District Court, Larimer County, State of Colorado 201 LaPorte Avenue Fort Collins, Colorado 80521 970-494-3500	DATE FILED: April 27, 2020 10:15 AM CASE NUMBER: 2018CV30676
DEAN MATTHEWS et al, Plaintiffs, v. CRYSTAL LAKE ROAD AND RECREATION ASSOCIATION et al, Defendants.	▲ COURT USE ONLY ▲ Case No.: 2018CV30676 Courtroom: 3C
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	

THIS MATTER came on for a trial to the Court commencing on January 27, 2020. The parties presented proposed findings of fact and conclusions of law on February 26, 2020. The Court has considered the evidence presented at trial as well as the arguments of counsel and issues the following findings of fact, conclusions of law and Order:

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs commenced the present action with the filing of their Complaint on July 16, 2018. A First Amended Complaint was filed on behalf of the Plaintiffs on November 2, 2018. Plaintiffs are property owners of certain lands in Red Feather Lakes, Colorado. Defendant CLRRA is a road and recreation association whose members are owners of property within the Crystal Lakes subdivision, In their Amended Complaint, Plaintiffs seek a permanent injunction barring and enjoining the Defendants, their members, guests, and invitees from accessing purported easements over the Plaintiffs' respective properties to access the National Forest. Plaintiffs further seek to quiet title and a declaration by the Court that Defendants have no interest in easements across the Plaintiffs' respective properties and seek a complete adjudication

of all rights of the parties with regard to the purported easements. Plaintiffs further assert a claim for damages for trespass over their respective properties.

Defendant CLRRA asserts a counterclaim for a deeded easement over and across the Plaintiffs' properties by virtue of various deeds and agreements. Alternatively, CLRRA asserts that a prescriptive easement has been established over the Plaintiffs' properties. Prior to the bench trial, the parties filed cross-motions for a determination of a matter of law as to the existence of purported easements based upon the various deeds and agreements. In its Order dated January 17, 2020, the Court determined that on October 16, 1986, Glacier Financial Corporation ("Glacier") conveyed Lot 10 and Lot 11 to J.S. VanAlsburg and David L. Bryan properly reserving nonexclusive road and utility easements…" and describing a "70-foot-wide access road." The 1986 Deed also reserves to Glacier "a 70 feet right-of-way on roads not yet surveyed but are in existence," then describes such road. The Court determined that the 1986 Deed created a valid easement in gross in favor of Glacier over Lot 10 and Lot 11. The Court further determined that a 1992 Agreement between Crystal Lake, Inc. and Defendant CLRRA did not transfer the easement created by the 1986 Deed reservation because a proper power of attorney was not signed on behalf of the Developer Entities and was not recorded as required by statute. The Court further found that the description of the easement purported to be conveyed by the 1992 Agreement was so vague the Court finds that no easement was granted as to Lots 10 and 11. The Court determined that the 1992 Agreement was legally insufficient to convey Glacier's interest in the easements over Lots 10 and 11 to CLRRA. The Court further determined that the 1986 Easement in favor of Glacier as to Lot 10 was terminated as a result of a 2005 Release and the easement in gross as to Lot 11 was terminated when Glacier ceased to exist as an entity. As part of its determination regarding questions of law, the Court also determined that a

2000 Easement Agreement lacked a description of the purported location of the easement because the referenced Exhibit B which was supposed to describe the easement was not attached and according to the parties cannot be located. For various reasons set forth in the prior order, the Court determined that no road easement for CLRRA access to the Roosevelt National Forest was created as a result of the 2000 Easement Agreement. In its order regarding the determination of questions of law the Court did find and determine that the Harvey Plat established a valid access easement over Lot 12 to and for public use in the location set forth on the Harvey Plat. Any further determination regarding use of the access easement was reserved for determination at trial.

Defendant CLRRA asserts that a prescriptive easement over Lots 10 and 11 (referred to at trial as "Bear Gulch Trail") has been established and that a permissive easement over Lot 12 is established by virtue of the grant included in the Harvey Plat. Based upon the Court's ruling on cross motions for determination of questions of law, the matter proceeded to a three-day bench trial on Defendant's claim to an easement by prescription over the Plaintiffs' properties and Plaintiff's claim to quiet title, for injunctive relief and for trespass.

FINDINGS OF FACT

The Court hereby incorporates in this Order the specific findings set forth in its Order dated January 17, 2020 regarding the parties' cross-motions for determination of a question of law and based upon the evidence presented at trial, the Court makes the following findings of fact:

The Parties

1. Plaintiffs Gail Perry and William Perry (the "Perrys") are the owners of Lot 12, which is located at 2182 Osage Trail, Red Feather Lakes, Colorado ("Lot 12").

2. Plaintiffs Dean Matthews ("Matthews") and the Dean A. Matthews, Donna J. Matthews, Matthews Family Trust aka Dean Allen Matthew Trust Number 1 ("Matthews Trust") own the property located at 2238 Osage Trail, Red Feather Lakes, Colorado ("Lot 10").

3. Plaintiffs Matthews and the Gordon Matthews Living Trust ("GM Trust") are the owners vacant land located in Larimer County also known as 2238 Osage Trial, Red Feather Lakes, CO 80545. ("Lot 11").

4. Defendant CLRRA is a road and recreation association comprised of members who are owners of property within the Crystal Lakes subdivision, adjacent to Plaintiffs' properties.

5. CLRRA was created by the filing of protective covenants including the Crystal Lakes Subdivision Thirteenth Filing Protective Covenants on or around February 6, 1979. ("Crystal Lake Covenants")

6. CLRRA encompasses land that borders the Perrys' Lot 12 to the south and west, and the Matthews' Lot 10 to the south.

7. Lots 10 and 11 are bounded to the east, north, and west by the Arapahoe and Roosevelt National Forest ("National Forest"). A general depiction of the Plaintiffs' properties and surrounding National Forest is included in Def. Ex. 106 received at trial. Def. Ex. 106 also generally depicts the location of Bear Gulch Trail and was extensively referred to at trial.

8. The Crystal Lakes subdivision and surrounding areas, including Lots 10, 11, and 12, were initially owned by a group of entities including Crystal Lakes Development Company ("CL Dev"), Crystal Lakes, Inc. ("Crystal"), and Glacier Financial Corporation ("Glacier").

Chain of Title and Purported Creation of Easement - Lots 10 and 11

9. On August 3, 1984 Crystal Lakes Development sold Lots 10 and 11 to David S. Woronoff. [Pl. Ex 17].

10. On July 3, 1985, David Woronoff sold Lots 10 and 11 to Glacier Financial Company who became the fee simple owner of the land comprising the Crystal Lakes subdivision. ("Woronoff to Glacier Deed") [Pl. Ex. 18].

11. On October 16, 1986, Glacier conveyed Lot 10 and Lot 11 to J.S. VanAlsburg and David L. Bryan. ("1986 Deed") [Pl. Ex. 5].

12. Exhibit B to the 1986 Deed provides that "[t]he seller grants and reserves the following nonexclusive road and utility easements…" and describes a "70-foot-wide access road." The 1986 Deed also reserves "a 70 feet right-of-way on roads not yet surveyed but are in existence," then describes such road. ("1986 Deed") [Pl. Ex. 5].

13. The 1986 Deed and attached exhibits were recorded on November 3, 1986 under Reception No. 86063951.("1986 Deed").

14. On July 25, 1991, Crystal executed a Grant of Easement ("1991 Grant of Easement") [Pl. Ex. 20]. The Grant of Easement is "for the Grantors, its successors, assigns, guests, and employees" and describes a "road easement for ingress and egress, measuring seventy (70) feet in width…" and as more particularly described in the metes and bounds description attached as Exhibit B. The 1991 Grant of Easement was recorded under Reception No. 91035035 on July 30, 1991.

15. The 1991 Grant of Easement was not signed by J.S. VanAlsburg, David L. Bryan (then owners of Lots 10 and 11), Glacier, Mary Christine Harvey or the Mary Christine Harvey Trust. (then owner of Lot 12).

16. On September 5, 1992, Defendant CLRRA and Crystal entered into an Agreement whereby certain "Developer Entities" conveyed to CLRRA "a right of way through Section 35, Township 11 North, Range 74 West, to the National Forest Boundary." The 1992 Agreement

does not make specific reference to the easement reservation in the 1986 Deed. The 1992 Agreement was recorded under Reception No. 9205823. [Pl. Ex. 10]. ("1992 Agreement").

17. The 1992 Agreement was not signed by J.S. VanAlsburg, David L. Bryan, (then owners of Lots 10 and 11) Glacier, (the beneficiary of the 1986 Deed reservation) or Mary Christine Harvey or the Mary Christine Harvey Trust (then owners of Lot 12).

18. On January 8, 1997, David L. Bryan conveyed his interest in Lot 10 and Lot 11 to Helen K. Bryan. ("Bryan to Bryan Deed").

19. On September 30, 1998, Helen K. Bryan and J.S. VanAlsburg conveyed Lot 10 and Lot 11 to Gregory Peter Lubkin and Kathleen Mary Lynch. [Pl. Ex. 6]. ("Bryan to Lubkin Deed").

20. The September 30, 1998 Deed conveying Lot 10 and Lot 11 on September 30, 1998 failed to identify the 1986 Easement.

21. On December 17, 1999, Gregory Peter Lubkin and Kathleen Mary Lynch conveyed Lot 11 (but not Lot 10) to Chuen-Mei Fan, Liang-Shing Fan, Stephanie Shwiff, Keira Harkin, Jodi Crane, and Rodney Rogers (the "Fan Group"). [Pl. Ex. 7]. ("Lubkin to Fan Deed").

22. On January 13, 2000, Gregory P. Lubkin and Kathleen Mary Lynch and CLRRA and Crystal Lakes Water & Sewer Association ("CLWSA") entered into an Easement Agreement ("2000 Easement Agreement"). [Pl. Ex. 11]. ("2000 Easement Agreement"). The 2000 Easement was signed on behalf of CLRRA and CLWSA on January 17, 2000.

23. The 2000 Easement Agreement states that CLRRA and CLWSA "assert a claim of ownership to an access easement through and across the property owned by Grantors pursuant to an Agreement dated September 5, 1992 and recorded September 22, 1992 at Reception No. 9205823 ("1992 Agreement").

24. The 2000 Easement Agreement purportedly conveys an easement "across and through Grantors' property as shown and described on the attached Exhibit B," permitting CLRRA members to use the access easement consistent with the access permitted by the United States Forest Service. The agreement provides that "so long as the official policy of United States Forest Service is to not permit vehicular access into Roosevelt National Forest through entry points on Grantors' property, CLRRA agrees that it will not use the granted easement for non-emergency vehicular use; that it will inform its members that the access is not available for motorized vehicular use; and will use its reasonable efforts to discourage and eliminate vehicular use of the easement by its members." The agreement goes on to provide that CLRRA members may use the access easement consistent with such access (foot, bicycle, or horse) as permitted or restricted by the United State Forest Service…" Exhibit B is, however, omitted from the recorded version of the 2000 Easement Agreement and has not been located by either party. Accordingly, the 2000 Easement Agreement does not provide any description of the location of the purported Easement.

25. On January 13, 2000, Gregory Peter Lubkin and Kathleen Mary Lynch conveyed Lot 10 to Brian D. Boos and Nickie L. Boos. [Pl. Ex. 8]. ("Lubkin to Boos Deed").

26. On January 1, 2002, Brian D. Boos and Nickie L. Boos conveyed Lot 10 to Boos Invsts., LLC. ("Boos to Boos Invsts. Deed").

27. On August 26, 2004, the Fan Group conveyed Lot 11 to Plaintiff Dean Allen Matthews and Gordon Matthews Living Trust. ("Fan to Matthews Deed"). [Pl. Ex 3].

28. On April 14, 2006, a surveyor approved an Amended Land Survey Plat for Lot 10 (then referred to as the "Boos Tract") ("Boos Plat"). The Boos Plat was recorded on April 14, 2006. ("Boos Plat") [Pl. Ex 9].

29. The Boos Plat depicts a "70' wide road" over a portion of the original 1986 easement. While the Boos Plat does not depict any "easements," the Boos Plat contains the following notes:

> 3. No rights-of-way or easements, except those shown hereon, were determined by this survey, nor was any research conducted to determine the existence of additional easements, per the request of the client.
>
> 4. The owner did not request a title search; therefore this survey does not constitute a title search by the surveyor. Any information regarding record easements, adjoiners, and other documents that might affect the quality of title to this tract of land was obtained from general information on deeds or etc. supplied by the owners. **Exhibit N** Boos Plat.

30. On April 25, 2006, Boos Invsts, LLC conveyed Lot 10 to Plaintiff Dean Allen Matthews and Trust Number 1. [Pl. Ex. 2]. ("Boos to Matthews Deed").

Purported Release of Easement and Creation of 2005 Easement

31. On August 23, 2005, Boos Investments, LLC, which owned Lot 10 at the time, Donald Weixelman, and Crystal, entered into a Consent Agreement, in which they purportedly agreed that "in consideration of [Crystal] granting approximately one and one half (1.5) acres to Boos to ensure that his lot meets the 35-acre minimum requirement for legal status, Weixelman and [Crystal] will not oppose setting a gate at the junction of Osage Trail and the road that connects with Elk Ridge Road, and to segregate [a] newly granted easement [providing access to the National Forest] to prevent road users from accessing Grantor's property." ("2005 Consent Agreement"). [Pl. Ex. 12]. (2005 Consent Agreement").

32. Neither CLRRA nor the Fan Group, were parties or signatories to the 2005 Consent Agreement.

33. On the same day the 2005 Consent Agreement was signed, Boos Investments, LLC and Crystal entered into a Private Road Easement Agreement [Pl. Ex. 13]. ("2005 Easement Agreement").

34. Under the 2005 Easement Agreement, Boos Investments, LLC purported to

convey a "perpetual nonexclusive private road easement sixty feet in width" to Crystal and its successors and assigns for purposes of accessing the National Forest. The last page of the 2005 Easement Agreement is a map showing the location of the purported 60-foot right-of-way over Lot 10, in a different location than the original easement reserved in the 1986 Deed. [Pl. Ex. 13].

35. On September 23, 2005, Glacier and Boos Investments, LLC entered into a Release of Road Easement Agreements. The 2005 Release of Road Easement Agreements acknowledges that "[r]ights-of-way easements appurtenant to the property previously owned by [Glacier] created the right to use private roads on the Boos property… [Glacier] no longer owns the properties for which the easements were granted." [Pl. Ex. 14]. ("2005 Release of Easement Agreement").

36. The 2005 Release of Road Easement Agreements acknowledges the original easement created in 1986 and purports to release that easement as follows: "[Glacier] releases all benefits it had in the road easements concerning the Boos Property in… Deed recorded on November 3, 1986, at Reception No. 86063951… This is a total release of all rights and benefits of the easements held by [Glacier] as they pertain to the Boos Property only." [Pl. Ex. 14].

37. Neither CLRRA, nor the Fan Group were parties or signatories to the 2005 Release of Road Easement Agreements.

38. The 2005 Release of Road Easement Agreements does not provide for consideration paid to CLRRA for the purported release of CLRRA's original easement.

Chain of Title and Creation of Easement - Lot 12

39. On April 3, 1984, CL Dev conveyed Lot 12 to O.J. Harvey and Mary Christine Harvey. [Stipulated Exhibit S],("CL Dev to Harvey Deed").

40. On August 7, 1984, O.J. Harvey conveyed his interest in Lot 12 to Mary Christine

Harvey as Trustee for the Mary Christine Harvey Trust. [Stipulated Exhibit T] ("Harvey to Harvey Trust Deed").

41. On June 25, 1999, Mary Christine Harvey, both as Trustee for the Mary Christine Harvey Trust, and in her individual capacity, executed a Plat of Harvey M.L.D. No. 99-S1437 ("Harvey Plat"). ("Harvey Plat").

42. The Harvey Plat was approved by the Larimer County Board of County Commissioners on August 3, 1999 and was approved by the Larimer County Engineering Department on July 30, 1999. It was recorded on August 6, 1999, under Reception No. 99070494.

43. The Harvey Plat depicts a 70-foot wide "access easement" extending from the border of Lot 12 with Osage Trail Road, in a northeasterly direction, then turning to a northwesterly direction, and extending past the north boundary of Lot 12 and into Lot 11 where it joins the 1986 easement over Lot 11.

44. The Harvey Plat depicts a portion of the western boundary of Lot 12 abutting Osage Trail Road. No portion of Osage Trail Road lies within Lot 12.

45. With the exception of the 70-foot wide "access easement" described above, the Harvey Plat does not depict a road or streets crossing over Lot 12.

46. The Harvey Plat contains the following language:

> KNOW ALL MEN BY THESE PRESENTS: That the undersigned being the owner and proprietor of the following described land... have by these presents caused the same to be surveyed and subdivided into a lot to be known as A PLAT OF HARVEY, M.L.D. NO. 99-S1437, and do hereby dedicate and convey to and for public use, forever, the street as is laid out and designated on this plat, and do also hereby reserve perpetual easements for the installation and maintenance of utilities and for irrigation and drainage facilities as are laid out and designated on this plat."

47. On August 9, 1999, Mary Christine Harvey, both as Trustee for the Mary

Christine Harvey Trust and in her individual capacity, conveyed Lot 12 to Donald T. Turnwall and Jennifer L. Turnwall, "subject to any easements, and rights of way of record." ("Harvey to Turnwall Deed").

48. On June 2, 2017, Donald T. Turnwall and Jennifer L. Turnwall conveyed Lot 12 to Plaintiffs Gail Perry and William Perry. ("Turnwall to Perry Deed") [Pl. Ex 1].

49. Prior to their purchase of Lot 12, the Perrys received a Title Commitment with the following exceptions in the Title Commitment:

> 2. Easements, liens or encumbrances, or claims thereof, not shown by the Public Records…
>
> 7. All matters as shown on the Map recorded August 6, 1999 at [sic] in Plat Book H at Page 418 [the Harvey Plat]…
>
> 11. Easement and right of way for road, granted by CRYSTAL LAKE, INC., a Colorado Corporation, by instrument recorded July 30, 1991 as Reception No. 91035035… [the 1991 Grant of Easement, described above].
>
> [Stipulated Exhibit X] ("Perry Title Commitment") and [Stipulated Exhibit Y] ("Testimony of William Perry during August 14, 2018 injunction hearing, pp. 45-47").

Prescriptive Easement Claims and Historic Use of the Bear Gulch Trail

50. The evidence presented at trial established that there was a historic use of what the parties have generally referred to as the "Bear Gulch Trail" for a myriad of uses to access Roosevelt National Forest. According to testimony received at trial, use of the trail for hiking, biking, vehicle traffic, off-highway vehicles ("OHV") and all terrain vehicles ("ATV") to access the national forest dated back to at least the early 1970's. Several witnesses testified as to their use of the trail referred to as a "jeep road" or "logging road." Although the evidence was conflicting as the specific location of the Bear Gulch Trail at specific times, Gary Weixelman,

the son of developer Donald Weixelman, testified that the Bear Gulch "road" was established in its current location with access through Lot 12 off of Osage Trail, in approximately 1976.

51. Cheryl Poage testified at trial that she owns several properties in Crystal Lakes and has been traveling to them weekly for many years with family members. Ms. Poage testified that she is a member on the board of CLRRA and currently serving as the board's vice president. Ms. Poage testified regarding historic research that she has conducted with regard to the Bear Gulch Trail. The Court received into evidence Def. Ex. 120, a 1967 topographical map from the U.S.G.S. which depicts the Bear Gulch Trail connecting with Forest Service Road 195 and depicts the trail as a "jeep trail." Ms. Poage testified that both she and family members used Bear Gulch Trail 5-10 times per year from 2002 to 2017, hiking, using ATVs and OHVs and other vehicles. She testified that she saw others using the trail almost every time that she was using the trail. Ms. Poage testified that she continued to use the trail until 2017 when a gate was placed across the entrance at Osage Trail in the summer of 2017 [Def. Ex. 128, photo 1] that was replaced by a more substantial gate in 2018. Ms. Poage testified that she was aware that national forest access was closed off to vehicles but she was unsure of the time frame and did not know the exact dates. Exhibits received by the Court at trial indicated, however, that in 1998 CLRRA was aware of the Forest Service closing access to forest service roads for motorized vehicles through Crystal Lakes [Pl. Ex 47, 48, 50]. Ms. Poage testified regarding the CLRRA Board minutes from August 21, 1999 [Pl. Ex. 50] which reflects that the then owners of Lots 10 and 11 hired an attorney to "contest the easement" referring to the Bear Gulch Trail. The August 21, 1999 CLRRA Board minutes reflect purported ongoing discussions between Mr. Lubkin and a CLRRA Manager regarding an alternative easement location and limiting use to hiking and horse travel. [Ex. 50, p.4].

52. Helain Steele testified that she has been an owner in Crystal Lakes since 2001 and that she would generally go up to her property on weekends and sometimes during the week in the summer time. During the winter she testified that she would go to her property every other week. She testified that she has led a hiking group through CLRRA since 2005. She testified regarding a "hiking map" created by her group for hiking in Crystal Lakes which was received into evidence [Pl. Ex.59]. She testified that the Bear Gulch Trail was not highlighted on the hiking map but that the group would hike on the trail once or twice every summer and that it was only with the permission of either the Perrys or the Matthews. Ms. Steele testified that at some point she was informed by the Crystal Lakes board that access from Elkridge Raod could not be used. She believed that occurred in 2015 or 2016 but was not sure.

53. Defendants offered the testimony of Jess Kuntz at trial. Mr. Kuntz testified as an expert in land surveying and provided testimony as to the specific location, on the ground, of the Bear Gulch Trail. Relying on several documents reflected in Def. Ex. 144 Mr. Kuntz testified as to the location of the purported easement based upon metes and bounds descriptions provided in relevant documents of title (primarily the 1986 Deed). Mr. Kuntz testified that he created Def. Ex. 106 to depict the location of the claimed easement referred to as the Bear Gulch Trail. Based upon Mr. Kuntz testimony and that of other witnesses including Gary Weixelemen who testified that the current location of the Bear Gulch Trail was established in approximately 1976, the Court finds that Def. Ex. 106 provides an accurate, if not precise, description of the location of Bear Gulch Trail for which the Defendant seeks a prescriptive easement.

54. Jerry Gruber testified that his parents purchased property in the area in 1972 and built a cabin in 1974. Mr. Gruber testified that he and his family were at the property most weekends and that from 1972 to the present time he has averaged being at the property three or

four times per year staying four or five days at a time. Mr. Gruber testified that he used the Bear Gulch "road" dozens and dozens of times for access into the national forest until they stopped using the road approximately 8-10 years ago. He testified that he traveled the road by Jeep to access the forest for camping and hunting. He further testified that he would frequently see others using the road with ATV's, Jeeps and other vehicles.

55. Jim Ekberg testified that he purchased a lot in Crystal Lakes in 1983 and would generally use his property in the summer months. He testified that he used the Bear Gulch Trail perhaps once every two years from approximately 1983 through 2014 to access the national forest. He testified that he would generally access Bear Gulch Trail through the Elkridge Road access through Lot 10 and continued to do so until access to the national forest was chained off.

56. John Baladez testified at trial. He testified that he has owned property in Crystal Lakes for 7 years and that he frequented the area as a child because his grandparents owned property in the area. He testified that he would travel to the area every weekend to go hunting and fishing after a cabin was built in 1982. He testified that he would go to the cabin 5-6 times a year during the summer months. He testified that as a kid he and his family would access the national forest using Bear Gulch Trail 8-10 times a year using vehicles, ATV's and motorcycles until approximately 14 years ago. He testified that a chain was placed across the road at the entrance on Osage Trail approximately at that time. He testified that he would occasionally walk the easement, but that he had not done so for ten years. Mr. Baladez testified that he believed he used the trail from approximately 1979 until the late 1990's.

57. Don Anderson testified that he has owned several properties in Crystal Lakes since 2003 and is a year-round resident. He testified that he has used the Bear Gulch Trail since approximately 1993 and stopped using it in approximately 2018. He testified that he traveled the

trail eight to ten times by vehicle from 1993 to 1995. Mr. Anderson further testified that he had traveled the trail by ATV on a couple of occasions between 1993 and 2018. He testified that on one occasion when he was using the trail by ATV others were also using the trail with an ATV. He believed that occurred in 2018.

58. Gary Weigel testified that he has owned property in the area since 2006 and is a year-round resident. He testified that he started using Bear Gulch Trail in 1996 and continued to use the trail until the day of the High Park fire in 2012. He testified that he probably utilized the trail 25 times from 1996 to 2012 using an ATV. He further testified that he never asked for permission to use the trail and he frequently saw others on the road with ATV's. He testified that he believes berms were placed at the entrance to the national forest in approximately 2006-2008. Mr. Weigel testified that a wire or rope was placed across the entrance at Osage Trail in approximately 2010 and that he did not use the trail after that except with regard to emergency access that he required because of the fire.

59. Scott Brown testified at trial that he purchased a lot in 1996 in Crystal Lakes and built a cabin. He testified that he spends most summers at the cabin and one or two weekends during the school year. He testified that he used Bear Gulch Trail to access the national forest via Forest Road 195 mostly for hunting. He testified that he would travel the trail in his truck until berms were installed at the entrance to the national forest. Mr. Brown testified that after the berms were placed he would use an ATV to travel to the border of the national forest and then walk from there. He testified that he frequently saw others on ATV's and other vehicles on the trail as well as hikers and mountain bikers. Although his testimony was conflicting regarding various dates, Mr. Brown testified that 4-5 years ago a chain was placed across the entrance to Bear Gulch Trail and that he also noticed "no trespassing" signs that were placed perhaps 10-12

years ago. He testified that when the chain was placed across the trail, he stopped using Bear Gulch Trail and began using the Elkridge access. He further testified that he had received permission from the property owners to hike the Bear Gulch Trail.

60. Kyle Spilker testified that his family has a tract of land located at 1965 Osage Trail and that since the 1970's he has visited the property on an annual basis, usually visiting for 3-4 days. He testified that in the early 1980's he would use a 4-wheeler to access the national forest using Bear Gulch Trail. He testified that he used the trail every year until it was chained off and that he stopped using the trial when he observed "no-trespassing" signs. During the time that he used the trail, he testified that he would see others using 4-wheelers on the trail as well as observing horse manure on the trail. He also testified that his nephew used the trail on his mountain bike. Mr. Spilker testified that he stopped using the trail in the early 2000's when the signage was placed at the entrance to Bear Gulch Trail on Osage Trail.

61. Michael Holland testified that he has owned two properties in Crystal Lakes for approximately seven years. He testified that he frequently traveled to the area before owning property and that he used Bear Gulch Trail on numerous occasions to provide access to the national forest in his vehicle. He testified that he was last on Bear Gulch Trail in 2016 and saw other vehicles using the trail but would rarely see hikers or bikers. On cross-examination, Mr. Holland conceded that he was not a member of CLRRA until 2013 and had only used the trail one time since becoming a member. Mr. Holland testified that the entrance to Bear Gulch Trail was blocked or chained off in 2016 and that he has not seen anybody access the trail since that time.

62. Dennis Webber testified that he purchased a home on Osage Trail within Crystal Lakes in February 1996. He testified that the home was used as a "second home" and that in the

first ten years through 2006 he was on the property virtually every weekend. Mr. Webber testified that he frequently used the Bear Gulch Trail. He estimated that he used the trail 20 times a year, usually walking accompanied by his wife. He testified that he and his wife hiked various portions of the Bear Gulch Trail from 1992 until 2012. He testified that he frequently saw other folks using the trail on ATV's, OHVs, hiking and on mountain bikes. He testified that he never requested permission to use the trail and believed that it was easement access to the national forest. Mr. Webber testified that a chain was placed across the access point at Osage Trail probably in 2002, but that he continued to use the trail as did others. He testified that the chain remained in place for probably 4-6 years. He vaguely remembered signs being placed at the entrance prohibiting use which were removed or knocked down at different times.

63. Plaintiff William Perry testified that he purchased Lot 12 in 2016-2017 but that he had owned a different Lot in the area and had built a cabin in approximately 2004. Mr. Perry testified that he and his wife have served as a caretaker for the Matthews with regard to Lots 10 and 11 commencing in approximately 2004. Mr. Perry testified as to the placement of game cameras on Lots 10, 11 and 12 which were set up initially in 2012 with additional cameras added over the years and he identified the position of various cameras. [Def. Ex 127]. Mr. Perry testified that a gate was installed at the Osage Trail access to Bear Gulch Trail in 2019 [Def. Ex. 128]. Mr. Perry testified regarding photos obtained from the game cameras on the properties depicting use of the Bear Gulch Trail from 2017 through 2019 by hikers, bikers, motorcyclists and ATV owners. [Def. Ex. 128, 129 and 130]. Mr. Perry testified that from 2012 to 2016 he did not see ATV's or bikers entering on to the Bear Gulch Trail at the entrance on Osage Trail but conceded that there were likely a handful of hikers. Mr. Perry testified that when access to the Elk Ridge easement was blocked off in summer of 2017, there was additional traffic on the Bear

Gulch Trail with access off of Osage Trail. According to Mr. Perry this increased use continued when according to Mr. Perry Defendant CLRRA alerted its members that they could use the Bear Gulch easement. Mr. Perry testified that the access at Osage was initially chained off in 2004 or 2005 and "private property" signs were place near the access prohibiting use. [Pl. Ex. 65].

64. Henrietta Mathews testified that she and her husband purchased Lot 11 in 2004 and Lot 10 in 2006. She testified that she would travel to the property in the summer time but lived elsewhere during the winter months. Ms. Mathews testified that from 2004 through 2016 she did not observe ATV's bikers or hikers using the Bear Gulch Trail. She testified that in 2017 she did learn that ATV's were using accessing the Bear Gulch Trail by viewing photographs. Ms. Matthews testified that until 2017 relatively few people entered the property and it was when the Elkridge access was blocked off that there was increased traffic on the Bear Gulch Trail. Ms. Matthews testified that the access off of Osage Trail was blocked off in 2004 or 2005 with a chain placed across the road and placement of private property signs. She testified regarding photos taken of the signs at the Osage access in 2012 [Pl. Ex. 61]

65. Dean Matthews testified that he had been traveling to the Crystal Lakes area since 2004 and that he went to the property probably twice a year from 2004-2006. He testified that during the period of the time that he was on the property he did not see, hikers, ATV's mountain bikers or horses using Bear Gulch Trail. He testified that he has never personally seen anyone enter the Bear Gulch Trail access and that he has only seen people entering at the Elkridge access with ATV's. He conceded, however, that in recent years he has only been to the property approximately every five years.

66. Gail Perry testified that she traveled to the Crystal Lakes area every weekend from 2001 to 2007 and met the Matthews in 2004 or 2005. She testified that a chain was placed

across the access at Osage Trail in approximately 2004 or 2005. She testified that she and her husband became caretakers for the Matthews property Lots 10 and 11 in 2005 or 2006. She testified that she and her husband purchased Lot 12 in 2017. Ms. Perry testified that from 2006 to 2010 she never personally observed people entering the Bear Gulch Trail during that time and that thereafter she infrequently saw people on the trail and was only aware of people on the trail as a result of photographs taken by the cameras installed along or near the trail.Pl. Ex. 66, 67] and [Def. Ex.128, 129 and 130]. According to Ms. Perry this continued until mid-2017 when according to Ms. Perry Defendant CLRRA alerted its members that they could use the Bear Gulch easement. Ms. Perry testified that as a result she saw an increase of traffic through the Osage access.

67. Janet Stellema testified at trial that she has owned property in Crystal Lakes since 2000. Ms. Stellema testified that she has used the Elkridge access for ATV from approximately 2014 until 2017 until a cable was placed blocking access. Ms. Stellema testified that she sent an email to CLRRA when the Elkridge access was blocked on July 13, 2017 [Pl. Ex. 63] and received a response from CLRRA. Ms. Stellema testified that she had not seen ATV's hikers or mountain bikers on the Plaintiff's property and that she herself had only been on the Plaintiff's property with the permission of the Matthews and Perrys. Ms. Stellema testified that she was not aware of anyone using the Bear Gulch Trail for access to the national forest.

68. Jennifer Price testified that she has owned property in Crystal Lakes since 2000 and built a house in 2008. She testified that she has lived in the area full time since retiring in 2015. Prior to her retirement she testified that she traveled to the area pretty much every weekend. Ms. Price testified that she has used the Bear Gulch Trail but only with the permission of the Plaintiffs. Ms. Price testified that at least since 2014 the access at Osage Trail has been

chained off. She testified that the times that she has used the Bear Gulch Trail she never saw anyone use an ATV on the trail, nor did she see any hikers utilizing the trail.

69. Although conflicting evidence was presented at trial the Court finds that the evidence establishes that there has been historic use of the Bear Gulch Trail dating back to at least the early 1970's. The Court is persuaded that use of the Bear Gulch Trail has been open and notorious dating back to that time and that there has been use of the trail by vehicular traffic including 4-wheel drive vehicles, ATVs, motorcycles and other OHVs as well as by hikers and mountain bikers primarily to access the Roosevelt National Forest. Use of the trail was continuous until at least 2004 or 2005 when Plaintiff's initially chained off access to Bear Gulch Trail at Osage Trail. Use of the trail has generally been without the specific permission of the landowners and even after placing a chain across the access at Osage Trail, users have continued to use the trail despite the barrier and signs indicating that access is not allowed. Placement of a chain and signage at the access point off of Osage Trail in 2004 or 2005, did result in decreased use of the trail and several witnesses at trial testified that they ceased using the trail when a barrier and signage were placed at the entrance off of Osage Trail.

70. Conflicting evidence was presented at trial regarding the scope of the use of Bear Gulch Trail during the prescriptive period and during the several years after the Matthews became owners of Lots 10 and 11. Plaintiffs Gail Perry and William Perry testified at trial that there was little, if any, vehicular traffic along Bear Gulch Trail after they became caretakers for Lots 10 and 11 and that increased use of the trail occurred only in 2017 when access through Elkridge was blocked. Both Mr. Perry and Mrs. Perry testified that there was no vehicular traffic through Bear Gulch until after 2017. Both testified that they only identified a handful of hikers on the trail up until that time. Henrietta Matthews testified similarly, although she was not on the

property as frequently. Contrary testimony was presented by a number of witnesses who testified that they had utilized the trail using ATV's on the trail as recently as 2018. Based upon conflicting evidence, the Court finds that vehicle traffic along Bear Gulch Trail was significantly limited after the 2000 Easement Agreement was entered into by CLRRA on January 13, 2000 and that limited vehicle use continued until approximately 2017 when the Elkridge access was blocked.

71. During the prescriptive period to establish an easement, CLRRA entered into the 2000 Easement Agreement [Pl. Ex. 11]. The 2000 Easement Agreement manifests a clear intent on behalf of CLRRA to limit use of any "access" across Lots 10 and 11 consistent with access permitted by the United States Forest Service. For various reasons, the Court has determined that the 2000 Easement Agreement was not valid to *establish* an easement in favor of CLRRA over Lots 10 and 11.[1] The 2000 Easement Agreement provides, in relevant part, as set forth in paragraph 1:

> "a. So long as the official policy of the United States Forest Service is to not permit vehicular access into Roosevelt National Forest through entry points on Grantors' property, CLRR agrees that it will not use the granted easement for non-emergency vehicular use; that it will inform its members that the access is not available for motorized vehicular use and will use its reasonable efforts to discourage and eliminate vehicular use by its members.
>
> b. CLRR members may use the easement consistent with such access (foot, bicycle and/or horse) as permitted or restricted by the United States Forest Service. In other words, if the Forest Service does not allow bicycle traffic into Roosevelt National Forest land adjacent to Grantor's property, then the Association similarly will restrict and attempt to eliminate bicycle traffic on the access easement

[1] In the Court's Order Cross Motions for Determination of a Matter of Law the Court determined that the 2000 Easement Agreement did not *establish* an easement because the agreement contains no description of the purported location of the easement--referenced Exhibit B is not attached and according to the parties cannot be located. Further, the undisputed evidence establishes that at the time of the conveyance of the alleged easement, the Grantors, Lubkin and Leach, did not own Lot 11, having conveyed Lot 11 on December 17, 1999 to the "Fan Group." Accordingly, the Court determined that no road easement for CLRRA access to the Roosevelt National Forest was *created a*s a result of the 2000 Easement Agreement.

c. Should the Forest Service change or modify its policy and permit vehicular access to the National Forest through the entry points on the property at some future date, CLRR may use the access easement for vehicular access.

d. CLRR Agrees to include Grantors or their successors or assigns in the deliberations and negotiations of its task force with the Forest Service and will notify Grantors, their successors and assigns of meetings with regard to the issue of opening the National Forest Access to motorized vehicular access."

Paragraph 2 of the 2000 Easement Agreement provides:

"Notwithstanding the foregoing, the Grantees shall have the unrestricted use of the granted easement for fire protection and other emergency services."

72. The evidence before the Court indicates that vehicular traffic along Bear Gulch Trail was significantly limited after the 2000 Easement Agreement was entered into in January 2000. Vehicle use of the trail was further limited by the placement of a chain and signage at the entrance to Bear Gulch Trail from Osage Trail The evidence and reasonable inferences from the evidence support a finding that this was as a result of the 2000 Easement Agreement in which Defendant CLRRA agreed to limit vehicle access along the trail until such time as the Forest Service opened Roosevelt National Forest to vehicle traffic.

73. The Court takes judicial notice that a lawsuit was commenced by the then owners of Lots 10 and 11, Gregory Lubkin and Kathleen Lynch, on April 6, 1999 in Case No. 1999CV366 designated as an action under C.R.C.P. Rule 105 to Quiet Title. The Register of Actions in the case indicates that the case was dismissed, without prejudice, on December 7, 1999. No additional information is available to the Court with regard to the ultimate resolution of the lawsuit. Although Plaintiffs argue that the 2000 Easement Agreement was the result of the parties' lawsuit, there is no evidence presented to the Court that the 2000 Easement Agreement was the product of the parties' dispute.

74. Plaintiffs also assert that the prescriptive period was interrupted as a result of the placement of barriers at the entrance to Bear Gulch Trail off of Osage Trail. The evidence before the Court is, again, conflicting as to when a barrier was first placed across the access at Osage Trail and whether the barrier was effective. Dennis Webber testified that a barrier was "probably" first placed at the access in 2002. However, the weight of evidence suggests that a barrier, initially in the form of a chain with signage indicting "private property" was likely first placed across the Osage Trail access point sometime in 2004 or 2005 after the property was purchased by the Matthews.[2] The evidence was further in conflict as to whether any barrier, once placed, was effective to interrupt use of the easement. Several witnesses testified that they ignored any barrier or signage at the access point and continued to use Bear Gulch Trail. Other witnesses testified that when the barrier or chain was placed across the access and signage was placed forbidding continued use, they ceased use of Bear Gulch Trail. Based upon conflicting evidence the Court finds that the use of a barrier and or signage across the access at Osage Trail was likely first placed in 2004 only after the prescriptive period had been established in 2002. Accordingly, the Court does not find that there was an effective interruption in the prescriptive period from 1984 through 2002 as a result of the placing of any barrier or signage at the access point of Bear Gulch Trail at Osage Trail.

ISSUES TO BE DETERMINED

The issues for determination by the Court include (1) Whether an easement by prescription over the Bear Gulch Trail has been created in favor of CLRRA and the scope of that easement; (2) whether Plaintiffs have proved their claim of trespass, (3) damages sustained as a result of any trespass, and (4) whether injunctive relief should be ordered.

[2] Plaintiffs in their proposed findings assert that "At some point after 2005/2006 and prior to 2012, a chain and no trespassing signs were placed at the entrance of the Easement on Lot 12."[Proposed Findings, ¶40.]

LEGAL STANDARDS

In Colorado, an easement by prescription is established when the prescriptive use is: 1) open or notorious, 2) continued without effective interruption for the prescriptive period, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant. *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002) (citing Restatement (Third) of Property: Servitudes §§ 2.16, 2.17); *accord LR Smith Invs., LLC v. Butler*, 378 P.3d 743 (Colo.App. 2014). The prescriptive period is eighteen years. C.R.S. §38–41–10 (2018).

A prescriptive easement claimant that shows that its use of the property was open and notorious and continuous for the statutory period is entitled to a presumption that its use was adverse. *Woodbridge Condominium Association, Inc. v. Lo Viento Blanco, LLC*, ___P.3d ___ Colo.App. 2020); *Trueblood v. Pierce*, 116 Colo. 221, 233, 179 P.2d 671, 677 (1947); *see also Brown v. Faatz*, 197 P.3d 245, 250 (Colo. App. 2008); Restatement (Third) of Property: Servitudes § 2.16 cmt. g, Further, intermittent use on a long-term basis satisfies the requirement for open, notorious, and continuous use. *Clinger v. Hartshorn*, 89 P.3d 462 (Colo.App. 2003). The landowner can rebut that presumption by showing that the claimant's use at any time during the statutory period was permissive. However, if the claimant proves the other elements, the court must find a prescriptive easement. *Trueblood,* 116 Colo. at 233, 179 P.2d at 677. An easement by prescription may also be created when there is a showing that there has been open or notorious use, continued without effective interruption for the prescriptive period and that the use was pursuant to an attempted, but ineffective grant. *Lobato v. Taylor, supra*.

Effective Interruption. A servitude can be acquired by prescription only if the owner or possessor of the claimed servient estate does not effectively interrupt the adverse use prior to the end of the prescriptive period. To interrupt the acquisition of a prescriptive easement before the

statutory period has run, the true owner must assert a claim to the land or perform an act that would reinstate the owner's possession. An owner may also interrupt the running of the statutory period by physically limiting access to the property. *Trask v. Nozisko*, 134 P.3d 544 (Colo.App. 2006); *See also McKenzie v. Pope*, 33 P.3d 1277 (Colo.App.2001).[3] To be successful, the owner must either cause the adverse user to stop the use, comply with a statutory procedure that produces an interruption, or bring a legal action that results in establishing the landowner's right to terminate the use.

Tacking of Uses. In determining continuous use for the prescriptive period, prescriptive users are entitled to tack their periods of use together to complete the prescriptive period if there is a transfer between them of the servitude or the estate benefited by it. This requirement has been described as a privity requirement. *See, Trueblood v. Pierce, supra*; Restatement (Third) of Property: Servitudes § 2.17 cmt. l. [4] However, use by strangers and members of the general public does not qualify as prescriptive use to establish servitude rights in a particular entity or individual. Restatement (Third) of Property: Servitudes § 2.16 cmt.e. *See also, Chournos v. Alkema*, 27 Utah 2d 244, 494 P.2d 950 (1972)(use by the general public does not inure to the benefit of an individual prescriptive user).

Ineffective Grant. In the case where a claimant argues that a prescriptive easement should be determined as a result of continuous use based upon an ineffective grant, the claiming party need not show that the use was adverse *Lobato,* 71 P.3d at 950. In *Lobato,* the Colorado Supreme Court adopted the Third Restatement of Property Law to help explain how a

[3] 11 *In* Trask, the Court determined that a barrier established for the purpose of, and in fact, interrupting an adverse claimant's use is effective even if it is ultimately removed by the adverse claimant or proves to be ultimately ineffective to stop the adverse use.

[4] C.R.S. §38-41-102 further provides that "If such right or title first accrued to an ancestor, predecessor, or grantor of the person who brings the action or to any person from, by, or under whom he claims, the eighteen years shall be computed form the time when the right or title so accrued.

prescriptive easement may be established based upon an ineffective or imperfectly executed grant. In *Lobato* the Court noted:

> It has long been established, then, that the element of adversity is not required in all circumstances. It is not required when other evidence makes clear that the parties intend an easement, but fail "because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction." Restatement, supra, § 2.16, cmt. a. 71 P.3d at 954.

The Court in *Lobato* does not further define what constitutes an imperfectly executed grant other than noting that it involves a failure to comply with a formal requirement necessary to effectuate the grant. The Restatement (Third) of Property: Servitudes § 2.16, cited by the Court in *Lobato* defines an "imperfectly executed grant" as follows:

> "Imperfectly created" means that the parties failed to comply with a formal requirement imposed by law for creation of the servitude. Since the only formal requirement recognized by this Restatement is compliance with the Statute of Frauds, subsection (2) will only apply when parties failed to articulate their intent to create a servitude or failed to reduce it to writing. The Restatement (Third) of Property Servitues, §2.16 cmt.b.

The commentary goes on to explain that Subsection (2) does not apply to defects that are "substantive" rather than formal. The commentary identifies substantive defects to include that the party purporting to burden property does not own the property, or lacks the power to create the servitude. Use that would have been authorized by the servitude that failed on account of a substantive defect requires a showing of adverse use to establish an easement by prescription.

DISCUSSION AND CONCLUSIONS OF LAW

The Court has previously determined that Defendant CLRRA does not hold a valid easement over Lots 10 and 11 by virtue of the reservation set forth in the 1986 Deed. The Court has determined that the reserved easement was not properly conveyed to CLRRA by the 1992 Agreement. The Court has determined that CLRRA further has a valid easement over Lot 12 which was conveyed in the "Harvey Plat." The Court must now determine whether Defendant

CLRRA has established, based upon the evidence before the Court the existence of a prescriptive easement over the Lots 10 and 11 referred to as the Bear Gulch Trail.

In making this determination the Court must determine whether Defendant CLRRA has established the requirements that the alleged prescriptive use is: 1) open or notorious, 2) continued without effective interruption for the prescriptive period, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant. *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002).

Open and notorious. Here the evidence establishes that there has been historic use of the Bear Gulch Trail dating back to at least the early 1970's. The Court is persuaded that use of the Bear Gulch Trail has been open and notorious dating back to that time and that there has been use of the trail by vehicular traffic including 4-wheel drive vehicles, ATVs, motorcycles and other OHVs as well as by hikers and bikers. As noted above, intermittent use on a long-term basis satisfies the requirement for open, notorious, and continuous use. *Clinger v. Hartshorn*, *supra*.

The Court must next determine whether use was adverse and continuous, without effective interruption, for the prescriptive period. As noted above, the prescriptive period is 18 years under C.R.S. §38-41-101. In determining whether the use was continuous and without effective interruption, the Court must first determine when the period began to accrue and whether or not periods of use may be "tacked" or added together in determining whether the use has continued for the prescriptive period. Plaintiffs argue that CLRRA was not even in existence prior to its formation in 1979 by Crystal Lakes Development Company. Accordingly, Plaintiffs argue that the prescriptive period cannot begin to run prior to formation of CLRRA. Plaintiffs

argue that any use made of the easement prior to formation of CLRRA by the general public cannot be tacked to use by CLRRA members.

Based upon the evidence presented, the Court agrees with Plaintiffs that the prescriptive period with regard to Defendant CLRRA's claim for a prescriptive easement did not begin to accrue, at the earliest, until such time as CLRRA was formed on February 6, 1979. Use by members of the general public does not qualify as a prescriptive use to establish servitude rights in a particular entity or individual. Restatement (Third) of Property: Servitudes § 2.16 cmt.e. *See also, Chournos v. Alkema*, 27 Utah 2d 244, 494 P.2d 950 (1972)(use by the general public does not inure to the benefit of an individual prescriptive user).[5]

Adverse use. The Court must now determine whether the use by members of CLRRA was adverse and whether such adverse use continued for the prescriptive period. According to the Restatement (Third) of Property: Servitudes § 2.16 cmt. f. to be adverse a use must create a cause of action for interference with an interest in property like trespass, nuisance, or interference with a servitude benefit. Plaintiffs argue that Defendant CLRRA has failed to present evidence that use of the Bear Gulch Trail was "adverse" to the servient owner of the property, prior to the conveyance by Crystal Lakes Development Company to Davis S. Woronoff on August 30, 1984. [Pl. Ex. 17]. The Court agrees. Accordingly, the Court finds that there is no evidence of "adverse use" of the Bear Gulch Trail prior to the conveyance to David Woronoff on August 3, 1984.

[5] Defendant CLRRA relies on C.R.S. §38-41-102 to argue that prior uses should be tacked to use made by its members. The Court does not, however, find that use by members of the general public equates to use by an ancestor, predecessor or grantor under the statute. Further, the cases cited by CLRRA with regard to an association's right to claim a prescriptive easement are distinguishable from this case as use by the general public in this case preceded formation of CLRRA.

To be adverse, the use must be made without authority and without permission of the property owner. Thus, uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes created expressly, by implication, or by necessity. As set forth in. *Woodbridge Condominium Association, Inc. v. Lo Viento Blanco, LLC, supra,* if use of the property is open and notorious and continuous for the statutory period there is a presumption that its use was adverse which must be rebutted by the property owner. The Court finds as noted above, that use of the Bear Gulch Trail by members of the CLRRA was open and notorious for a period of 18 years from at least August 4, 1984 through August 2002.

Based upon a finding that there has been an open and notorious use of the Bear Gulch Trail from 1984 through 2002, the Court must now determine whether there was an effective interruption in the prescriptive period. Based upon the findings set forth above, the Court determines that there was no effective interruption in the prescriptive period from 1984 to 2002.

The lawsuit filed by the then owners of Lots 10 and 11 ("Lubkins") in 1999 did not interrupt the prescriptive period. The weight of authority indicates that the filing of a lawsuit, alone, will not constitute an effective interruption of the prescriptive period. Rather, there must be a showing that there is a successful resolution of the claim on behalf of the landowner. *See*, *Men Thi Pham v. Tung Hoang Vo*, 2014 WL 1761679 (Cal.App. 2014) *Yorba v. Anaheim Union Water Co*. 41 Cal.2d 265, 270 (1953)("ordinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period, and the statute will be tolled while the action is actively pending…however, an action that has been dismissed or abandoned does not interrupt the running of the prescriptive period). *See also Welsher v. Glickman,* 272 Cal.App.2d 134 (1969); *Beckman v. Bard*, 2004 WL 3158534 (Mass. Land Court, 2004); *McMullen v. Porch*, 286

Mass. 383, 388 (1934)(adverse possession is interrupted at the time a complaint is filed, if the complaint is successful. If the action is not successful, either through abandonment of the lawsuit or judgment, the timing continues to accrue as if there was never an interruption). Restatement (Third) Property Servitudes §2.16 cmt. j.

Based upon the evidence presented at trial, the Court is unable to find that the mere filing of the lawsuit by Lubkin and Lynch constitutes an effective interruption with regard to the prescriptive period. The lawsuit was dismissed, without prejudice, on December 7, 1999, and there is insufficient evidence before the Court to indicate that there was a successful resolution of the claims asserted to interrupt the prescriptive period.

For the reasons set forth in the findings of fact, the Court similarly concludes that the placing of barriers at the access to Bear Gulch Trail on Osage Trail did not constitute an effective interruption in the prescriptive period from 1984 through 2002, as this occurred only after the prescriptive period had been established. Accordingly, the Court concludes as a matter of law that Defendant CLRRA has established a prescriptive easement for the use of Bear Gulch Trail based upon the open and notorious use of the easement from at least 1984 through 2002. Use of the Bear Gulch Trail was adverse and continued for the required prescriptive period of 18 years without effective interruption.

Because the Court has determined that CLRRA has established a prescriptive easement based upon open, notorious and continuous use, without effective interruption, from 1984 to 2002, the Court does not consider the further argument that CLRRA established a prescriptive easement based upon an ineffective grant. The Court notes that the easement created in favor of Glacier by reservation in the 1986 Deed was not an ineffective grant, but rather, was effective to create an easement in gross in favor of Glacier over Lots 10 and 11, which was subsequently

released and/or extinguished when Glacier ceased to exist. To the extent that Defendant relies upon the 1992 Agreement as an ineffective grant, the Court finds that the evidence does not support a finding of continuous use without effective interruption from 1992 through 2010. The placing of barriers at the entrance off of Osage likely in 2004 or 2005 would have been sufficient to establish an effective interruption. As set forth in *Trask v. Nozisko, supra,* a barrier established for the purpose of, and in fact, interrupting an adverse claimant's use is effective even if it is ultimately removed by the adverse claimant or proves to be ultimately ineffective to stop the adverse use.

The Court must now determine the appropriate scope of the easement and the impact, if any, as to whether agreements entered into by CLRRA impacted the scope of use regarding the easement. In general, the extent of an easement created by prescription is fixed by the "use through which it was created." *Wright v. Horse Creek Ranches*, 697 P.2d 384 (Colo.1985), *Trask v. Nozisko, supra*. A companion provision, Restatement (First) § 478, states with respect to uses:

> In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement.

The question before the Court is whether the permitted scope of any prescriptive easement was, in fact, limited by members of CLRRA after the 2000 Easement Agreement and further whether use should be limited in accordance with the specific agreement of CLRRA reflected in the 2000 Easement Agreement. The Court has not located nor have the parties provided any authority that directly addresses the issue regarding the proper scope of a prescriptive easement where the scope of use may change during or within the prescriptive period. However, unequivocal acts by the owner of the dominant estate which manifests a purpose inconsistent with continuance of the easement, or which manifests a clear intent to alter

or abandon the easement should generally be given effect. *See, e.g. Egidi v. Town of Libertyville*, 621 N.E. 2d 615, 251 Ill. App. 3d 224, 232 (1993). Further, the Court finds as a factual matter, that after the 2000 Easement Agreement vehicle use of the Bear Gulch Trail was significantly diminished. This is supported by the testimony of Gail and William Perry who testified that there was little, if any, vehicle traffic when they became caretakers for Lots 10 and 11.

Further, the Court finds that by entering into the 2000 Easement Agreement CLRRA clearly and unequivocally agreed to alter the scope of any easement and limit vehicular access to Roosevelt National Forest consistent with access permitted by the United States Forest Service. Accordingly, the Court determines that the scope of the prescriptive easement should be limited as set forth in the 2000 Easement Agreement.[6]

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Court enters the following Order:

1. The Court finds that Defendant CLRRA has established a prescriptive easement over Bear Gulch Trail in the location identified and as set forth in Def. Ex. 106.

2. The scope of the prescriptive easement shall be limited to access on foot, bicycle and/or horseback and shall not allow vehicular traffic, ATV's or OHV's unless or until the United States Forest Service changes or modifies its policy and permits vehicular access to the National Forest.

3. The precise location of the prescriptive easement over Lots 10 and 11 cannot be determined based upon the evidence before the Court. Accordingly, the Court grants CLRRA the

[6] The Court has also considered whether the 2005 Consent Agreement, the 2005 Easement Agreement and the 2005 Release of Easement Agreement impact either the finding of a prescriptive easement or the proper scope of the easement. Because Defendant CLRRA was not a party to any of those agreements, the Court is not persuaded that those agreements impact the Court's determination here.

right to conduct a ground survey to specifically identify a metes and bounds description of the prescriptive easement within 120 days of the date of this order which shall be appended to and become a part of the final judgment in this matter.

4. The Court has previously found and determines that the Harvey Plat establishes a valid 70-foot wide access easement over Lot 12 to and for public use in the location set forth on the Harvey Plat. As set forth in the Harvey Plat the access easement extends from the border of Lot 12 with Osage Trail Road, in a northeasterly direction, then turning in a northwesterly direction, and extending past the north boundary of Lot 12 to Lot 11. As provided for in the Harvey Plat a perpetual easement is reserved for the installation and maintenance of utilities and for irrigation and drainage facilities as are laid out and designated by the plat.

5. Based upon the Court's determination that Defendant CLRRA has established the existence of a prescriptive easement over Lots 10 and 11, Plaintiffs' claim for trespass and damages for trespass are hereby denied and dismissed. Plaintiffs claim for injunctive relief is hereby denied and dismissed.

6. Defendant CLRRA may submit a bill of costs within 21 days from the date of this Order.

SO ORDERED this 27th day of April.

BY THE COURT:

Stephen J. Jouard
District Court Judge