

Colorado's Adverse Possession Law

A Case Study for When Legislative Acts
Do Not Match Published Statutes

BY JOSHUA D. MCMAHON



This article highlights a section of Colorado adverse possession law that was passed by the legislature but does not appear in the published Colorado statutes.

The 2008 Colorado General Assembly substantially revised Colorado's adverse possession law,¹ but be forewarned, the full text of the law is not found in our published statutes. In response to a contentious, nationally publicized adverse possession lawsuit in Boulder, the General Assembly prioritized adverse possession reform during its 2008 legislative session.² This topic, and the resulting law, House Bill 08-1148 (Act), were the subject of a prior *Colorado Lawyer* article, "Adverse Possession After House Bill 1148," by Geoffrey P. Anderson and David M. (Merc) Pittinos.³ The Act took effect on July 1, 2008, over 18 years ago, and it radically altered Colorado's historic statutory adverse possession law.⁴ Notably, however, the full amended law as now published at CRS § 38-41-101 omits an important section from the Act that was adopted by the General Assembly and signed by the governor in 2008.⁵

This article is a reminder to all lawyers practicing in Colorado that the laws enacted by the General Assembly do not always match what you find published in Colorado's statutes. Colorado's adverse possession law provides just such an example.⁶

HB 08-1148

One of the Act's significant revisions to Colorado's adverse possession law was the creation of two standards for adverse possession claims. One standard applies to claims for fee simple title to real property by adverse possession for which fee simple title vests⁷ before July 1, 2008, and another standard applies to such claims for which fee simple title vests on or after July 1, 2008. Therefore, the date of title vesting is critical for initial analysis of all adverse possession claims under Colorado law.

Section 1 of the Act amended the existing historic adverse possession law by adding new

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subsections 3, 4, and 5 to CRS § 38-41-101. The preamble to section 1 of the Act provides: "SECTION 1. 38-41-101, Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS to read:" The new subsections 3, 4, and 5 are the same in the Act and published statute, and are summarized as follows:

- The burden of proof in adverse possession cases filed on or after July 1, 2008, is heightened (regardless of when the adverse possession claim vested), so that the elements of adverse possession now

must be proven by clear and convincing evidence rather than a preponderance of the evidence.⁸

- For claims where title by adverse possession vested on or after July 1, 2008, an adverse possessor must prove all common law elements of adverse possession and establish a reasonable good faith belief that the person adversely possessing (or their predecessor) was the true owner of the property.⁹
- For claims where title by adverse possession vested on or after July 1, 2008, the court has discretion to award damages, if fair and equitable under the circumstances, to the person losing title.¹⁰ These damages may include the actual market value of the property lost, as well as the amount of taxes and other assessments (plus interest at the statutory rate) paid by the losing party during the period commencing 18 years prior to the suit and ending the date a final, non-appealable judgment is entered.¹¹
- If, instead of a direct claim, a party asserts adverse possession as an affirmative defense to a claim for trespass, forcible detainer, forcible entry, or other similar claim, the burden of proof remains the preponderance of the evidence standard.¹² (However, as a cautionary note for practitioners, if the putative adverse possessor does not also assert a direct claim for adverse possession, which is subject to the heightened burden of proof, and only asserts adverse possession as an affirmative defense subject to the lower burden of proof, the putative adverse possessor gives up its claim to legal title to and possession of the disputed parcel.)

The Act's section 2, which was omitted from the published law, provides in full:

SECTION 2. Effective date – applicability. This act shall take effect July 1, 2008. The provisions of section 38-41-101(3)(a), Colorado Revised Statutes, in section 1 of this act shall apply to civil actions filed on or after said date. All other provisions of this act shall apply to claims for title to real property for which fee simple title vests in favor of the adverse possessor and against the owner of record of the real property on or after said date. (Emphases added.)

The entirety of this section 2 is omitted from CRS § 38-41-101 as published in the Red Book¹³ and by third parties such as Westlaw. This omission has a substantive impact on how litigants analyze adverse possession claims and how courts adjudicate such claims and is, therefore, highlighted by this article. For example, reading the Act's section 1 and section 2 together, the court's discretion to award damages applies only to claims for title to real property for which fee simple title vests in favor of the adverse possessor and against the owner of record of the real property on or after July 1, 2008. Without seeing that clear, but now omitted, section 2, litigants may argue erroneously a right to damages under the Act even for claims for which title vested by adverse possession long before 2008.

The Act's section 3 also was omitted from the published versions of CRS § 38-41-101, and

it provides in full: "SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety."

This language is useful for adverse possession claimants and courts to understand because the General Assembly made clear how necessary it believed the Act was at the time. And, the ample legislative history and publicity that resulted in the Act only reinforce these concepts. However, section 3 is not further analyzed in this article because it is less likely to have a substantive impact on adverse possession claims.

Impact of Section 2's Omission

Discretion to edit the laws of the State of Colorado is vested with Colorado's revisor of statutes, under the supervision and direction of the Committee on Legal Services.¹⁴ Despite the revisor of statutes' omission of section 2 from the published statute, section 2 remains part of the Act and has a substantive effect on adverse possession claims. The omission of section 2 from the published statutes has caused confusion among litigants and courts. For example, for claims for title to real property for which fee title vests in favor of the adverse possession claimant before July 1, 2008, with one exception, the Act's revisions to adverse possession law do not apply. The one exception is that, regardless

of when fee title vests in favor of the adverse possession claimant, the heightened burden of proof of clear and convincing evidence applies.¹⁵ Because the Act's section 2 was omitted from the published statute, the published statute does not accurately provide guidance for adverse possession claimants for claims for fee simple title to real property by adverse possession for which fee simple title vests *before* July 1, 2008; it accurately addresses only claims for which fee simple title vested *on or after* July 1, 2008.¹⁶ Therefore, as published, the law creates a risk that an adverse possession claimant whose claim vested before July 1, 2008, may be required to pay for real property that it had already owned by operation of the pre-2008 adverse possession law, even though the Act did not amend that law. Providing litigants and courts with the Act's section 2 should diminish the risk that a party will pursue a frivolous argument or that a court will make an erroneous finding or holding.

This risk is not merely theoretical. At least one panel of the Colorado Court of Appeals has relied on the published text at CRS § 38-41-101 instead of the text in the Act. In 2009, a panel of the court of appeals analyzed an adverse possession claim in *Beaver Creek Ranch, L.P. v. Gordman Leverich Ltd. Liability Ltd. Partnership*.¹⁷ The case was an appeal from the district court following a bench trial where the district court held in favor of the adverse possession



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claimant, Beaver Creek Ranch, in part based on its finding that the claimant's adverse possession claim had begun in 1949 and thus had vested before July 1, 2008. The claimant filed the case on December 7, 2004. The court of appeals explained in a footnote that the General Assembly had changed Colorado's adverse possession law in 2008, but the court incorrectly stated that "[t]he 2008 amendments also give trial courts discretion to award damages to the party losing title," citing CRS § 38-41-101(5).¹⁸ This is erroneous because it omits the qualifier that such discretion to award damages to the party losing title applies only to claims for title to real property for which fee simple title vests in favor of the adverse possessor and against the owner of record of the real property on or after July 1, 2008. The court of appeals compounded its initial error by providing the wrong qualifier in the next sentence of its footnote.

Read in context, the court's apparent misstatement of the law likely had no substantive impact on the outcome of the case because the court applied the appropriate burden of proof.¹⁹ However, because this is a published opinion, risk exists that litigants and courts will rely on the misstatement of law and compound the error. Both before and after the Act, an adverse possession claim vests simply by satisfying the statutory elements. Once that happens, title has transferred and vested automatically, and an adversely possessing party could, for example, bring a claim against the record-title owner for trespass.²⁰ Thus, for adverse possession claims that vested before July 1, 2008, a court requiring an owner to pay for the property for which they had already obtained title through adverse possession would result in an unconstitutional taking. The legislative history shows consideration of this important factor.²¹

Conclusion

Litigants and courts that address adverse possession claims should be familiar with the Act, the published statute, and the history of the amendments so that they have a full understanding of the General Assembly's intent as it relates to application of its drastic changes to adverse possession law. It is also important to understand that the law as published in Col-

orado's statutes is not always a direct reflection of the law enacted by the General Assembly. Research of Colorado's statutory law should always involve reviewing the law as enacted

by the General Assembly to ensure that legal arguments and court orders based on such arguments contain complete and accurate statements of the law. CI



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NOTES

1. Act of April 25, 2008, ch. 190, 2008 Colo. Sess. Laws 688, <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=4473&context=session-laws-2001-2050>. HB 08-1148 is available at <https://www.leg.state.co.us/clics/clics2008a/csl.nsf/fsbillcont2/B77DA198A575F7F0872573990079C3CF?Open>.
2. *McLean v. DK Trust*, No. 06CV982, 2007 Colo. Dist. LEXIS 14 (Boulder Cnty. Dist. Ct. Oct. 17, 2007). The Boulder *Daily Camera* provided extensive coverage of this lawsuit. See, e.g., Urie, "No. 9: Boulder Couple Settles Land Fight," *Daily Camera* (Aug. 15, 2009), <https://www.dailycamera.com/2009/08/15/no-9-boulder-couple-settles-land-fight>.
3. Anderson and Pittinos, "Adverse Possession After House Bill 1148," 37 *Colo. Law.* 73 (Nov. 2008).
4. Published at CRS §§ 38-41-101 et seq.
5. It actually omits two of the amended sections, both of which are discussed herein, but only one, new section 2, is critical.
6. The author credits Julie Waggner of JAMS Denver for presenting this topic at the 43rd Annual Real Estate Symposium: New Horizons, Timeless Tactics at The Hythe, Vail, on July 10, 2025, and thanks her for her significant contributions to this article.
7. Analysis of when title vests by adverse possession is beyond the scope of this article. In general, title vests after 18 years of possession that is actual, adverse, hostile under a claim of right, open and notorious, exclusive, and continuous for the statutory period. *Segelke v. Atkins*, 357 P.2d 636, 637 (Colo. 1960). For analysis of these elements, see Anderson, *Colorado Quiet Title Actions*, ch. 10 (3d ed. CBA-CLE 2016). The 2008 amendments to this law relate principally to title that vests on or after July 1, 2008, except for heightening the burden of proof applied to claims filed after July 1, 2008.
8. CRS § 38-41-101(3)(a).
9. CRS § 38-41-101(3)(b)(I)-(II).
10. CRS § 38-41-101(5)(a)(I)-(II).
11. *Id.* This damages section also only applies to titles vested after 2008 (see further discussion in this article).
12. CRS § 38-41-101(5)(b). See CRS § 38-41-113 (party may assert adverse possession claim affirmatively and defensively).
13. The Red Book is a publication that accompanies the Session Laws and lists all changes made by amendments, additions, and repeals to Colorado Revised Statutes at the preceding legislative session. The Red Book and its archive are available at <https://content.leg.colorado.gov/agencies/office-legislative-legal-services/red-book>.
14. CRS §§ 2-5-101 et seq.
15. CRS § 38-41-101(3)(a).
16. CRS § 38-41-101(3)(b).
17. *Beaver Creek Ranch, L.P. v. Gordman Leverich Ltd. Liab. Ltd. P'ship*, 226 P.3d 1155 (Colo. App. 2009).
18. *Id.* at 1161 n.2.
19. *Id.* at 1161 (applying preponderance of the evidence standard, as the case was filed before July 1, 2008).
20. See, e.g., *Hunter v. Mansell*, 240 P.3d 469, 475 (Colo. App. 2010) ("Title to property acquired by adverse possession matures into an absolute fee interest after the statutory prescriptive period has expired. Section 38-41-101, C.R.S. 1973.").
21. See Final Bill Summary for HB 08-1148, Senate Committee on Judiciary (Mar. 12, 2008), at 3:10 p.m., <https://www.leg.state.co.us/CLICS/CLICS2008A/commsumm.nsf/CommByBillSumm/65FDA546CD6ACDCE8725740A006DA3DF?OpenDocument&bn=yes>.