognition of Native custom may be one reason why the *Fagerstrom* decision has been viewed as an "exotic

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color and claim of title for seven years or more is conclusively presumed to give title to the property except as against the state or the United States." ALASKA STAT. § 09.25.050(a) (Supp. 1993).

7. *Fagerstrom*, 799 P.2d at 310.

8. *Id.*

9. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 11.7, at 761 (1984).

10. 3 AM. JUR. 2D *Adverse Possession* §§ 1, 2 (1986).

11. Helmholz, *supra* note 3, at 332. While Helmholz does not necessarily advocate subjective analysis under the law, he does question the objective test's use as a factor for determining title by adverse possession: he sees an acceptance of subjective analysis in practice. *Id.*

12. *Fagerstrom*, 799 P.2d at 310.

solution."[13] Nevertheless, due to the uniquely undeveloped and barren nature of the disputed land in *Fagerstrom*, the claimants' arguments in favor of adverse possession had some merit. As a factual matter, a lesser degree of possession is needed to establish adverse possession of lands which could be considered wilderness.[14]

This note concludes that the Alaska Supreme Court, by accepting customary use as sufficient for establishing legal title to land in Alaska, lowered the standard for determining the elements of adverse possession too greatly in *Fagerstrom*. In reaching this conclusion, part II of this note reviews the justifications for adverse possession and the requirements for the claims under Alaska doctrine. The *Fagerstrom* decision itself is analyzed in part III. Part IV examines the role that custom plays in the context of adverse possession doctrine, and part V analyzes the implications of the court's decision in *Fagerstrom*.

Three arguments will be presented in support of the conclusions of this note: (1) that the lenient objective standard adopted by the court fails to fulfill the purposes behind the elements required for establishing adverse possession; (2) that custom is unsatisfactory as a basis for establishing legal title, because where there is the potential for cultural misperception, the more stringent cultural standard must be applied in order to ensure that all potential parties could be put on actual notice of the adverse claim; and (3) that the policy ramifications of *Fagerstrom* are undesirable.

II. THE ADVERSE POSSESSION DOCTRINE

A. Justifications for Adverse Possession

At first glance, the doctrine of adverse possession appears to be an anomaly in the law of property. There is something that "feels" inherently unjust about allowing title to transfer as a result of "wrongful" possession. To the untrained eye, adverse possession appears to be something akin to theft. However, the doctrine rests

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13. Telephone Interview with Joseph J. Perkins, Jr., Shareholder, Guess & Rudd, Anchorage, Alaska (Aug. 30, 1993).

14. WILLIAM F. WALSH, TITLE BY ADVERSE POSSESSION, CONTEMPORARY LAW PAMPHLETS SERIES 1, NO. 19, 12 (1939). Generally, a lesser degree of ownership is required for wild, undeveloped lands because the usual acts of possession such as making improvements and cultivating the soil are "impossible or unreasonable." *Id.*

upon a societal judgment that the need for security of title to land outweighs whatever injustice may result from an adverse possession claim.[15] Historically, adverse possession statutes in the United States have been derived from English laws on the subject. The doctrine of adverse possession was developed in England because of the need for order and security within the realm of the kingdom.[16] This need for order and security has continued to serve as the justification for the doctrine.

1. *The Need to Quiet Title.* The primary purpose of the adverse possession doctrine is to bar stale claims and quiet title to estates.[17] Statutes recognizing this rationale date back as far as the thirteenth century.[18] These laws are based on the belief that claims to land grow stale as time passes, and the costs to society of determining original title simply become too great.[19] Thus, once the statute of limitations runs, an older claim of title is fully extinguished and title is vested in the adverse possessor. The statutes generally serve both a procedural purpose (acting as a bar against an action by the title holder) and a substantive purpose (affirmatively vesting title in the adverse claimant).[20]

2. *Rewarding the Productive User.* A second justification for adverse possession is that it acts as a reward for the person who makes use of land.[21] This concept rests on the premise that productive use of land is a quality most societies seek to promote.[22] Alaska has incorporated this idea into its property law by choosing to apply an objective standard to adverse possession claims which looks at whether the claimant's actions on the land were sufficient to give the record holder notice.[23] This test both

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15. 7 RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 1012[3] (P. Rohan rev. ed., 1986).

16. Epstein, *supra* note 1, at 675.

17. WALSH, *supra* note 14, at 4-5.

18. POWELL, *supra* note 15, at ¶ 1012[1].

19. *Id.*

20. *Id.*

21. CUNNINGHAM ET AL., *supra* note 9, § 11.7, at 764.

22. *Id.*

23. *E.g.*, Penn v. Ivey, 615 P.2d 1, 3-4 (Alaska 1980) (holding that "[t]he proper determination of whether the required degree of hostility exists is whether the acts of the claimant are the acts of an owner, sufficient to give the record owner notice of the possessor's claim."); Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 831 (Alaska 1974) (stating that "'possession . . . need only

promotes productivity and serves to give notice to the record title holder that his or her land is being held adversely.

3. *Punishing the Absent Title Holder.* In connection with the previous justification, adverse possession can also be seen as a punishment for landowners who fail to utilize their land productively.[24] This idea apparently comes from the English civil law, as it has been remarked that "'English lawyers regard not the merit of the possessor, but the demerit of the one out of possession.'"[25] The focus here is on whether the actions of the title holder are inconsistent with societal norms regarding land use. Loss of title, however, may be viewed as too harsh a punishment for a property owner's mere lack of diligence and may, alternatively, be more positively viewed as rewarding the productive land user and quieting title to disputed property.[26]

4. *Internalization Theory.* A final justification for adverse possession was suggested by Justice Oliver Wendell Holmes, who stated that by working a parcel of land, that parcel "takes root in [one's] being and cannot be torn away without [resentment]."[27] Holmes stated that the basis for this acquisition of title "is in the nature of man's mind" and that "[t]he law can ask no better justification than the deepest instincts of man."[28] This notion of one's soul becoming intermixed with the soil of the land strays far from an objective analysis, however, and receives little or no support in modern writings.

B. The Operation of Adverse Possession in Alaska

Early case law on adverse possession in Alaska established that the applicable legislative enactments are to be considered statutes of repose, by which a cause of action for ejectment is extinguished after the prescribed interval of time.[29] The Alaska adverse

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be a type of possession which would characterize an owner's use'") (quoting Norgard v. Busher, 349 P.2d 490, 496 (Or. 1960)).

24. CUNNINGHAM ET AL., *supra* note 9, § 11.7, at 764.

25. Epstein, *supra* note 1, at 677 (quoting Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918)).

26. *See supra* parts II.A.2 & II.A.1, respectively.

27. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

28. *Id.*

29. *See* Roberts v. Jaeger, 5 Alaska 190, 191 (D. Alaska 1914).

possession statutes set the length of the relevant intervals at either seven or ten years, depending on whether the claimant can establish color or claim of title.[30] The claimant must show that his or her possession was adverse throughout the full period of time; otherwise the title holder's possession of the property will be constructively re-established.[31] So long as the claimant maintains the adverse possession, however, the legal title holder will be considered ousted from possession.

Establishing title by adverse possession for the full statutory time period is by no means easy. Generally, adverse possession is not a favored means of acquiring title to land.[32] The Alaska Supreme Court has stated that the party seeking to establish title by adverse possession bears the burden of proving each element by "clear and convincing evidence."[33] In so doing, the court asserted that, as a policy matter, "[w]e hereby adopt that more stringent standard because of our desire to foster reliance on record title and enhance marketability."[34] Additionally, the court has explicitly set out five requirements that the claimant must satisfy to establish adverse possession.[35] These requirements, which are discussed in

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30. ALASKA STAT. § 09.10.030 (1983); *id.* § 09.25.050 (Supp. 1993). The shorter period of time permitted, where color and claim of title can be established, is in recognition that one who holds land under these conditions will be more likely to make improvements to the property. Lott v. Muldoon Rd. Baptist Church, Inc., 466 P.2d 815, 818 (Alaska 1970). Color and claim of title also give the adverse possessor a stronger claim against the legal title holder. Thus, the equities will be balanced between the two sides in a shorter period of time. For a general discussion of the element of time in the law of property, see Epstein, *supra* note 1.

31. Ayers v. Day & Night Fuel Co., 451 P.2d 579, 581-82 (Alaska 1969); Ringstad v. Grannis, 171 F.2d 170, 173-74 (9th Cir. 1948) (reasoning that "the possession must be continuous for the statutory period in order to prevent the original owner's possession from constructively attaching to the land, thus starting the statute running anew").

32. *See* Edward G. Mascolo, *A Primer on Adverse Possession*, 66 CONN. B.J. 303, 305 (1992). ("[I]n proceedings invoking a claim of title by adverse possession, every presumption runs in favor of the holder of legal title, and none against him.").

33. Curran v. Mount, 657 P.2d 389, 391-92 (Alaska 1982). The court has stated that for "clear and convincing proof" to be shown "there must be induced a belief that the truth of the asserted facts is highly probable." Saxton v. Harris, 395 P.2d 71, 72 (Alaska 1964).

34. *Curran*, 657 P.2d at 391.

35. *E.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (Alaska 1974).

turn below, are that the possession must be actual, open and notorious, continuous, exclusive and hostile.[36]

1. *Actual Possession.* Of the elements necessary for establishing adverse possession, actual possession of the land is perhaps the most significant. Actual possession by an adverse claimant divests the legal title holder of any constructive possession gained from holding that title and begins the running of the statute of limitations on the legal title holder's claim.[37] While actual possession over the term of the statute of limitations is not by itself sufficient to establish adverse possession, it is procedurally an essential element in beginning the statute of limitations. Actual possession is also substantively essential, providing visible notice to a title holder that the land has been occupied in a hostile manner.

The issue of actual possession is often the determinative element decided by the trier of fact as to whether there has been a sufficient showing by the adverse claimant to establish title. The requisite degree of actual possession is dependent upon the characteristics of the land in dispute.[38] Obviously, a party in possession of a parcel of commercial real estate in the city of Anchorage will undertake different actions with respect to the property than will a party possessing a rural plot on the banks of the Nome River. There is no specific formula stating how much evidence of possession is enough. Rather, the issue often will be determined by whether the trier of fact can be persuaded that the title holder should have been put on notice by the adverse claimant's actions in light of the surrounding circumstances. Thus, the level of proof necessary for showing adverse possession differs depending on a parcel's characteristics.

Certain decisions of the Alaska Supreme Court provide a glimpse of the type of factors used to determine actual possession. In *Peters v. Juneau-Douglas Girl Scout Council*,[39] an elderly Tlingit man was awarded title to a rural piece of property that he

36. *Id.*

37. *See* Tyee Consol. Mining Co. v. Langstedt, 136 F. 124, 128 (9th Cir. 1905) (stating that "'seisin and possession is [sic] coextensive with [a title holder's] right, and continues till he is ousted thereof by an actual adverse possession'") (quoting United States v. Arredondo, 6 Pet. 743 (1832)).

38. *See, e.g.*, Shilts v. Young, 567 P.2d 769, 776 (Alaska 1977) ("The same acts are not required for uninhabited and forested land as for urban lots.").

39. 519 P.2d 826 (Alaska 1974).

had maintained over a forty year period.[40] The factual evidence of possession in that case was quite extensive. Peters, the adverse possessor, was able to prove that there were several cabins in various stages of repair on the land, that he had cleared the adjacent beach of rocks and maintained it in that condition, and that he had also constructed a smokehouse, a seal-skinning bench and a well.[41] There was also evidence of at least one boundary post that at some time had a sign indicating that it was Peters' property.[42] Finally, Peters testified that he drove out to the property every weekend and that he and his family "never stop[ped] seal hunting" on the land.[43] The court found Peters' actions sufficient to establish actual possession of the land and, therefore, focused its analysis on the exclusivity and hostility requirements of adverse possession.[44]

Three years later in *Alaska National Bank v. Linck*,[45] the court considered another claim of adverse possession of a rural parcel. The appellee, Linck, had brought an action to quiet title, claiming that she had adversely possessed the land. The trial court ruled in favor of Linck, and the Alaska Supreme Court affirmed.[46] Linck showed that her claim of possession was based upon a number of factors. Linck had kept the property clear of litter and had used a substantial plot as a garden.[47] More significantly, she had constructed a barricade to prevent others from crossing the property and had posted a sign prohibiting trespassing for hunting purposes.[48] Additionally, Linck had negotiated a transaction granting an easement for power lines to be placed upon the property.[49] In light of this evidence, the court found that Linck established actual possession over the rural property.[50]

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40. *Id.* at 827-28.
41. *Id.* at 828.
42. *Id.* at 828-29.
43. *Id.* at 828 n.6.
44. The court held that Peters' use of the disputed land was both exclusive and hostile and, therefore, that adverse possession was established. *Id.* at 831-32. For a further discussion of the exclusivity analysis in *Peters*, see *infra* text accompanying notes 69-75 and 151-58.
45. 559 P.2d 1049 (Alaska 1977).
46. *Id.* at 1054.
47. *Id.* at 1051.
48. *Id.*
49. *Id.*
50. *Id.* at 1052.

A case decided just five months after *Linck* provides an interesting contrast. In *Shilts v. Young*,[51] the appellee, Young, had brought an action to quiet title to approximately 80 acres of land. Shilts, the legal title holder, conceded that Young had adversely possessed most of the parcel but counterclaimed for possession of 240,000 square feet of the 80 acres, asserting that Young lacked "actual possession" of that portion of the land.[52] Evidence showed that the relevant local community believed that Young was the owner of the land and that he had previously been approached by a logging company to discuss a sale of the parcel.[53] However, Young's activity on the land was minimal at best. Young stated that he flew over the property ten to fifty times per year, and he annually walked around what he believed were the boundaries.[54] The court found it notable that Young had "never fenced the boundaries of the land, [or] made any improvements or posted signs on the land indicating his ownership or warning trespassers."[55] Based on these findings of fact, the court ruled that Young could not establish adverse possession to the disputed 240,000 square foot parcel.[56]

The above examples are intended only to provide a glimpse of the type of factors that the court has used to determine actual possession. As noted earlier, no set formula or specific type of evidence is considered essential to determining whether there is actual possession. Similarly, the above examples are not intended to be an exclusive list of the type of evidence the court will consider. It is evident, however, that factors relevant to the determination of "actual possession" include the presence of enclosed boundaries, permanent structures and improvements, signs indicating a warning to trespassers, and evidence of clearing and maintaining the property.

2. *Open and Notorious Possession.* Another requirement of adverse possession is that it must be open and notorious.[57] The possession must be of such a nature that if the title holder were to

51. 567 P.2d 769 (Alaska 1977).
52. *Id.* at 771.
53. *Id.* at 772.
54. *Id.*
55. *Id.*
56. *Id.* at 777.
57. *E.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (Alaska 1974).

visit the property, she would be put on notice that it is necessary to assert her ownership rights.[58] This requirement is related to that of actual possession, in that it relies on there being some visible evidence of possession on the property. The characteristics of the land in dispute, and thus the uses to which the land can be put, also affect whether the possession can be classified as open and notorious. As the Alaska Supreme Court stated in *Linck*, "[w]e cannot expect the possessor of uninhabited and forested land to do what the possessor of urban residential land would do before we charge the record owner with notice."[59] In general, an adverse claimant in a semi-wilderness area may make less of an open showing of possession and still successfully maintain an adverse possession action.

One's reputation in the community regarding the ownership of property is also a relevant, although by no means controlling, factor for proving open and notorious possession.[60] The rationale for allowing reputation to be considered as substantive evidence is that if the possession of an adverse claimant is so conspicuous that it is generally known and discussed by the community, then the record title holder should at least be put on constructive notice.[61] Reputation alone, however, is also not dispositive on the open and notorious issue. For example, the Alaska Supreme Court in *Shilts* denied transfer of title under adverse possession, although, the claimant was reputed to be the owner of the property.[62]

Whether the adverse claimant paid taxes on the property is also a factor that the Alaska courts will consider in determining notoriety. The rationale is that payment of taxes establishes a record with the tax assessor, which would indicate ownership of the property to a third party attempting to find the true owner.[63] This factor is limited, however, by its lack of physical visibility. Thus, the Alaska Supreme Court has stated that payment of taxes is only a factor to be considered in connection with a visible physical presence on the land.[64]

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58. Bentley Family Trust v. Lynx Enters., 658 P.2d 761, 766 (Alaska 1983).
59. Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1053 (Alaska 1977).
60. *Id.*
61. 3 AM. JUR. 2D *Adverse Possession* § 70 (1986).
62. Shilts v. Young, 567 P.2d 769, 777 (Alaska 1977) (the denial of transfer of title was based on Young's very minimal activity upon the property).
63. *Linck*, 559 P.2d at 1054.
64. *Shilts*, 567 P.2d at 777.

3. *Continuous Possession.* The requirement that possession be continuous in order for adverse possession to ripen into good title is well established.[65] Although actual and hostile possession of the adverse claimant are said to divest the constructive possession of the title holder, once the continuity of the adverse possession is broken, constructive possession once again vests in the record title holder, and the claim for adverse possession is negated.[66]

Continuous possession does not mean, however, that the adverse claimant must be physically present on the property for the full statutory period.[67] Like the other requirements for establishing adverse possession, continuity is considered by the courts in light of the characteristics of the land in dispute. The test established by the Alaska Supreme Court is "whether the adverse possessor has used and enjoyed the land as 'an average owner of similar property would use and enjoy it.'"[68] In other words, if the nature of the land is such that it cannot reasonably be used throughout the entire year, then the possession need only cover the portion of the year during which the land is usable. Thus, for a rural parcel of land in Alaska, which may be uninhabitable for a significant amount of time during the year, an adverse claimant may have to show adverse possession only for a relatively short period of time—for example, three months.[69]

4. *Exclusive Possession.* The exclusivity requirement tends to work in conjunction with the hostility requirement (discussed in the next subsection) in establishing adverse possession. By excluding others, including the record title holder of the property, the adverse claimant gives clear evidence to the rest of the world that he intends to appropriate the land. The Alaska Supreme Court stated in *Peters*[70] that "[a]n owner would have no reason to

65. *E.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (Alaska 1974).

66. Ringstad v. Grannis, 171 F.2d 170, 173-74 (9th Cir. 1948); *Linck*, 559 P.2d at 1052.

67. *Linck*, 559 P.2d at 1052.

68. *Id.* (quoting 3 AM. LAW OF PROPERTY § 15.3, at 765 (A. J. Casner ed., 1952)).

69. This was the case in *Fagerstrom*, which will be discussed further below. *See infra* part III.

70. 519 P.2d 826 (Alaska 1974).

believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not exclusive, but in participation with the owner or with the general public."[71]

This does not mean, however, that the possession of the adverse claimant must be *absolutely* exclusive. Consistent with the other requirements for establishing title by adverse possession, the exclusivity requirement is considered in light of the way in which an average owner would make use of the property.[72] Inevitably, the finder of fact in an adverse possession case will therefore need to make a subjective estimate of how hospitable the "average owner" would be with regard to allowing others to use his or her land.

In *Peters*, for example, the court found that allowing the general public to use the land for clamdigging did not destroy the exclusivity of possession, because "Peters was merely acting as any other hospitable landowner might."[73] The court so held despite the fact that there was no evidence that other owners of similar land in the community acted in a like manner. Ultimately, the court's determination of exclusivity appears to have turned on whether Peters believed that his rights as a property owner were infringed upon.[74] The court stated that "[o]ccasional clamdiggers could not destroy the exclusive character of Peters' use since such casual intrusions were clearly not considered by Peters to interfere or conflict with his own use."[75] By taking Peters' subjective beliefs into account with regard to the exclusivity requirement, the Alaska Supreme Court has shown its willingness to deviate, to a certain extent, from a purely objective standard.

5. *Hostile Possession.* The hostility requirement has proved to be the most difficult for courts to apply consistently in adverse possession claims. Subjective factors have most frequently entered

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71. *Id.* at 830.

72. *Id.* at 831; *see also* Norgard v. Busher, 349 P.2d 490, 496 (Or. 1960).

73. *Peters*, 519 P.2d at 831.

74. *Id.*

75. *Id.* The court's focus appears misplaced, however, because the requirements for adverse possession are justified by the notice that they give to the record title holder. The record title holder could not reasonably be required to ascertain whether the adverse claimant believed that there was an interference with her use. A better option would be to ask whether an average title holder, upon taking notice, could determine that his property was being claimed by a hostile possessor, with exclusivity acting to give physical evidence of that fact.

into adverse possession analyses through this requirement. Terminology may be the reason for this problem. "Hostile possession" seems to imply an element of ill will toward the record title holder. However, animosity is not an accurate portrayal of "hostility" as it is used in the adverse possession doctrine. For a claim to be "hostile," it merely must be without the permission of the legal title holder.[76] The Alaska Supreme Court has stated that the purpose of the hostility requirement is to show that the adverse claim "is not subordinate to the title of the true owner."[77]

The test for hostility that has been applied to claims of adverse possession in Alaska may be characterized as "a fairly objective one."[78] The initial presumption is that a party who takes possession of property legally owned by someone else does so permissively.[79] The presumption of permission is overcome by showing that the possession was openly adverse to the owner's interests.[80] Such a showing can be made by the claimant if he proves, by clear and convincing evidence, that he "acted toward the land as if he owned it."[81] Furthermore, unlike the requirements of exclusive possession, in regard to hostility the court has stated that the claimant's "beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession . . . all are irrelevant."[82] Thus, it is the physical action of the adverse possessor toward the land that is important. The court has summarized the significance of the hostility requirement by stating that "[t]he whole doctrine of adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession."[83]

6. *Summary.* The five requirements for establishing adverse possession all have a common purpose: to ensure that the legal title holder of the disputed property is put on notice of the adverse claim.[84] Notice is essential because it allows the legal title holder

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76. CUNNINGHAM ET AL., *supra* note 9, § 11.7, at 760.

77. City of Anchorage v. Nesbett, 530 P.2d 1324, 1328 (Alaska 1975).

78. *Peters*, 519 P.2d at 832.

79. *Id.* at 833 (citing Hamerly v. Denton, 359 P.2d 121, 126 (Alaska 1961); Ayers v. Day & Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969)).

80. *Id.* at 833.

81. *Id.* at 832.

82. *Id.*

83. *Id.* at 833.

84. Bentley Family Trust v. Lynx Enters., 658 P.2d 761, 766 (Alaska 1983) (citing *Peters*, 519 P.2d at 832).

to "take steps to vindicate his rights by legal action."[85] The true owner is not required to have actual notice, however; he may be charged with knowing that which a reasonably diligent owner *should* have known.[86] The Alaska courts apply a general standard which considers whether the adverse claimant's possession and use is the same as that of an "average owner." The "average owner" standard must, in turn, always be considered in light of the physical characteristics of the land, and the uses to which the land can be put. Only when this type of possession can be established by clear and convincing proof over the statutorily prescribed period of time will the adverse possession ripen into legal title in Alaska.

III. ANALYSIS OF *NOME 2000 V. FAGERSTROM*

The Alaska Supreme Court set its apparent standard for resolving adverse possession disputes in *Nome 2000 v. Fagerstrom*. The *Fagerstrom* case presented the court with an uniquely Alaskan fact-pattern involving a claim made by a Native couple to a rural parcel of property. The court held that the Native couple established title to the land by adverse possession. However, the court failed to fulfill the purposes underlying the adverse possession doctrine when it adopted a too lenient objective standard and misused custom to establish title.

A. Factual Background of *Fagerstrom*

The area of land in dispute in *Nome 2000 v. Fagerstrom* was a parcel of approximately seven and a half acres overlooking the Nome River in the Osborn area, a popular recreation site.[87] The relevant title of the land dated back to 1918, when it was patented by the federal government to a private individual as a portion of a mineral survey.[88] Record title to the land changed in 1982, when the entire area of the mineral survey was conveyed to Nome 2000, a private land-holding partnership.[89]

Between 1918 and 1982, the record title holder had no apparent activity upon the land. The property was uninhabitable for most of the year, and was used sparingly for subsistence and

85. *Peters*, 519 P.2d at 832.

86. *Bentley Family Trust*, 658 P.2d at 766.

87. Nome 2000 v. Fagerstrom, 799 P.2d 304, 306-07 (Alaska 1990).

88. Brief for Appellants at 2, Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (No. S-3409).

89. *Id.*

recreational purposes during the summer months.[90] The Fagerstrom family was one of the groups of people using the land between 1918 and 1982.[91] Charles Fagerstrom claimed that he could recall camping in the surrounding area as far back as the 1940's.[92] He had begun moving building materials onto the disputed parcel in the late 1960's, and in 1970 he and his wife staked off a twelve acre parcel for the purposes of applying for a Native Allotment.[93] Two of the stakes were located on the mineral survey, while two were not.[94] The area between the stakes, which overlapped a portion of the mineral survey, was the land in controversy.[95]

Beginning in 1974, the Fagerstroms parked a camper on the land during each summer, from June through September, until 1978, when they built a permanent cabin.[96] In 1974, the Fagerstroms also placed a lightweight outhouse and a fish rack on the land; one year later, they planted a group of spruce saplings.[97] During the summer of 1977, the Fagerstroms erected a reindeer pen on the land, which was used for only one and a half months but remained in place until 1978.[98] No other fences, barricades or signs of any kind were on the property.

The Fagerstroms used the disputed land for subsistence and recreational activities.[99] Other people also used the disputed land for those purposes without objection from the Fagerstroms.[100] Mr. Fagerstrom's mother testified that no one was ever excluded from the property because allowing free use of the land by others was "the Eskimo way."[101] Overall, the Fagerstroms spent approx-

90. *Fagerstrom*, 799 P.2d at 307.

91. *Id.*

92. *Id.*

93. This action was taken pursuant to the Alaska Native Allotment Act of 1906, 34 Stat. 197, *amended by* 70 Stat. 954 (1956), *repealed by* Alaska Native Claims Settlement Act, § 18, 43 U.S.C. § 1617(a) (1982) (with a savings clause for applications pending on or before December 18, 1971).

94. *Fagerstrom*, 799 P.2d at 307.

95. *Id.*

96. *Id.* at 307-08.

97. *Id.* at 307.

98. *Id.* at 307-08.

99. *Id.* at 308.

100. *Id.*

101. Brief for Appellants at 8, *Fagerstrom* (No. S-3409).

imately thirteen weekends per year, between June and September, on the disputed property.[102]

Because Nome 2000 brought suit in 1987 pursuant to Alaska's ten-year adverse possession statute,[103] the Fagerstroms had the burden of proof for establishing adverse possession only from the time period beginning in 1977. Nome 2000 stipulated that the Fagerstroms adversely possessed a portion of the disputed land between 1978 and 1987, and thus, the court's factual inquiry regarding possession focused only on 1977.[104]

B. Arguments of the Parties in *Fagerstrom*

1. *Nome 2000's Arguments Opposing Adverse Possession.* After obtaining title to the property in 1982, Nome 2000 attempted to negotiate with the Fagerstroms to allow them to continue using the land as a recreational site.[105] When the attempts proved unsuccessful, Nome 2000 filed a suit for ejectment. The Fagerstroms counterclaimed by asserting that they had acquired title to the land through adverse possession.[106] On the factual basis presented above, the trial court denied Nome 2000's motion for a directed verdict on the adverse possession claim, and granted title of the entire parcel of land to the Fagerstroms.[107]

On appeal, Nome 2000 presented three arguments which are relevant for the purposes of this note.[108] These three arguments were that the Fagerstroms' use of the land was insufficient to

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102. *Id.* at 5.

103. ALASKA STAT. § 09.10.030 (1983).

104. *Fagerstrom*, 799 P.2d at 308-09.

105. Brief for Appellants at 2, *Fagerstrom* (No. S-3409).

106. *Id.*; *Fagerstrom*, 799 P.2d at 306.

107. *Fagerstrom*, 799 P.2d at 306-07.

108. In addition to the arguments against adverse possession, Nome 2000 presented two arguments concerning evidentiary matters (one asserting that certain evidence offered by the Fagerstroms was erroneously admitted, and the other claiming that certain evidence offered by Nome 2000 was erroneously excluded). *Id.* at 311-12. Nome 2000 also argued that attorneys' fees should not have been awarded to the Fagerstroms by the trial court. *Id.* at 313. The Alaska Supreme Court held that the evidentiary rulings made by the trial court were harmless to Nome 2000's case. *Id.* at 311-12. However, the court did vacate the trial court's order regarding attorneys' fees. *Id.* at 313. For purposes of this note, these aspects of *Fagerstrom* are irrelevant, as the focus here is on the court's consideration of the primary issue, adverse possession.

establish (1) open and notorious possession, (2) exclusive possession and (3) hostile possession.[109]

First, Nome 2000 argued that the requirement of open and notorious possession was not satisfied because there were insufficient permanent structures or other signs of improvement on the property.[110] They claimed further that the Fagerstroms' activity on the parcel was insufficient to establish adverse possession.[111] Therefore, Nome 2000 asserted that it could not have been put on notice during 1977.

Second, Nome 2000 argued that the Fagerstroms' use of the land was not exclusive.[112] Their argument rested upon Mrs. Fagerstrom's testimony that people were never excluded from using the property because, according to Native custom, everyone had the same right to use the land.[113]

Finally, Nome 2000 argued against finding hostile possession by the Fagerstroms because the couple lacked the requisite intent to establish title by adverse possession.[114] Nome 2000 asserted that the Fagerstroms used the property consistently with the traditional system of Native Alaskan land usage, which does not recognize ownership per se, but instead considers occupants of parcel to be similar to stewards.[115] The implication of Nome 2000's argument was that the Fagerstroms should have been treated no differently than other people who used the land for recreational purposes, since nothing other than the duration of the couple's land use distinguished them from other Natives in the area.

As an alternative to the above rationales, Nome 2000 argued that the Fagerstroms did not actually possess all portions of the land at issue.[116] Nome 2000 asserted that even if adverse possession were found concerning certain tracts of the land, other portions of the disputed property were not actually possessed to the same extent.[117] Thus, adverse possession should not be found

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109. *Id.* at 309-10; Brief for Appellants at 19-24, *Fagerstrom* (No. S-3409).

110. Brief for Appellants at 19-20, *Fagerstrom* (No. S-3409).

111. *Id.* at 20.

112. *Id.*

113. *Id.* at 20-22.

114. *Id.* at 23-28.

115. *Id.* at 24, 28. Like stewards, Native Alaskans feel that the land is not theirs; rather they are guardians of it. They may use the property and watch over it, but the land is not theirs to the exclusion of all others.

116. *Id.* at 28-35.

117. *Id.* at 28-29.

with regard to those areas of the parcel.[118] The Alaska Supreme Court ultimately accepted this alternative argument, and in doing so provided some clarification regarding what features of occupation are insufficient to establish actual possession.[119]

2. *The Fagerstroms' Arguments Favoring Adverse Possession.* The appellees' brief focused on establishing the elements of continuity, hostility and notoriety of possession. For each element, the Fagerstroms were careful to stress that the land was rural; therefore, lesser acts of dominion and control were acceptable for establishing adverse possession. The appellees relied on the holdings of *Peters v. Juneau-Douglas Girl Scout Council*[120] and *Alaska National Bank v. Linck*,[121] cases in which adverse possession was found over rural parcels of land, to establish an analogous situation.

Arguing that there was continuous and uninterrupted use of the land, the Fagerstroms relied on the presence of what they considered to be "permanent improvements" to demonstrate that use of the property was continuous over the entire time period.[122] Among the permanent improvements pointed to by the Fagerstroms were the fish rack, non-indigenous spruce trees, the reindeer pen and the camper. The Fagerstroms argued that these improvements showed that their use of the land was the same as any average owner.[123]

The Fagerstroms' argument regarding hostility followed the same analysis as the argument supporting continuity. The couple invoked the "average owner" test once again and cited many of the same "permanent improvements" as evidence that the land use was not merely permissive, but was similar to the use of an average

118. *Id.*

119. Nome 2000 v. Fagerstrom, 799 P.2d 304, 311 (Alaska 1990). Neither the placement of cornerposts marking the boundaries nor the maintenance of existing trails over the property were found sufficient to elevate the Fagerstroms' use of certain tracts of the land to the status of possession. The court did not elaborate as to what further actions would have been necessary to constitute possession of those portions by the Fagerstroms. *Id.*

120. 519 P.2d 826 (Alaska 1974). *See supra* text accompanying notes 39-44.

121. 559 P.2d 1049 (Alaska 1977). *See supra* text accompanying notes 45-50.

122. Brief for Appellees at 6-8, Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (No. S-3409).

123. *Id.* at 7.

owner.[124] Summarizing their surprisingly short hostility argument, the Fagerstroms simply stated that "[n]o actions inconsistent with ownership were in evidence."[125]

Finally, the Fagerstroms asserted that their actions were notorious. Once again, the "permanent improvements" placed upon the land were offered to support this claim.[126] Remarkably, in neither this section of the argument nor in the section on hostility did the Fagerstroms cite the testimony of others in the Osborn area, where they were reputed to be the owners of the property. They instead mis-cited this favorable evidence in support of their claim that the use of the property was continuous.[127] The Fagerstroms summarized their argument for notorious possession simply by stating that their "claim would have been readily apparent to appellant" based on the improvements upon the land.[128]

C. The Alaska Supreme Court's Decision

The Alaska Supreme Court affirmed the decision of the trial court and held in favor of the Fagerstroms' claim of adverse possession in regard to the portions of the property which they found the couple to have occupied.[129] Specifically, the court held that the Fagerstroms were able to establish that their possession was actual, continuous, exclusive, notorious and hostile; thus, "all of the elements of adverse possession were met."[130] The court reasoned that a single test would suffice for establishing continuity, exclusivity and hostility: whether the land was used as an average owner of similar property would use it.[131] The court stated that a jury could "reasonably conclude" that the Fagerstroms' use of the land passed the "average owner" test.[132]

As for the remaining element of notoriety, the court considered both visibility of a physical presence on the land and community reputation regarding ownership. The court stated that "a quick

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124. *Id.* at 8-9.
125. *Id.* at 9.
126. *Id.* at 9-11.
127. *Id.* at 7.
128. *Id.* at 9.
129. Nome 2000 v. Fagerstrom, 799 P.2d 304, 310 (Alaska 1990).
130. *Id.* at 310.
131. *Id.* at 309-10.
132. *Id.*

investigation of the premises, especially during the season which it was best suited for use, would have been sufficient to place a reasonably diligent landowner on notice that someone may have been exercising dominion and control over at least the northern portion of the property."[133] This finding was based upon the evidence of permanent improvements to the land during the relevant periods of time.[134] The court found that once Nome 2000 had been put on notice by the physical evidence on the property, "further inquiry would indicate that members of the community regarded the Fagerstroms as the owners."[135] Thus, the court held that the Fagerstroms' possession of the property was sufficiently notorious.[136]

D. Analysis of the Court's Decision

Upon first impression, the Alaska Supreme Court's reasoning in *Fagerstrom* appears to be a sound application of the adverse possession doctrine. The court enumerated the necessary elements for proving adverse possession, and stated that, in light of the rural characteristics of the land, the Fagerstroms established each element. A closer analysis of the decision, however, demonstrates that the underlying purposes of the adverse possession doctrine were not served.

At the outset of its analysis in *Fagerstrom*, the court stated that "[w]hether a claimant's physical acts upon the land are sufficiently . . . notorious and exclusive does not necessarily depend on the existence of significant improvements, substantial activity or absolute exclusivity."[137] However, the court left uncertain exactly what is necessary for establishing notorious and exclusive possession. Additionally, the court has previously stated that "mere occupation of the premises, even for the statutory period does not establish title."[138] Instead, the adverse possessors must offer "'proof of a distinct and positive assertion of a right hostile to the owner of the property.'"[139] Although a lesser showing of proof is often acceptable for rural property, some clear demonstration of

133. *Id.* at 310.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 309.
138. Ayers v. Day & Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969).
139. *Id.* (quoting Hamerly v. Denton, 359 P.2d 121, 126 (Alaska 1961)).

actual possession must still be made or the adverse claimant can not acquire title by adverse possession.[140] This section questions the court's stance on the issues of (1) actual possession, (2) notoriety and (3) exclusivity, in light of whether they were established in a way that serves the purposes of the adverse possession doctrine.

1. *Actual Possession.* The court's finding of actual possession in *Fagerstrom* was based on evidence that showed little more than customary use of the property by the Fagerstroms. The evidence of "permanent improvements" consisted of a camper parked on the land, an outhouse, a fish rack, a reindeer pen and a few newly planted spruce saplings.[141] Additionally, the Fagerstroms' presence on the land was limited, consisting of weekends over an annual three month period, during which time they mainly engaged in recreational activities.[142]

These facts present a very weak case for actual possession. First, a camper, because of its mobility and known recreational use suggests a lack of permanence to outside observers. Similarly, the outhouse, which a strong wind blew over one winter,[143] could hardly be characterized as a significant, permanent structure. Furthermore, the fish rack and the spruce saplings could be interpreted as improvements on the parcel in conjunction with its recreational use, rather than as part of a permanent settlement. This would leave the reindeer pen as the one structure on the land indicative of a permanent improvement.

In contrast, the factors considered by the Alaska Supreme Court for determining actual possession in *Peters*, *Linck* and *Shilts* give a clearer indication of ownership.[144] In those cases, the court considered evidence such as enclosed boundaries, warning signs to trespassers, and permanent features like cabins and the claimants' clearing of the land.[145] While these items are not intended to be an exclusive list of the evidence the court will look for, it is notable that none of these items were present in *Fagerstrom*. Quite simply,

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140. *See* Bentley Family Trust v. Lynx Enters., 658 P.2d 761, 768 (Alaska 1983).
141. *Fagerstrom*, 799 P.2d at 310.
142. *Id.* at 308.
143. *Id.* at 307 n.4.
144. *See* discussion *supra* part II.B.1.
145. *Id.*

in *Fagerstrom*, the court established a significantly lower standard for proving actual possession.

Visible signs of actual possession serve to "put the record owner on notice of the existence of an adverse claimant,"[146] which fulfills the basic purpose behind the elements required for establishing adverse possession. By setting aside the need to show evidence such as significant improvements, substantial activity and absolute exclusivity, the Alaska Supreme Court unjustly deprived Nome 2000 of valuable opportunities to take actual notice of an adverse claimant. Furthermore, by weakening the standard for notice, the court undercut the very purpose of the statute, which is to allow the record title holder an opportunity to take legal action to vindicate his or her rights.[147]

Permanent, visible improvements and substantial use of the land also reflect an underlying intent to own the property, rather than merely to make use of it. These are, in fact, precisely the types of activities that courts typically consider when applying the "average owner" test. In considering adverse possession, it is important to keep in mind that the doctrine involves the transfer of legal ownership—a rather drastic and severe outcome under the law. Although the "average owner" test attempts to provide an objective standard, the various objective manifestations are reflections of the adverse claimant's subjective intent to be an owner.

2. *Notoriety.* In theory, under the notoriety requirement the record title holder should be able to take notice of the adverse claimant's objective manifestations of ownership. The title holder is then in the best position to assert his right as legal title holder or inquire in the community about the adverse claimant's reputation of legal ownership. Notoriety is necessary because where there are insufficient acts to clearly show an adverse claimant's intent to own, the legal title holder may feel little need to assert his legal claim or make a reasonable inquiry. This appears to have been the case in *Fagerstrom*, where Nome 2000 was aware that the land was being used for recreational purposes when it bought the property, but did not feel the need to file a suit for ejectment.

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146. Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 830 (Alaska 1974).

147. Shilts v. Young, 567 P.2d 769, 776 (Alaska 1977).

Reputation within the community as to property ownership serves to augment a reasonably notorious claim of possession, but cannot in itself establish notoriety.[148] The court must first establish that the record title holder could have reasonably believed that an adverse possessor was attempting to establish dominion and control over the property. The decision to inquire about reputation would never arise without a reasonably clear showing of another party's existing intent to own.

Ultimately though, because the court focused its inquiry solely on evidence of usage, rather than on the actions reflecting ownership, Nome 2000 lost title. In this sense, the Alaska Supreme Court's reliance upon the Fagerstroms' reputation in the community as being the owners of the land was misplaced. Without some evidence of significant improvements or substantial use, it is difficult to see why a record title holder would inquire into reputation because there would be no reason to believe that another party was attempting to establish adverse possession. In *Fagerstrom*, however, a showing of mere use was deemed sufficient to lead into evidence of reputation. This focus on use fails to fulfill the purpose of the notoriety requirement.

3. *Exclusivity.* In its analysis of exclusivity in *Fagerstrom,* the Alaska Supreme Court also improperly emphasized the mere use of land. As previously noted, the purpose of the exclusivity requirement is to give notice to the record title holder that an adverse claimant is acting upon the title holder's land as would an actual owner. Implicit in the exclusivity requirement is the idea that the right to exclude others from property is an essential feature of ownership. In *Fagerstrom*, the court stated that absolute exclusivity need not be shown, but only such exclusivity as an average owner would maintain based on the characteristics of the land.[149] The court offered little further analysis of the exclusivity of the Fagerstroms' "possession" of the disputed parcel, stating only that allowing others to pick berries and fish on the property was "consistent with the conduct of a hospitable land owner."[150] For this proposition, the court relied on *Peters v. Juneau-Douglas Girl Scout Council* in determining the issue of exclusivity.[151]

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148. *E.g., id.*
149. Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (Alaska 1990).
150. *Id.* at 310.
151. *Id.*

The *Peters* case is distinguishable, however, because of the degree of notice that was afforded to the record title holder despite other people's use of the land. In *Peters*, the adverse claimant used the disputed land for repairing boats, hunting and subsistence activities.[152] The exclusivity of his claim was challenged based on other's recreational clamdigging on the property.[153] The court held that such use did not destroy the exclusivity of Peters' claim, as he was merely acting as a hospitable landowner would act.[154] In other words, it would have been clear to the record title holder that a dominant party was making use of the property as an owner would (for subsistence), while others were using the land for an entirely different activity (recreation), presumably with permission.

The facts presented in *Fagerstrom* are only slightly, yet significantly, different from those in *Peters*. The *Fagerstrom* court stated that the couple used the property "to fish, gather berries, clean the premises, and play."[155] At the same time, however, others were also free to come onto the property for the very same purposes—namely to fish, pick berries and play.[156] The only distinction may have been that the Fagerstroms cleaned the premises, but the court later in its opinion held that cleaning the property "would not provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control."[157] Thus, the Fagerstroms' activities on the land were indistinguishable from the activities engaged in by others, and neither set of activities clearly exhibited an intent to own. Instead, a reasonably diligent owner would observe a number of people similarly engaged in recreational activity upon the land, with little distinction among them. Such an owner would feel little or no need to assert his or her legal rights to the property. The Alaska Supreme Court has recognized this point, stating in *Peters* that "[a]n owner would have no reason to believe that a person was making a claim of ownership inconsistent with his own if that person's possession was not

152. Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 828 (Alaska 1974).

153. *Id.* at 830.

154. *Id.* at 831. See *supra* notes 73-75 and accompanying text (discussing the weakened objective standard applied to the issue of exclusivity in *Peters*).

155. *Fagerstrom*, 799 P.2d at 310.

156. *Id.*

157. *Id.* at 311.

exclusive, but in participation with . . . the general public."[158] Thus, the court's standard for determining exclusivity ultimately fails to fulfill the purpose of providing sufficient notice to the record title holder.

4. *Conclusion.* There is an inherent dilemma in adverse possession cases regarding rural or semi-wilderness property. On the one hand, because of the nature of the land, the adverse claimant cannot reasonably be expected to exert the same degree of possession over the property as one would expect in a more developed area. However, if the standards of proof are made too lenient the record title holder will receive insufficient notice as to when he should assert his legal rights. Additionally, it must be remembered that adverse possession is a disfavored remedy at law, and the requirements are to be applied strictly, with all presumptions running in favor of the record title holder.[159]

In *Fagerstrom*, the Alaska Supreme Court squarely confronted this dilemma. The result reached by the court, however, drastically lowered the threshold for proving possession of property by allowing evidence of mere customary use to be sufficient to establish adverse possession, regardless of any showing of an intent to own. The "average owner" test becomes more akin to an "average user" standard. Under this reduced standard, the court recognized the Native Alaskan system of land use as sufficient to establish the elements of adverse possession. Thus, arguably, the court has instituted custom as a means of acquiring title.

IV. THE ROLE OF CUSTOM

A. Recognition of Custom as a Basis for Law

The test that the Alaska Supreme Court purportedly relied upon in *Fagerstrom* was an examination of whether the Fagerstroms used the land as an "average owner" would.[160] Naturally, such a standard raises the question of what, or who, is meant by an

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158. *Peters*, 519 P.2d at 830; *see also* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711-12 (1986) (discussing exclusivity as "the most important characteristic of private property," and the paradox of "public property," stating that "things left open to the public are not property at all, but rather its antithesis").

159. Mascolo, *supra* note 32, at 305.

160. *Fagerstrom*, 799 P.2d at 309.

"average owner." Consideration of the location and characteristics of the parcel of land in dispute provides some clarification. That frame of reference will assist in determining how an average member of the community would use such land in order to put it to the most beneficial use for society, and in turn, establish a claim of title in that person.

There are still some ambiguities, however. What if there is no relevant community to use as a frame of reference, as may be the case with rural, semi-wilderness property? What if a parcel's characteristics do not make it particularly adaptable to private ownership, thereby failing to establish any norm of an "average owner," but instead best suit the land for public use? What if the adverse claimant is from another culture with different customs regarding land use, and thus utilizes the land in a way usually sufficient to establish ownership, but according to the surrounding community, insufficient to exhibit an intent to own the land? Each of these questions can be raised with regard to the facts of *Fagerstrom*. It is this combination of the rural characteristics of the land and the confrontation of cultures that makes *Fagerstrom* a uniquely Alaskan dispute.

The resolution which the Alaska Supreme Court reached in *Fagerstrom* relied upon custom as a basis for the objective standard embodied in the "average owner" test. Professor Epstein states that "[t]he great attractiveness of common custom [as a source of ownership rights] is that it purports to place the law of property on a firmer footing by referring it back to something other than the assertions of the judges."[161] The Alaska courts have not stated a clear definition of what can be considered custom. However, a long-standing general definition that the United States Supreme Court has suggested is that "custom" is a practice which through its universality and antiquity, has acquired the force and effect of law with respect to the subject matter to which it relates.[162] To a certain extent, one can argue that our system of law acts to institutionalize long-standing customs of interaction in our society.

Thus, an interesting aspect of the court's decision in *Fagerstrom* is the custom that it chose to recognize as a basis for the

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161. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1231 (1979).

162. Strother v. Lucas, 37 U.S. (12 Pet.) 410 (1838).

objective "average owner" standard.[163] Confronted with two distinct cultural systems of land use, the court accepted the Native Alaskan way of life (with its notions that people do not own land exclusively and that everyone should be able to enjoy a parcel) as a sufficient reference point for considering ownership. The court showed its reliance on Native custom when it found the Fagerstroms' "ownership" sufficient to establish adverse possession. The court's willingness to defer to Native Alaskan custom is particularly surprising in light of the attitudes implicit in other recent decisions that seem hostile to Native claims.[164] Ultimately, if we are to ensure that the purposes and policies of the adverse possession doctrine are adequately served, we must determine what role custom should play in the law.

At common law, courts had limited powers for dealing with violations of property rights. They could either award damages to the aggrieved party or demand the return of land.[165] Without broader administrative remedies, courts looked to develop doctrines which defined rights along more "natural" lines.[166] This inquiry provided general principles applicable to all members of the community.[167] Furthermore, the local customs were easy for the courts to apply.[168] In this sense, the use of custom appears to be consistent with the idea that the particular characteristics of the land and local reputation are relevant factors to be considered in evaluating an adverse possession claim.

Local convention could in fact override the common law in feudal England, where members of local communities could assert "customs of the manor" as valid law.[169] To achieve this status,

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163. The court's need to choose between two distinct customs implicates the weakness of using custom as a source of law due to its lack of universality. *See infra* text accompanying notes 181-88.

164. *See, e.g.*, Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229, 1243 (Alaska 1992) (Moore, J., concurring). Justice Moore stated that the Alaska Native Claims Settlement Act "constitutes an express indication of Congress' will that, with the sole exception of the Metlakatla Indian Community, any sovereign status held by Alaska Native groups prior to 1971 be terminated." *Id.*; *In re* F.P., 843 P.2d 1214 (Alaska 1992) (holding that the state has exclusive jurisdiction over matters involving the custody of Native children, thus denying concurrent jurisdiction to Native villages).

165. Epstein, *supra* note 161, at 1222.

166. *Id.*

167. *Id.* at 1222-23.

168. *Id.*

169. Rose, *supra* note 158, at 740.

the customary claim had to be shown to have existed from a time before memory, and had to be well defined and reasonable.[170] Unlike the typical adverse possession case, however, such customary claims were generally asserted on behalf of the community as a whole, and lacked the exclusivity that typifies the establishment of an individual title to property.[171]

By referring back to the theories of entitlement, one can see the way in which custom relates to establishing individual title by adverse possession.[172] One of the justifications for allowing adverse possession is that it rewards the party who puts the land to productive use. To determine what productive use means in a particular community, it is necessary to look at the way in which land is customarily used in that locale. The typical use in a community reflects the shared underlying values held toward the type of productivity needed to establish title. Thus, custom is in fact a necessary element of an objective standard, for it is perhaps the most visible means of determining how land would be used by an "average owner."

A federal district court in Alaska long ago indicated a willingness to take notice of custom in the property law area. In *Johnson v. Pacific Coast S.S. Co.*,[173] the District Court of Alaska stated that in land disputes involving Native Alaskans it was important to note that:

> [T]he natives of this country by their peculiar habits live in villages here and there, in some of which they remain most of the year and in others during certain summer months; that while their habits are somewhat migratory, they have well-settled places of abode, and these usually are not abandoned, though they may vacate them for a few months at a time.[174]

The implication is that the Alaska courts will at times recognize special circumstances regarding the "peculiar habits" of the Native population.[175] The Alaska Supreme Court, itself, has shown this

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170. *Id.*

171. *Id.*

172. *See supra* part II.A.

173. 2 Alaska 224 (D. Alaska 1904).

174. *Id.* at 239.

175. However, the *Johnson* court also noted that "it is evident that Congress never intended that the natives of Alaska could become the owners of town lots . . . or that they could acquire title to lands *in any other way.*" *Id.* at 241 (emphasis added).

willingness to recognize Native lifestyles in previous decisions when considering adverse possession claims.[176]

Custom has not gained greater general acceptance in American law for several reasons. United States courts in the early part of this century became reluctant to consider custom as a basis of law because of the tendency of local conventions to benefit members of certain communities over others.[177] There were also concerns about the potential of the public at-large to make law through custom, which could thus supplant the law-making function of elected legislatures.[178]

There are also more fundamental reasons why custom is an unsatisfactory basis for establishing property rights. One difficulty is that custom merely provides a general framework for considering the law; it cannot determine the many fine details that may arise in legal doctrines, especially with respect to a highly fact-driven concept such as adverse possession.[179] A further set of rules is required to resolve specific situations that will undoubtedly develop.[180]

A more significant problem is that no custom is universal to all parties.[181] This is visible in *Fagerstrom*, where the opposing parties followed distinctly different customs regarding land use, and thus one disputant would inevitably be bound by a foreign practice. The element of notice in adverse possession is also implicated, as it would be unreasonable to hold a record title holder responsible for recognizing all cultures' varied objective manifestations of ownership.

In his book *Changes in the Land,* William Cronon provides an insightful historical discussion of how cultural misperceptions have

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176. *E.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974). In *Peters*, the court detailed the confusion that Mr. Peters, a Tlingit, had with the formalities for establishing title. *Id.* at 833. Though not explicitly stated, the attention the court gave to that factor indicates that the court may have believed Peters was entitled to some equitable relief to compensate for his confusion. Additionally, in the court's analysis of sufficient use, as in *Fagerstrom*, it cited to several Native subsistence activities Peters performed on the land. *Id.* at 828.

177. Rose, *supra* note 158, at 741-42 (discussing Graham v. Walker, 61 A. 98 (Conn. 1905)).

178. *Id.* at 742.

179. Epstein, *supra* note 161, at 1234.

180. *Id.*

181. *Id.* at 1231.

played out in determining title to land.[182] Cronon describes how the seventeenth century colonists of New England appropriated much of the Native Americans' land; they justified their actions based on the assertion that the Natives' land use could never be sufficient to establish ownership.[183] The Natives of New England primarily used the land for hunting and gathering purposes, with women engaging in limited agriculture.[184] Because mobility was an essential feature of Native life, the Natives had little reason for making substantial improvements or thinking of land in terms of exclusivity.[185]

This approach was in direct contrast to the colonial concept of ownership, which conceived of property rights in terms of agricultural improvements[186] and enclosed parcels.[187] This "civil" right of ownership superseded the "natural" rights of the Natives, which in the opinion of the colonists were insufficient to establish any type of ownership claim. Thus, the colonists did not see taking the Natives' property as immoral because they believed that they were merely civilizing the system of land use in the colonies. Cronon characterizes this rationalization as an "ideology of conquest."[188]

B. The Alaska Supreme Court's Use of Custom

In a sense, a similar "ideology of conquest" was expressed in Nome 2000's argument against a finding of hostility in *Fagerstrom*. Nome 2000, with the support of an anthropologist, argued that the Fagerstroms had used the disputed parcel consistently with the Native Alaskan system of land use, which does not conceive of land in terms of ownership.[189] Thus, Nome 2000 argued, the Fagerstroms could not exhibit the necessary elements to establish an

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182. WILLIAM CRONON, CHANGES IN THE LAND (1983).

183. *Id.* at 55.

184. *Id.* at 55-56.

185. *Id.* at 61.

186. Thus, it appeared to the colonists that only Native women could be property owners since they were the ones who engaged in agriculture. This was a difficult concept for the colonists to accept.

187. CRONON, *supra* note 182, at 56.

188. *Id.* at 57.

189. Brief for Appellants at 28, Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (No. S-3409). The system of land use followed by Native Alaskans is not claimed to be equivalent to the system adhered to by the Natives of New England. The analogy to the situation described in Cronon's book is intended solely to demonstrate a parallel circumstance of cultural misperception.

adverse claim because they did not regard themselves as owners.[190]

The Alaska Supreme Court rejected Nome 2000's hostility argument, stating that it had "nothing to do with the question whether the Fagerstroms' possession was hostile."[191] The court correctly identified Nome 2000's argument as miscast because it claimed that the Fagerstroms could not acquire title by adverse possession on the basis of their cultural identity. The implication of Nome 2000's argument is that Natives could never acquire title by adverse possession. Such a proposition has no merit. Inevitably, the law will reflect the culture in which it exists. In situations where legal disputes cross cultural boundaries, however, resolution requires that one set of cultural values be chosen over the other for the sake of creating certainty in the law. Thus, instead of a rule reflecting the Native Alaskan system of land use, a stronger argument for Nome 2000 would have been that an objective standard better serves the purpose of the required elements of adverse possession. Such an objective standard reflects the traditional Western system of land use and fulfills the purposes behind the elements of adverse possession by giving notice of an adverse claim to legal title holders.

The Alaska Supreme Court has previously stated that "adverse possession must be such that the owner could see that a hostile flag was being flown over his property."[192] One commentator has presented the requirements of adverse possession as being such that "an average man, if in the neighborhood" would have notice of hostile possession.[193] But what about the case where the parties are from different "neighborhoods," where different "flags" are used to denote an intent to appropriate land as one's own? Such is the situation in *Fagerstrom*. If customs were truly universal, then all "flags" would be understood. However, where there is the potential for cultural misperception, the more demanding standard must be applied in order to ensure that all of the potential parties could be put on actual notice of the adverse claim. By requiring actions indicative of possession, rather than mere use, the more demanding traditional doctrine of adverse possession better achieves the certainty in the law necessary to give notice to any

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190. *Id.*

191. Nome 2000 v. Fagerstrom, 799 P.2d 304, 310 (Alaska 1990).

192. Shilts v. Young, 567 P.2d 769, 776 (Alaska 1977).

193. WALSH, *supra* note 14, at 14.

legal title holder. Consequently, it meets the primary goal of adverse possession, which is to provide for security of land claims.[194]

V. THE IMPLICATIONS OF *FAGERSTROM*

As time passes, outside factors, such as witnesses dying, memories fading and deeds being forged or lost, tend to weaken the claim of the record title holder by reducing the amount of evidence available to prove his or her ownership.[195] The costs of discovering evidence to determine that the legal title holder still has good title eventually become so great that it is simply more efficient to bypass litigation and settle title to the property in favor of the adverse claimant.[196] This premise underlies the justification for statutes of repose in the adverse possession doctrine.[197] The declining amount of quality evidence regarding property ownership creates an increased burden on the legal title holder which in turn produces a bias in favor of the weaker side, the adverse claimant.[198] Similarly, decreasing the burden on the adverse claimant would create a bias in the claimant's favor. One way to achieve the proper balance would be to lessen the amount of objective proof that the claimant would have to present in support of the adverse claim.

In *Fagerstrom*, the Alaska Supreme Court reduced the degree of objective manifestations necessary to establish adverse possession by "clear and convincing" proof. By accepting customary use as satisfactory proof of the elements of adverse possession, the court created greater uncertainty in the law. To some extent, uncertainty is inevitable when considering rural, semi-wilderness land, as it is well recognized that a lesser evidentiary showing is acceptable in light of circumstances which make productive use more difficult. In many respects, it may even seem to be good policy to give greater strength to the adverse claimant in such situations, because it encourages people to attempt to develop rural land and put it to productive use. However, there is the competing issue of notice, which is essential to the adverse possession doctrine. By relaxing the required proof of substantial improvements and

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194. *See supra* text accompanying notes 17-19.
195. Epstein, *supra* note 1, at 675.
196. *Id.* at 676-77.
197. *Id.* at 677.
198. *Id.* at 676.

activities in certain circumstances involving rural, semi-wilderness land, the Alaska Supreme Court renders unclear what physical evidence the record title holder (who may likely be unfamiliar with the Native system of land use) is to look for in determining if there is an adverse claim being asserted against his land. The court in *Fagerstrom* appeared to state that customary use should be a determining factor.

Customary use might be an attractive solution where it is sufficiently universal so as to be unambiguous. However, this is not the case with respect to land use in Alaska, where there are several distinct cultures. Additionally, custom is better suited for resolving general problems, and less suitable for settling issues that are highly fact-specific, such as claims of adverse possession.

The relatively slight extent of actual possession deemed acceptable for establishing adverse possession by the *Fagerstrom* court is repugnant to the ideals of legal ownership. The "average owner" test was seemingly converted into an "average user" standard. In so doing, the court institutionalized a system which allows for less objective proof and makes adverse possession a more loosely applied doctrine. The Natives of rural Alaska will now find it less difficult to establish adverse possession.

Therefore, the public policy implications of *Fagerstrom* should be considered. In *Linck*, the Alaska Supreme Court expressly indicated the policy goals it sought to achieve through the adverse possession doctrine. The court stated that the adverse possession doctrine exists "because of a belief 'that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected.'"[199] The possible ramifications of *Fagerstrom* leave some doubt as to whether the court's new, less demanding objective standard will fulfill these policy objectives. While it is true that a successful action for adverse possession leaves no doubt as to who holds title to the disputed property, it is also evident that a different kind of uncertainty is created in *Fagerstrom*. That uncertainty concerns whether a land user seeks to establish adverse possession in the first place.

199. Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1054 (Alaska 1977) (quoting William B. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960)).

Furthermore, it is unclear that society will benefit from the use of the kind of land in dispute in *Fagerstrom*. Generally, when one considers land use that will benefit society, what comes to mind are productive or substantial uses that provide society with some benefit that can be enjoyed by the community as a whole. This notion likely relates to the concepts of land which the early American colonists infused into our legal system.[200]

With respect to the land at issue in *Fagerstrom*, as well as other similar parcels of land, society at large does not gain anything that it did not already enjoy (for example, the ability to use the land for recreation) if legal title vests in users such as the Fagerstroms. In fact, one can picture a long-term scenario where the implications of the *Fagerstrom* decision will be to curtail Natives' free recreational use of rural lands. After *Fagerstrom*, absent title holders will likely be much more conscious of protecting their legal rights, and will be more inclined to exclude potential adverse claimants from their lands through the use of barricades or fences. This is particularly true where the legal title holder may be unfamiliar with the objective manifestations of ownership in different cultures and wishes to protect against the risk of uncertainty. As a result, it is foreseeable that many Natives could be "locked out" from lands that they had long believed were open for the public enjoyment. Such a scenario sheds a different light on what may at first glance appear to be a decision favoring Native property rights.

VI. CONCLUSION

Ultimately, the Alaska Supreme Court does not go so far in *Fagerstrom* as to establish a subjective standard for evaluating the various elements of adverse possession. However, there is a weakening of the objective standard, and a corresponding emphasis placed on custom as a source of entitlement. As a result, the court fails to effectuate the stated purposes of the adverse possession requirements (for example, notice to the record title holder). Additionally, a weaker objective standard creates an imbalance in the law of adverse possession, thereby facilitating the acquisition of title by adverse claimants. This result conflicts with the notion that adverse possession is a disfavored remedy. Therefore, the court needs to adopt definite guidelines for the evidence needed to

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200. *See supra* text accompanying notes 182-88.

establish adverse possession. Deference to local circumstance should only arise when *all* of the parties involved should have reasonably known of the unique custom. Additionally, where there is ambiguity as to whether all of the relevant parties were aware of unique factors in cultural custom, a strict standard must be applied to adverse possession claims in order to protect the value given to legal title of property under the law. The court's holding in *Fagerstrom*, however, casts doubt upon how strictly the doctrine of adverse possession is to be construed in Alaska and, correspondingly, on the value to be placed upon the concepts of title and ownership under Alaska law.

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