



Troublesome *Neighbors*:

THIRD PARTY TRESPASS AND STANDING



The Bennett Ranch is just one of the many beautiful properties protected by Colorado Open Lands. In 2007, the organization faced a third party trespass lawsuit.

BY Sheila McGrory-Klyza

The proverb “Good fences make good neighbors” may be intentionally ambiguous, but as far as land trusts are concerned, clear boundaries should be anything but ambiguous. Unfortunately, individuals who own property adjacent to conserved land sometimes, intentionally or not, fail to respect boundaries. They might trespass on the land or claim to have the right to enforce the easement on their neighbor’s property.

Land trusts can be dragged into these disputes between neighbors, and all of a sudden, find themselves faced with a lawsuit and the prospect of steep legal fees, lost time and bad publicity. In two recent cases, one in Colorado and the other in New Hampshire, land trusts prevailed, suggesting promising results for future third party cases.

Third Party Trespass

One of the difficulties about third party trespass is that it seemingly happens out of the blue. Colorado Open Lands was sued in 2007 when land on which it held a conservation easement became the subject of a neighborhood dispute.

In this particular case, a group of landowners had been deceived by a developer, whom the landowners eventually sued for fraud. In 2001, the developer sold an easement on 102 acres to Colorado Open Lands. He also sold off 10 adjacent lots,

giving these lot owners recreational licenses on the conserved land, which referenced a 20-foot-wide trail. The easement, however, allows recreational use on a “footpath” to be designated by the landowner and approved by the land trust prior to construction—not a 20-foot-wide trail.

The developer did not consult the land trust before issuing the recreational licenses. He then went on to sell the conserved land to one of the lot owners, subject to the easement and the recreational license. The new owner and the adjacent lot owners disagreed about the adjacent owners’ ability to use the land and their right to a trail on it. After the conflict escalated, the adjacent landowners sued the developer and the new conservation easement parcel owner, and named Colorado Open Lands in order to quiet title. (This legal term describes a lawsuit that is designed to answer the question of who owns what real estate interests.)

The case went before the District Court in Weld County, Colorado, in January 2009. The judge ruled that the adjacent landowners didn't have easement interests in the land, but instead had revocable licenses that were subject to the terms of the conservation easement.

"Third party trespass is a wild card," says Cheryl Cufre, director of land stewardship at Colorado Open Lands. "Because they were a third party, we had no prior communication with the adjacent landowners."

complaint, a land trust must meet a strict court deadline to respond."

Although the expense, time commitment and potential bad publicity can cause land trusts to shy away from litigation, this approach is usually a mistake. Colorado Open Lands' attorneys advised them to stay involved and give the case their full attention. "That was a wise decision," Cufre says. "If we had backed out, the judge could have made a decision and we wouldn't have had any input."

They stayed calm and focused on the facts, relying on good documentation and expert counsel to succeed. They were fortunate that their attorneys were willing to work on the case pro bono; if not, legal costs could have exceeded \$125,000. And it's not over, as the adjacent landowners have appealed the ruling; thus additional expenses will be required until the case is finally closed.

Given the price of legal fees and the toll they can take on an organization, Beck recommends that a land trust talk to a local lawyer experienced in conservation law about whether he or she might be willing to provide legal fees pro bono up to a certain amount.

We're hopeful that, with a growing body of law around the country, **neighbors will be deterred from suing in the future.**

– TOM MASLAND, SPNHF

Because third party cases can be so unpredictable, Cufre stresses that it is all the more important to be prepared: "We were fortunate to have significant documentation of our monitoring, so we could prove to the judge we were doing our job protecting the property. It gave us credibility." She also advises getting an attorney right away and not taking the issue lightly.

Attorney Melinda Beck, who worked on the case, agrees: "It's important for an organization to have good litigation counsel at the ready. After receiving a

To land trusts that might weigh the costs of litigation versus the costs of removing themselves from a case, Beck advises, "It's critical for a land trust to analyze what the risks are from an outcome that could be detrimental to the conservation values of the land. If we had not stayed active, the judge could have approved the 20-foot-wide trail that would have cut between two riparian areas."

Emotions can run high during such trials, but Colorado Open Lands staff did not let themselves get pulled into the landowners' emotional bickering.

Third Party Standing

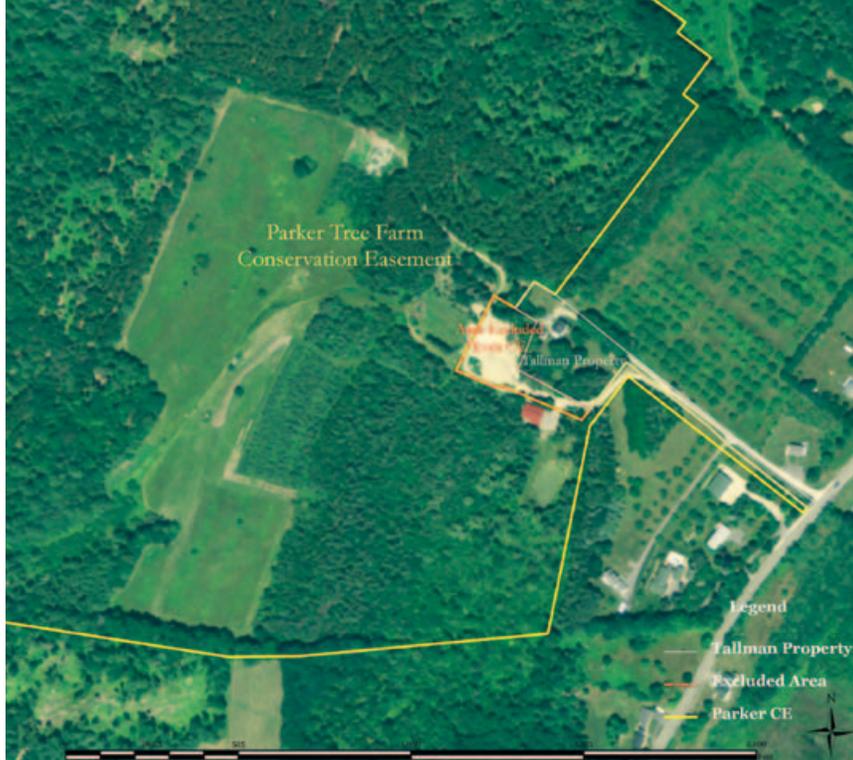
Although completely different from third party trespass, third party standing often ends up playing a part in trespass cases. "Standing" is the legal term for the right to initiate or intervene in a lawsuit, the idea being that a person has to have enough of an interest in a case to have a legal right to bring a claim to court.

In a typical scenario, a neighbor might try to intervene in matters concerning easement land by challenging how the land trust is enforcing or interpreting the easement, thereby attempting to interfere in the relationship between the landowner and land trust. Essentially quarrels between neighbors, these disputes can escalate into lawsuits that embroil the easement holder. Such a case took place in September 2009 in a New Hampshire trial court. In a key victory for land trusts, the court ruled that the neighbor did not have standing, sending a clear message that third parties do not have the right to enforce or interpret conservation easements.

Elizabeth Tallman filed this case against her neighbors the Outhouses, who own land partially protected by a conservation easement; the Rockingham County Conservation District who is the grantee of the easement; and the Society for the Protection of New Hampshire Forests, the executory interest holder in the easement. (Through its executory

Conservation Law in Progress...

The land trust community is now forming case law on third party trespass. In these early stages it is extremely important that these cases get settled in such a way as to build up a substantial foundation of law favorable to conservation. This responsibility lies with every conservation practitioner to get things right! So far, the case decisions on trespass on both fee-owned land and conservation easements have been positive for conservation. For more information go to the Conservation Defense homepage at www.lta.org/conservation-defense or contact Leslie Ratley-Beach, conservation defense director at 802-262-6051 or lrbeach@lta.org.



COURTESY OF SARA CALLAGHAN

LEFT: In this aerial photograph, the proximity of Elizabeth Tallman's and the Outhouses' house lots can be seen. They share an access road and a portion of the Outhouses' road crosses through the conservation easement and Tallman's house lot. Rights of access were one of the disputed issues during the trial.

interest, the Forest Society backs up and reinforces the primary easement holder.) Claiming she had a third party right to enforce the easement, Tallman asserted that the Conservation District and the Forest Society were failing to enforce the terms. In essence, she sought a ruling that the easement prevented her neighbors from building their home on land not encumbered by it, and that the easement prevented access to the residence site.

Although the Forest Society filed a motion to dismiss the case on the standing issue, the court denied the motion. Tom Masland, attorney for the Forest Society, says that it was unfortunate that the case went to trial: "There have been a number of cases around the country where neighbors have attempted to sue, but every case, with the exception of those in states where there is an expressed recognition of a third party right, has ultimately been dismissed."

The New Hampshire statute that authorizes conservation easements does not include an express statement that *only* the holders of a conservation easement have legal standing or a right to sue to enforce the easement. Despite the initial setback, the court ultimately found for the defendants on all counts and ruled explicitly that New Hampshire recognizes no third party right of enforcement.

Masland was pleased with the outcome, but says, "It took a trial to get there. We're hopeful that, with a growing body of law around the country,

neighbors will be deterred from suing in the future." Although the case cannot be used as a precedent since it was not appealed to the Supreme Court, Masland is optimistic that it will influence future rulings: "This court opinion is not binding, but it's quite powerful."

Similar to third party trespass, third party standing cases are unpredictable. As Masland explains, "People can sue all the time for anything. This case was a shot from the dark."

Sara Callaghan, easement steward for the Forest Society, adds, "We were only the executory interest holder so we weren't intimately involved with the regular monitoring of the property." Nevertheless, the case still cost the organization a considerable amount of dollars and time: upwards of \$100,000 and 125 staff hours. While the organization is fortunate to have an easement fund that exceeds \$1 million dollars, Callaghan recognizes that this is not the norm: "We had funds available to defend ourselves, but other land trusts may not have that capability."

Unfortunately, challenges to conservation easements are on the rise because many easement-protected properties are changing hands. "We're seeing more questionable activities on protected properties," Masland says. "The original landowners are no longer there and the land is now owned by people who may not have the same conservation ethic. There are more challenges by third parties who weren't there when the

Quick Take

Landowners adjacent to conserved land might trespass on the land or claim to have the right to enforce the easement on their neighbor's property. Land trusts should be ready by:

- Taking the issue seriously
- Having the proper monitoring documentation
- Relying on expert counsel

easement was granted, and who may not understand where the boundaries are or respect the conservation values."

Preparing for the Future

Because these cases are increasing, it is all the more important for land trusts to be prepared by writing well-drafted deeds, establishing effective documentation, retaining expert counsel, and maintaining a healthy endowment. Under current economic conditions, this last goal is easier said than done.

Every land trust may eventually face an expensive legal challenge. The proposed Conservation Defense Insurance Program is a safety net for when that happens. Although neither Colorado Open Lands nor the Forest Society relied on defense insurance, both cases would have potentially been covered by the plan. As Masland states, "The Tallman case was a poster child for conservation defense insurance. It was unexpected and expensive." 🌿

SHEILA MCGRORY-KLYZA IS A FREELANCE WRITER AND EDITOR IN BRISTOL, VT.

The Land Trust Alliance presents these case studies to offer general lessons learned and ideas on conservation defense. Land trusts should discuss their particular circumstances and options with competent professionals.