Enforcing Perpetual Conservation Easements Against Third-Party Violators

*Jessica E. Jay**

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* Founding partner of Conservation Law, P.C., a law firm devoted to ensuring the permanence of land conservation through sound transactions and the defense and enforcement of perpetual conservation easements. Ms. Jay represents and partners with easement holders and landowners to conserve working landscapes and environmentally significant properties using perpetual conservation easements. She also collaborates with the conservation community over the enforcement, defense, and permanence of perpetual conservation easements. Ms. Jay guides conservation professionals, easement holders, and landowners in educational workshops, and the next generation of land conservationists through her Land Conservation Law courses at Vermont Law School and the University of Denver's Sturm School of Law, for which she recently was invited to author a textbook. Ms. Jay's expertise and perspective, shaped by years of research, publication, teaching, and practice of land conservation law, informs courts, legislatures, regulators, and policymakers. Ms. Jay is a member of the Land Trust Alliance's Conservation Defense Network, and serves on the Land Trust Alliance Conservation Defense Advisory Council, which advises the Alliance on matters involving the enforcement, defense, and permanence of perpetual conservation easements. She publishes extensively on land conservation law topics, and her seminal research and publication of approaches to land trust risk management over a decade ago provided the model for the newly created Terrafirma Risk Retention Group LLC insurance service, led and designed by the Alliance to provide defense and enforcement resources for land trusts owning land and holding perpetual conservation easements. This Article would not have been possible without the case summaries, case studies, and fact sheets authored by Leslie Ratley-Beach, Conservation Defense Director, Land Trust Alliance, former Stewardship Director, Vermont Land Trust, and the willingness of the easement holders involved in the case studies to share their experiences and documents with her and the author.

I.
INTRODUCTION

Among the most daunting challenges the holder of a perpetual conservation easement faces is the enforcement of the easements it holds, for all time, and against all violators.[1] National

1. *See* Jessica E. Jay, *When Perpetual is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012); Jessica E. Jay, *Understanding*

organizations estimate that at least forty million acres of land in the United States are protected with perpetual conservation easements.[2] Each of these conservation easements is held by an entity, either a government agency or a tax-exempt, non-profit land trust, charged with the responsibility of enforcing easement violations against any and all violators.[3] Holders must contend with violations caused by landowners and third parties.[4] In the latter instance, someone who is not the owner of the easement-protected property enters the land by trespass without the knowledge or permission of the landowner or the easement holder, and violates the conservation easement.[5] A Land Trust Alliance (Alliance) survey, specifically designed to gather information on conservation easement violations, reveals that behind successor-generation landowners, *third parties are the most frequent class of easement violators*.[6] The findings of this survey track those of an earlier Alliance survey and are consistent with violation reporting in the most recent Alliance census.[7] Further, anecdotal reporting of conservation easement violations indicates that many violations are caused by third parties—possibly as much as forty percent.[8]

Violations caused by landowners whose lands are protected with conservation easements present fairly linear practical and

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When Perpetual is Not Forever: An Update to the Challenge and Response to Ann Taylor Schwing, 37 HARV. ENVTL. L. REV. 247, 248 (2013).

2. Land Trust Alliance, *Land Trust Alliance Census Survey,* SAVING LAND, Winter 2012 at 34 [hereinafter *Census Survey*]. *See also* The National Conservation Easement Database (NCED), http://nced.conservationregistry.org/ (stating that "[t]he NCED provides a comprehensive picture of the estimated forty million acres of privately-owned conservation easement lands.").

3. ADENA R. RISSMAN & VAN BUTSIC, LAND TRUST DEFENSE AND ENFORCEMENT OF CONSERVED AREAS , 1–2 (Dep't of Forest and Wildlife Ecology, Univ. of Wis.-Madison 2010).

4. *Id.*

5. *See Census Survey*, *supra* note 2, at 34.

6. Melissa Danskin, *Conservation Easement Violations: Results from a Study of Land Trusts*, EXCHANGE, Winter 2000 at 5 (out of twenty-one litigated land trust cases, the violator was a successor-generation in nineteen cases, and a third party in two cases).

7. *See Census Survey*, *supra* note 2, at 34; Adena R. Rissman, *Conservation Defense and Enforcement in the Land Trust Community*, SAVING LAND, Winter 2011 at 24; RISSMAN & VAN BUTSIC, *supra* note 3, at 4.

8. LESLIE RATLEY-BEACH, LAND TRUST ALLIANCE TRESPASS AND THIRD-PARTY VIOLATIONS FACT SHEET (2011).

legal avenues for resolution. The easement holder has an established means of reaching the landowner through the conservation easement document. When a third party causes a violation, the legal and practical avenues are less clear. Part II of this Article explores the legal and practical avenues available for pursuing third-party violators in the context of holders' responsibilities regarding the applicable law of perpetual conservation easements. Part III identifies the tools available for conservation easement drafting, stewardship, management, and enforcement of third-party violations. Part IV distills lessons learned from litigated and non-litigated cases of third-party violations. The Article concludes by offering practical guidance to easement holders anticipating or addressing third-party violations.

II.
APPLICABLE LAW, DRAFTING, STEWARDSHIP, MANAGEMENT, AND ENFORCEMENT OF THIRD-PARTY VIOLATIONS

Conservation easement holders must contemplate both legal and practical considerations in order to identify third-party violators and hold them accountable for damage to the land, the conservation easement, and the conservation values protected by the easement. These considerations include how easement holders identify and gain access to non-parties, and how easement holders approach and handle violations by people who are not the landowner. To determine how to legally hold third-party violators accountable, an easement holder must identify the legal interest or right represented by the conservation easement and held by the holder, as defined by state law. Once the holder identifies the legal interest protected by the conservation easement, the holder can explore and evaluate its options available by law and articulated by the conservation easement at issue.

A. *Determining the Legal Interest of the Conservation Easement*

An easement holder must first understand the nature of the interest or right that it holds in the conservation easement before determining legally how to approach a third-party violator and violation of a conservation easement. Conservation

easement enabling acts provide definitions of the right or interest represented by a conservation easement, and by extension, illuminate legal avenues to pursue the violator. For example, if a state's enabling act defines conservation easements as real property interests, an easement holder within that state may have standing to sue a third-party violator because the holder owns a vested property right.[9]

Almost all state enabling acts define conservation easements as enforceable real property interests. This definition is consistent with the definitions provided by the legal regimes that guide perpetual conservation easements: the Internal Revenue

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9. ROB H. LEVIN, *A Guided Tour of the Conservation Easement Enabling Statutes*, LAND TRUST ALLIANCE 42 (2010), http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf. One possible exception is Illinois, with a conservation easement enabling act that uses the term "conservation rights" as opposed to "conservation easement." *See* ILL. COMP. STAT. ANN. 120/1 (West 2012).

> A conservation right is a right, whether stated in the form of a restriction, easement, covenant or condition, or, without limitation, in any other form in any deed, will, plat, or without limitation any other instrument executed by or on behalf of the owner of land or in any condemnation order of taking…

Id. However, Illinois' common law has defined conservation easements to be real property interests. *See, e.g.*, Town of Libertyville v. Connors, 541 N.E.2d 250 (Ill. App. Ct. 1989). Also, although a federal district court settling an estate question in New Jersey originally found that conservation easements were servitudes in the nature of contract rights, and not real property interests, that court's decision was reversed on appeal. *See* Estate of Gibbs v. United States, WL 882393 (D. N.J. Aug. 13, 1997) (the district court looked to the New Jersey law of equitable servitudes and determined that New Jersey follows the minority rule that treats equitable servitudes as creating contract rights, not property rights), *rev'd* 161 F.3d 242, 250 (3d Cir. 1998) (holding that "[t]he district court erred in holding that the grant of a development easement to the State of New Jersey by taxpayer did not constitute the disposition of any interest in property under 26 U.S.C. § 2032A(c)(1)(A). Accordingly, we will reverse the October 30, 1997 order of the district court and remand with instructions to grant summary judgment in favor of the United States."). With regard to whether the easement at issue represented a contract right or an interest in real property, the Third Circuit noted that the New Jersey Agriculture Retention Act defines an easement as an interest in land: "We believe that the district court's conclusion that a development easement is an equitable servitude and not a true easement under New Jersey law is questionable." *Id.* at 245. *See also* LESLIE RATLEY-BEACH, MANAGING CONSERVATION EASEMENTS IN PERPETUITY, LAND TRUST ALLIANCE 14 (Sylvia Bates ed., Land Trust Alliance, 1st ed., 2009) [hereinafter MANAGING CONSERVATION EASEMENTS IN PERPETUITY].

Code (and associated Treasury Regulations),[10] the Restatement of Law,[11] and the Uniform Conservation Easement Act (UCEA).[12] The Internal Revenue Code section, which creates a federal tax deduction for the gift of a conservation easement, requires that qualified contributions consist of qualified real property interests. Qualified real property interests are defined as interests in real property, and include restrictions on the use that may be made of the real property granted in perpetuity.[13] The National Law Conference created the UCEA to promote uniformity of state statutory law. The UCEA identifies conservation easements as non-possessory property interests. While the UCEA does not explicitly give standing to easement holders to sue third parties, the UCEA does recognize enforcement rights in the landowner, easement holder, third-party enforcers, and persons authorized by other laws.[14] The Restatement of Property also recognizes a right of enforcement for holders where there is interference with a conservation easement interest.[15] While the Restatement does not explicitly

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10. 26 U.S.C. § 170(h) (2010); 26 C.F.R. § 1.170A-14(a), (b) (2009).

11. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2001).

12. Nat'l Conference of Comm'ns on Unif. Laws, UNIF. CONSERVATION EASEMENT ACT § 3 (amended 2007), *available at* http://www.cals.ncsu.edu/wq/lpn/PDFDocuments/uniform.pdf (last visited Apr. 11, 2012).

13. 26 U.S.C. § 170(h) (2010) "(1) In general.—For purposes of subsection (f)(3)(B)(iii), the term 'qualified conservation contribution' means a contribution—(A) of a *qualified real property interest*." (emphasis added).

14. *See* UNIF. CONSERVATION EASEMENT ACT, § 1.

> As used in this Act, unless the context otherwise requires: (1) "Conservation easement" means *a nonpossessory interest of a holder in real property* imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

Id.

> (a) An action affecting a conservation easement may be brought by: (1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person authorized by other law. (b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

Id. § 3.

15. *See* UNIF. CONSERVATION EASEMENT ACT § 1, 3.

give standing to easement holders to sue third parties, neither does the Restatement expressly prohibit standing.[16] Rather, it encourages courts to vigorously defend conservation easements using the full panoply of legal and equitable remedies and damages designed to deter bad acts and actors.[17]

Although most state conservation easement enabling acts define conservation easements as real property interests, some do not explicitly define the conservation easement interest or right, are silent, or imply that conservation easements create contractual or other rights. Illinois' enabling act, for example, merely refers to a conservation *right* contained within a restriction, easement, covenant, condition, deed, will, plat, or any other instrument executed by the owner of the land, without defining that right as a property interest. Ambiguous enabling acts, or those that endow conservation easements with contractual rights, may still provide standing to enforce the conservation easement in certain circumstances. If a state's enabling act is ambiguous about whether a conservation easement is a property interest or a contract right, a holder can argue that the legislative intent of the enabling act allows standing to enforce based on the statute's enforcement language or other state laws. Easement holders may have standing under a state's real property, criminal, or tort laws, despite the ambiguous or contract-based language of the enabling act. Colorado, for example, defines conservation easements as property interests with limited rights of enforcement,[18] but also creates enforcement rights against third parties for any trespass against the real property of someone with a proprietary interest,

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16. *See* RESTATEMENT (THIRD) OF PROPERTY.

17. *See id.* § 8.3.

> A conservation servitude is a servitude created for conservation or preservation purposes. Conservation purposes include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply. Preservation purposes include preserving the historical, architectural, archaeological, or cultural aspects of real property.

Id. § 1.6 "A conservation servitude held by a governmental body or a conservation organization is enforceable by coercive remedies and other relief designed to give full effect to the purpose of the servitude." *Id.* at § 8.5.

18. *See infra* Appendix, COLO. REV. STAT. § 38-30.5-103.

in another statute.[19] An easement holder therefore could argue that it has a proprietary interest in a conservation easement, agricultural land,[20] or the "premises," which includes stream banks and streambeds, in order to establish standing to enforce against a third-party violator.[21]

Further exploration of the relevant state's enabling act is instrumental in clarifying a holder's right to enforce the conservation easement interest it holds against third-party violators. Although most enabling legislation gives an easement holder a right of enforcement, it is not always clear if that right applies to enforcement against third parties.[22] In Colorado, for example, the enabling statute states that both a conservation easement donor and the easement's holder may initiate an enforcement action for injunctive relief. This statute may be read to mean enforcement against one another or against a third party.[23]

By contrast, Vermont's enabling act recognizes conservation "preservation rights and interests"[24] in real property running with the land, but makes these rights enforceable only against the landowner.[25] However, because the statute also allows an easement holder to exercise all of the rights of a fee owner, including the right to enter and the right to pursue injunction or liquidated damages,[26] easement holders can enforce the same rights as the landowner against third parties.[27] Additionally, Vermont recently amended its criminal forestry trespass statute to include severe fines and penalties for anyone who knowingly cuts, destroys, or removes forest products without the consent of the owner.[28] A violator or offender is now liable to the owner for the greater of treble damages or up to fifteen hundred dollars based on the diameter of and for each tree, log, or sapling cut,

19. *See infra* Appendix, COLO. REV. STAT. § 18-4-501.
20. *See infra* Appendix, COLO. REV. STAT. § 18-4-503.
21. *See infra* Appendix, COLO. REV. STAT. § 18-4-504.
22. The one possible exception is Illinois; *see* LEVIN, *supra* note 9, at 42.
23. *See infra* Appendix, at COLO. REV. STAT. § 38-30.5-108.
24. *See infra* Appendix, at VT. STAT. ANN. tit. 10 § 821(a) (2012).
25. *See infra* Appendix, at VT. STAT. ANN. tit. 10 §§ 822–823.
26. *See infra* Appendix, at VT. STAT. ANN. tit. 10 § 6303.
27. *See infra* Appendix, at VT. STAT. ANN. tit. 13 §§ 3602, 3606.
28. *See infra* Appendix, at VT. STAT. ANN. tit. 13 §§ 3602, 3606.

destroyed, or removed.[29] Penalties include jail time, damages, or both.[30] These penalties for acts of non-owners indicate a bolstering of the protections afforded to private landowners, and possibly, by extension, to conservation easement holders in Vermont.

Connecticut also expanded the enforcement powers of easement holders and other parties by amending legislation relating to conservation easements (known there as conservation restrictions).[31] Connecticut's enabling act defines conservation easements as property interests,[32] and now creates express rights of enforcement in the state's attorney general,[33] landowners, and easement holders, for violations of encroachment. Encroachment is defined as trespass against real property, the remedy for which is restoration, with damage awards of up to five times the cost of restoration if the encroachment occurs on open space land. Open space land is defined to include both government and land trust fee-owned conservation lands, as well as lands protected with conservation easements.[34]

Other states narrow rights of enforcement through their enabling acts. In Pennsylvania, for example, enforcement of conservation easements is not allowed against pre-existing third-party coal operations. Instead, coal rights owners are granted automatic standing to enforce conservation easements themselves, in order to protect their mineral ownership.[35] Similarly, in New Mexico, easement holders are only allowed to pursue actions occurring on a conservation easement protected property itself, and not stemming from actions beyond those boundaries, or against any pre-existing right holders.[36]

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29. *Id.*

30. *Id.*

31. *See infra* Appendix, CONN. GEN. STAT. § 47-42(a), (c).

32. *Id.*

33. *Id.*

34. *See infra* Appendix, CONN. GEN. STAT. § 52-560(a).

35. *See infra* Appendix, 32 PA. STAT. ANN. §§ 5054(e), 5059. *See also* LEVIN, *supra* note 9, at 42 (stating that "[t]he most far-reaching language by far exists in Pennsylvania, with even a special standing provision (presumably to challenge the easement's potential impact on the abutting property) for abutting mineral interest owners").

36. *See infra* Appendix, N.M. STAT. ANN. § 47-12-3 E, F (1978).

Once an easement holder determines at the outset of any third-party violation whether, the conservation easement at issue is a property or contract right according to state law, and whether that law establishes rights for enforcement against third parties, the holder can then look to the conservation easement's own enforcement language for guidance regarding third-party violations. If the easement contains no specific language or guidance for third-party violations, the holder can take their knowledge of applicable state law, including the conservation easement enabling act, and draft easements going forward in anticipation of third-party violations.

B. *Conservation Easement Enforcement Language: Evaluation and Drafting Options*

An easement holder will evaluate conservation easement language in the context of a third-party violation against the backdrop of applicable state law in order to determine its specific enforcement rights against a landowner or third-party violator. In particular, holders examining or drafting easements in anticipation of enforcing third-party violations against landowners, third parties, or both should be aware of the variety of options in enforcement clauses imposing varying degrees of rights, responsibilities, and liabilities on the landowner or third party. Some conservation easements, for example, hold the landowner entirely responsible for all violations occurring on the conserved property, regardless of who caused them or how they were caused. Others allow the landowner to be exculpated for acts of nature, God, and other acts beyond their control, including, potentially, acts of third parties. Yet other easements hold the landowner responsible for acts of third parties, provided the acts or parties were within the landowner's control, and still others may hold the landowner fully responsible, while proposing a process of collaboration, cooperation, and partnership between the holder and landowner to pursue third-party actors. What follows hereafter is a brief examination of some of these easement enforcement options, which vary based on the degree of landowner responsibility.

1. Least Landowner Responsibility

The following clauses hold the landowner the least responsible for acts occurring on conserved property that are caused by third parties, nature, God, or otherwise not by the landowner. If a conservation easement holder believes its independent legal right to pursue third parties is clearly defined, it might use a clause such as the following to absolve landowners of the responsibility of enforcing third-party acts while independently pursuing the violator. If, however, a holder does not have a clear legal basis to independently enforce an easement against a third-party violator, or does not want to exculpate the landowner for acts of third parties, clauses such as the following should be avoided by drafters. Holders and landowners seeking to reduce the landowner's responsibility and increase the holder's responsibility in enforcing against third parties, however, would use clauses such as the following:

> **Responsibilities of Grantor and Grantee Not Affected.** Other than as specified herein, this Deed is not intended to impose any legal or other responsibility on Grantee, or in any way to affect any existing obligations of Grantor as owner of the Property. Additionally, unless otherwise specified below, nothing in this Deed shall *require Grantor to take any action to restore the condition of the Property after any Act of God or other event over which Grantor had no control.* Grantor shall continue to be solely responsible and Grantee shall have no obligation for the upkeep and maintenance of the Property and Grantor understands that nothing in this Deed relieves Grantor of any obligation or restriction on the use of the Property imposed by law.
>
> **Acts Beyond Grantor's Control**. Nothing contained in this Easement Deed shall be construed to *entitle the Trust to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control* including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. *Grantor is not responsible for acts of third parties who are out of Grantor's control, except that Grantor is responsible for guests, invitees, and other third parties authorized by Grantor to access the Property*;

> **Acts Beyond Grantor's Control**. Nothing contained in this Easement shall be construed to *entitle Grantee to bring action against Grantor for any injury or damage to, or change in the Property resulting from natural causes, acts of God, or natural acts beyond Grantor's control*, including without limitation, fire, flood, storm, and earthquakes, or from injury or damage to, or change in the Property resulting from, any prudent and reasonable action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury or damage to the Property resulting from such causes.[37]

In instances when a holder seeks to independently establish its rights against third parties, a conservation easement might explicitly state the "holder's rights" include the property interest that a conservation easement represents at law. In this manner, the holder establishes that it holds certain inviolate rights through the property interest represented by the conservation easement. Such rights might include requirements of notice, participation, and enforcement. When combined with third-party acts beyond-the-control-of-landowner language, this clause bolsters a holder's independent right to pursue third parties, without relying on or involving the landowner.

> **Rights of Grantee**. *The right to be recognized as an owner in the interest of the Property represented by this Easement,* and therefore to receive notification from and join Grantor as a party to any leases, surface use agreements, damage agreements or rights-of-way that may be proposed, granted or required hereafter as a result of condemnation or eminent domain proceedings, or for the purpose of exploring for or extracting oil, natural gas or other mineral resources on or below the Property in a manner that has the potential to impact the surface of the Property or its Conservation Values. . . .[38]
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> **Acts Beyond Grantor's Control**. Nothing contained in this Easement shall be construed to entitle the Trust to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control or

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37. Land Trust Alliance, *Enforcing Conservation Restrictions Against Third Parties* 24 (2010), http://massland.org/files/Third_party_trespass_enforcement.pdf (last visited Feb. 22, 2012) [hereinafter *Enforcing Conservation Easements*].

38. *Id.* at 7.

> from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. *Grantor is not responsible for acts of third parties not authorized to access the Property, but shall be responsible for all acts of third parties, including guests or invitees, authorized by Grantor to access the Property. The Trust retains the right to enforce against third parties for violations of the Easement or damage to the Property pursuant to Rights of Grantee herein.*[39]

2. Moderate Landowner Responsibility

On the other hand, a conservation easement holder might be reluctant to exculpate a landowner completely for acts of third parties that violate its conservation easement. A holder might want the landowner to take the lead on any enforcement action while reserving its own right to participate if it so chooses. The following clauses represent easement language that allots responsibility for third-party violations to both the holder and the landowner, with emphasis on the landowner having some responsibility over none:

> **Acts Beyond Owner's Control**.[40] Notwithstanding the Owner's obligations under this Conservation Easement and the Conservancy's rights to require restoration of the Protected Property pursuant to Section 8.3, the *Owner shall have the following rights and obligations for acts or occurrences at the Protected Property beyond the direct or indirect control of the Owner:*
>
> The Conservancy may not bring an action against the Owner for modifications to the Protected Property or damage to the Protected Property or its Conservation Values resulting from natural causes beyond the Owner's control, including, but not limited to, natural disasters such as unintentional fires, floods, storms, natural earth movement or other acts of God that impair the Conservation Values.
>
> The Owner shall be responsible for modifications or damage to the Protected Property that impair or damage the Conservation Values at the Protected Property *and result from*

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39. *Id.* (emphasis added).

40. Legacy Land Conservancy, *Model Conservation Easement*, 16 www.legacylandconservancy.org/assets/ModelConservationEasement.doc (last updated Mar. 2009) (emphasis added).

> *the acts of third parties whose use of or presence on the Protected Property is authorized by the Owner. Owner shall perform such restoration pursuant to and in accordance with a restoration plan prepared* by a competent professional selected by the Owner subject to the reasonable approval of the Conservancy. The contents of the restoration plan shall be subject to the prior written approval of the Conservancy, which shall not be unreasonably delayed or withheld.
>
> *In the event of an unauthorized third-party violation of the Conservation Values on the property, the Conservancy shall not seek restoration or exercise remedies available to it if and so long as the Owner diligently pursues all available legal remedies against the violator. In the event illegal actions taken by unauthorized third parties impair the Conservation Values protected by this Conservation Easement, the Conservancy reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to compel restoration.*[41]

An easement holder might take the additional steps of requiring the landowner to agree to join any legal action the holder pursues, to assign its rights to the holder, or to appoint the holder as its attorney-in-fact. This will allow the holder to proceed against a violator with the landowner's cooperation. An easement holder utilizing this language would not completely exculpate the landowner. Instead, through the process of collaboration, the easement holder retains its right to pursue the landowner, and thereby potentially splits the responsibility of protecting the easement between landowner and easement holder.

> **Optional procedural and collaborative language.**[42] In the event the terms of the Easement are violated by acts of third parties beyond the control of Grantor, including trespassers, or that Grantor could not reasonably have prevented, Grantor agrees, at the Trust's option, to (a) join in any suit against the third party or parties; (b) assign to the Trust a right of action against the third party or parties; (c) appoint the Trust as attorney-in-fact; and (d) take any action necessary to facilitate the Trust's pursuit of the third party for the purposes of enforcing, through judicial action or other dispute resolution

41. *Id.* (emphasis added).

42. RATLEY-BEACH, *supra* note 8, at 5 (emphasis added).

> means, the terms of this Easement against the third party or parties; provided, however, that all costs and attorney fees incurred by the Trust in any such enforcement action to address any damage or injury caused by any third party, and which are not caused by or aggravated by any act or omission of Grantor, shall be borne by the Trust, and Grantor hereby relinquishes any right or claim to any and all reimbursement of costs and fees, including but not limited to attorney fees, and any and all monetary damages or remedies provided, assigned, or directed to the Trust as a result of its pursuit of the third party and its pursuit of the restoration of the Conservation Values of the Property, or both. Grantor agrees to make its best efforts and take all actions practicable to restore the Conservation Values of the Property to their condition prior to the violation, regardless of the outcome of any legal or other action against the third-party violator, and the Trust [may elect] agrees to assist therewith. Nothing in this subsection shall prohibit the Trust from pursuing Grantor for violation of the terms of this Easement.

Another approach requires the landowner to cede certain rights to the easement holder in pursuit of remedying third-party violations. By identifying and assigning these rights and damages—including replacement property rights— the easement holder is able to proceed directly against third parties.

> **Right to Recover Damages**.[43] In the event of a violation of the terms of this Easement, in addition to the other remedies provided for in this paragraph 7, and any other remedies available in law or equity, the Grantee shall also be entitled to recover all damages necessary to place the Grantee in the same position that it would have been in but for the violation. The parties agree that in determining such damages the following factors, among others, may be considered (i) the costs of restoration of the Property as provided in subparagraph 7.2 above, and (ii) the full market cost of purchasing a conservation easement containing terms comparable to the terms of this Easement on land in the vicinity of the Property, of a size, and with conservation values, roughly comparable to those of the Property.
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> **Right to Proceed Against Third Parties**. The Grantee has the right to proceed against any third party or parties whose

43. *Id.* at 8 (emphasis added).

> actions threaten or damage the Conservation Values, including the right to pursue all remedies and damages provided in this paragraph 7. The Grantor shall cooperate with the Grantee in such proceeding.
>
> **Right to Require Assignment of Trespass Claims**. If requested by the Grantee, the Grantor shall assign to the Grantee any cause of action for trespass resulting in damage to the Conservation Values that may be available to such Grantor. The Grantor may condition such assignment to provide for the (i) diligent prosecution of any such action by the Grantee and (ii) division according to the proportionate values determined pursuant to subparagraph 11.1 below, between the Grantee and such Grantor of any recovery, over and above the Grantee's attorney's fees and expenses incurred, and costs of restoration of the Property, resulting from such action.[44]

Further, the easement holder might reserve the right to pursue third parties independent of the landowner. The easement holder might also reserve the right to relinquish rights against a landowner, if the holder is reasonably satisfied that the landowner was not responsible in any way for the third-party violation. The holder might also consider including this clause if the landowner diligently pursues all legal remedies against the third party itself:

> **Rights of Grantee**. To accomplish the purpose and to assure compliance with this Conservation Easement, Grantee shall have the following rights:
>
> The right to prevent Grantor or third persons (whether or not claiming by, through, or under Grantor) from conducting any activity on or use of the Property that is inconsistent with the protection of the Conservation Values or this Conservation Easement, and to require of Grantor or third persons the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use.
>
> **Grantee's Remedies.** *Grantee will waive its right to reimbursement under this Section as to Grantor (but not other persons who may be responsible for the violation) if Grantee is reasonably satisfied that the violation was not the fault of Grantor and could not have been anticipated or prevented by Grantor by reasonable means.*

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44. *Id.* (emphasis added and omitted).

> **Acts Beyond Grantor's Control**. Notwithstanding Grantor's obligations under this Conservation Easement and Grantee's rights . . . , *Grantor shall have the following rights and obligations for acts or occurrences at the Property beyond the direct or indirect control of Grantor:*
>
> *Grantee may not bring an action against Grantor for modifications to the Property or damage to the Property or its Conservation Values resulting from natural causes beyond Grantor's control*, including, but not limited to, natural disasters such as unintentional fires, floods, storms, natural earth movement or other acts of God that impair the Conservation Values, or for any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. *Notwithstanding the foregoing, nothing contained herein shall limit or preclude Grantor's or Grantee's rights to pursue any third party for damages to the Property from vandalism, trespass, or any other violation of the terms of this Conservation Easement.*
>
> *Grantor shall be responsible for modifications or damage to the Property that impair or damage the Conservation Values of the Property and result from the acts of third parties whose use of or presence on the Property is authorized by Grantor.* Grantor shall perform such restoration pursuant to and in accordance with a restoration plan prepared by a competent professional selected by Grantor subject to the reasonable approval of Grantee. The contents of the restoration plan shall be subject to the prior written approval of Grantee, which shall not be unreasonably delayed or withheld.
>
> *In the event of an unauthorized third-party violation of the Conservation Values of the Property, Grantee shall not seek restoration or exercise remedies available to it if and so long as Grantor diligently pursues all available legal remedies against the violator. In the event illegal actions taken by unauthorized third parties impair the Conservation Values protected by this Conservation Easement, Grantee reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to compel restoration.*[45]

Finally, a conservation easement may have language that does not hold landowners responsible for third parties acting

45. *Id.* at 6–9 (selected provisions, emphasis added and omitted).

beyond the landowner's control. This would not include situations in which the third parties were acting on the landowner's behalf, at the landowner's direction, or with the landowner's permission. In these cases the landowner *would* be responsible for the third-party acts. If the landowner further fails to cooperate with the holder, to report third-party acts, or to manage the circumstances within their control, the holder would have a right to enforce against the landowner.

> **Enforcement of the Covenants and Restrictions**. Grantors are responsible for the acts and omissions of persons acting on their behalf, at their direction, or with their permission, and Grantee shall have the right to enforce against Grantors for events or circumstances of non-compliance with this Grant resulting from such acts or omissions. *However, as to the acts or omissions of third parties other than the aforesaid* persons, *Grantee shall not have a right to enforce against Grantors unless Grantors are complicit in said acts or omissions, fail to cooperate with Grantee in all respects to halt or abate the event or circumstance of non-compliance resulting from such acts or omissions, or fail to report such acts or omissions to Grantee promptly upon learning of them*. Nor shall Grantee institute any enforcement proceeding against Grantors for any change to the Protected Property caused by fire, flood, storm, earthquake or other natural disaster. Grantee shall have the right, but not the obligation, *to pursue all legal and equitable remedies provided under this section against any third party responsible* for an event or circumstance of non-compliance with this Grant and Grantors shall, at Grantee's option, assign their right of action against such third party to Grantee, join Grantee in any suit or action against such third party, or appoint Grantee their attorney in fact for the purpose of pursuing an enforcement suit or action against such third party.[46]

3. Full Landowner Responsibility

Some conservation easement language holds landowners entirely responsible for any violation occurring on the protected property, regardless of who caused it or how it was caused, excluding acts of nature or God. In the case of such easement

46. *Id.* at 10 (selected provisions, emphasis added and omitted).

language, the holder would not pursue a third party independent of the landowner and would look primarily and directly to the landowner to make right any violation, regardless of cause. This language does not preclude the holder from electing to intercede when it deems appropriate.

> **Enforcement**. Holder has the right to enforce this Conservation Easement by proceedings at law and in equity, including, without limitation, the right to require the restoration of the Protected Property to a condition in compliance herewith. In the event that Holder becomes aware of a violation or threatened violation of the terms of this Easement, *Holder shall give written notice to Grantor and request that Grantor take corrective action sufficient to cure the violation or prevent the threatened violation.*
>
> If the Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Property, Grantee may pursue its remedies under this section without prior notice to Grantor or without waiting for the period provided for cure to expire. *Grantor will not be responsible for injury to or change in the Protected Property resulting from natural causes or environmental catastrophe beyond Grantor's control, such as fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes.*
>
> If a court (or other decision-maker chosen by mutual consent of the parties) determines that this Conservation Easement has been breached, *Grantor will reimburse Holder for any reasonable costs of enforcement,* including court costs, reasonable attorneys' fees and any other payments ordered by such court or decision-maker. [47]

Similarly, the conservation easement does not hold the landowner responsible for acts beyond his or her control. The easement also defines "acts beyond landowner's control" to exclude acts of third parties generally, such as prohibited dumping. Landowners are therefore responsible for certain acts of third parties:

> **Acts Beyond Grantor's Control.** Grantor shall not be

47. *Id.* at 6.

> responsible for any injury or change in the Property resulting from natural events beyond the control of the Grantor. Such natural events include fire, flood, storm, earthquake, tornado, landslide or Acts of God, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. *This paragraph shall not be construed to relieve the Grantor of the obligation to clean-up garbage or materials dumped on the Property by third-parties or to otherwise maintain the Property in a condition consistent with the purposes of this Easement.*[48]

A holder seeking to outline with specificity its approach to third party and other easement violations might accompany the above easement language with correspondence explaining the legalese in plain English. Such correspondence is designed to give the landowner some guidance and comfort as to the approach the holder will take regarding the violation. This example of correspondence describes in plain language the shared responsibility between the holder and landowner as expressed by the conservation easement and envisioned by the easement holder:

> For a third party violation of the conservation easement of which the landowner has no knowledge or control, [the Trust's] expectation is that the landowner will cooperate in good faith with [the Trust] in order to curtail the violation and return the property to its pre-violation condition. Such steps include, by way of example, but without limitation, a willingness to cooperate fully as a named plaintiff in suing to stop a third party violation and seeking damages from the third party violator. For those third party violations where the landowner had prior knowledge, or has a relationship or contract with the violator, [the Trust] expects the landowner to take full responsibility for stopping and correcting the third party violation. As long as [the Trust] considers that the landowner had no knowledge of and no control over the third party violation and is cooperative in the effort to halt it, [the Trust] will not proceed against the landowner. This limitation applies only to third party violations of this limited type, not to other circumstances that may be covered in Section V.

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48. *See Enforcing Conservation Easements*, *supra* note 37, at 6 (emphasis added).

> You asked about the potential for [the Trust] asking for payment of costs associated with voluntary resolution of violations. Again, given the philosophy I outlined above, you can expect that [the Trust] will be reasonable. [The Trust] has resolved almost all violations to date without asking for payment of costs. [The Trust] has asked for payment of costs when correction of the violation needed an easement amendment, for example, or to rearrange reserved rights, or when the violation has been serious and taken significant staff time to correct.
>
> You also asked about cost-sharing with [the Trust] in the event of a third party violation. [The Trust] approaches these situations on a case by case basis. When it is appropriate, we offer an array of free signs to landowners to post who have problems with ATVs or other types of trespass. The landowner and [the Trust] joined together in a few rare cases to sue a third-party trespasser because all voluntary remediation efforts failed, and agreed to share costs. More often, landowners are called upon to spend their own funds to correct third party damage without any contribution from [the Trust]. Since you own the land and agreed to the conservation easement that seems equitable. Examples of items which [the Trust] might look to the landowner to cover are installation of water bars that a logger failed to build, removal of trash, erecting gates or other obstructions to motor vehicles, hiring an attorney to force the removal of encroaching structures and recording fees to clarify title.[49]

A holder can evaluate the legal options to defend a conservation easement once it evaluates the conservation easement language and requirements to determine attendant landowner and holder responsibilities vis-à-vis the conservation easement and understands them in the context of the applicable state law for the interest or right a holder possesses.[50] Considerations for legal options include the holder's standing to reach the third party, together with or independent of the landowner, and the landowner's obligation to correct the violation, regardless of cause.[51]

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49. Letter from Richard F. Peterson, Jr., Project Counsel, Vermont Land Trust (on file with author).

50. *Id.*

51. *See generally Enforcing Conservation Easements*, *supra* note 37.

C. *Legal Options: Evaluation for Enforcement of Third-Party Violations*

A holder analyzing its legal options against a landowner and a third-party violator needs to examine whether and how to proceed against the violator, the landowner, or both, given the applicable law and language of the conservation easement. After examining these elements, a holder should consider the likelihood of success in pursuing the violator, the landowner, or both and the potential impacts of various legal options on its relationship with the landowner – to whom the holder continues to be tied through the conservation easement that binds them together in partnership over the land. In any event, holders will want the panoply of options available to them when pursuing the landowner, the third party, or both for violations.

If the landowner is also a violator of the conservation easement or contributed in any way to the easement's violation, the holder may consider legal action directly against the landowner. This presents a linear cause of action by the aggrieved easement holder against the landowner – the person principally responsible for adhering to the terms of the conservation easement.[52] Further, the language of the conservation easement may hold the landowner solely responsible for a third-party violation and require the easement holder to pursue the landowner as directly responsible for all violations occurring on the conservation easement-protected property, regardless of who or what might be the cause. While such an approach presents the most straightforward option by eliminating the third party from the holder's consideration, it might also inexorably strain the landowner and holder relationship to the point of jeopardizing any future cooperation regarding the conservation easement. A holder seeking remedies exclusively from the landowner responsible for third-party acts and violations relies on numerous causes of action, depending on the state's common or statutory law, including: violation of enabling statute, trespass, nuisance, negligence, and breach of contract.[53] Breach of contract would be available because the

52. *Id.* at 1.

53. Outline prepared by Jessica Jay, Leslie Ratley-Beach, and Lena Septimo (on file with author).

easement's holder and the landowner are contractually bound to the terms of the conservation easement conveyed between them.

Conversely, a holder may be interested in pursuing legal remedies directly against only the third party. This may occur particularly when the landowner is without fault in causing the violation and the landowner wants to avoid participating in the easement's enforcement. The holder may not want to involve or sue the landowner in order to protect that relationship going forward.[54] However, if the landowner wants to be a party, even though a holder intended on pursuing a third-party violator independently, the holder likely will not be able to prevent the landowner from joining the action.

In some cases, the third party may object to a holder's exclusive involvement on grounds of failure to include the landowner as an indispensable party, or the holder's lack of standing to sue the third party directly. In these cases, the holder might consider favorably the prospect of landowner involvement in an action or an assignment by the landowner of its rights to the holder. If the landowner was to assign its legal rights to the holder so the holder could pursue the third-party violator on its own, it could prevent the likely argument by a third-party violator that the landowner is a necessary party to be joined in the action. Additionally, courts are likely to look more favorably on a claim when both aggrieved parties, the holder and the landowner, are arguing against the third-party violator.[55]

Actions pursued by a holder acting alone against a third party might still succeed if the holder overcomes objections to its exclusive participation in the action. In this case, legal claims by the holder against the third-party violator could include violation of the conservation easement enabling statute, trespass, nuisance, negligence, or criminal actions. Contract claims based on the easement's violation would not be available to the holder because there is not a contractual relationship between the easement holder and the third-party violator.

Keep in mind, however, that a holder may not want or have the capacity to independently and directly enforce the conservation easement against a third-party violator. The holder

54. RATLEY-BEACH, *supra* note 8, at 14.

55. *See id.*

may not have the capacity or resources to track down the violator and hold him or her accountable for acts that violate the conservation easement. The holder must then determine whether other parties or entities – including the landowner or the state's attorney general – might better effectuate the intent of the conservation easement and its grantor through their own independent enforcement.[56] Holders should consider the capacity and resolve of any other potential enforcers and whether they have the same commitment or mission to uphold conservation easements as the holder. Depending on who is enforcing the easement and the state common or statutory law surrounding conservation easements, the landowner or attorney general may have possible causes of action against the third-party violator ranging across statutory, property, tort, contract, and criminal areas of law.

Another option to consider would be for the holder to collaborate with the landowner in pursuit of the third-party violator. The landowner and easement holder jointly have more legal options available to them than when working alone. Such participation by the landowner in enforcement also anticipates the likely argument by a third-party violator that the landowner is a necessary party to be joined in the action anyway. The ability of a holder and landowner to jointly pursue a cause of action against a third-party violator would depend on the state's common and statutory law. Such an action might include claims of enabling statute or other statutory violations, claims of torts such as trespass, nuisance, or negligence, claims of breach of contract (if the landowner had a contractual relationship with the third party), or, if working with the local or state enforcement agency, claims of violation of criminal laws.

Any partnership between the landowner and holder against a third party should not undermine the rights of the holder, and should preserve claims against both the landowner and third party. The landowner's participation should not under any circumstance exculpate the landowner from her own acts, whether intentional or accidental, including in any way

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56. *See generally* Jessica E. Jay, *Third-Party Enforcement of Conservation Easements,* 29 VT. L. REV. 757 (2005) (laying out third-party enforcement options by third parties).

facilitating or enabling the acts of third parties in violation of the easement. The landowner, therefore, should either be required to participate by the language of the easement or should independently initiate a partnership with the holder.

In addition to holding the landowner or third-party violator legally responsible and accountable for bad acts under the conservation easement, a holder would seek remedies for and restoration of the bad acts. Potential remedies a holder might seek from a landowner or third party violating a conservation easement include recovery under contract and tort theories for injunctive relief, specific performance, remediation, compensatory damages, punitive damages, liquidated damages, attorney fees and costs, and, if working with local or state law enforcement, possible misdemeanor or felony criminal penalties.

Together with evaluating and determining the most effective legal avenues to pursue landowners, third-party violators, or both, a holder can also stand on the shoulders of easement holders' experiences and lessons learned in enforcing the third-party violations described in the following cases and case studies.

III.
LEGAL CASES AND CASE STUDIES OF THIRD-PARTY VIOLATIONS

The following legal cases and case studies reveal strategies for resolving a diversity of third-party violations on land conserved with conservation easements. These litigated or resolved third-party violation cases include two instances in California: one involving a wildfire damaging conserved lands and one involving a proposed road across conserved land. This section also discusses three occurrences in Vermont, involving a two-acre adverse possession claim based on a tenth of an acre encroachment on conserved land; third-party timber trespass for sun and view on conserved land; and backcountry skiers cutting an illegal ski trail measuring twenty to sixty feet wide and more than two thousand feet long on Vermont's twelfth-highest peak. Other conservation easement cases of note involve construction of a trail serving a residential development in Colorado; the building of a river ford on conserved land in North Carolina; and over 1,300 abandoned tires discovered on conserved land in Wisconsin. Lastly, two cases involving fee-owned lands enforced

by their conservation organization owners include an airport clear-cutting trees on conservancy land in Connecticut and a homeowner cutting trees and building a pond and roads on conservation easement-protected land in New York.

A. *California Cases*

California's conservation easement enabling statute, which preceded the UCEA, allows both the conservation easement holder and the grantor to pursue violators of a conservation easement.[57] Like many states, California's enabling act also affirms that holders and grantors may pursue injunctive relief and monetary damages by seeking equitable and legal relief from wrongdoers.[58] In addition to the remedy of injunctive relief, California's statute expressly entitles the holder of a conservation easement to recover monetary damages for any injury to the easement, injury to the interest protected by the easement, and for the violation of the terms of the easement.[59] Further, the statute allows the presiding court to award costs and fees to the party prevailing in the legal action.[60]

1. Geysers Fire: Geothermal Corporation v. Conserved Open Space

During the 2004 "Geysers Fire," a 12,525-acre blaze in the Mayacamas Mountains burned about 4,600 acres protected under conservation easements held by Sonoma County's Agricultural Preservation and Open Space District.[61] A splice in a high-voltage line short-circuited and showered dry grass with hot metal that ignited the blaze.[62] In 2009, the Sonoma County Open Space District and several associated landowners filed a lawsuit based on the conservation easements encumbering the property. These parties sought damages for lost land values and

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57. *See infra* Appendix., CAL. CIV. CODE § 815.7(b)-(d); LEVIN, *supra* note 9, at 31.

58. *See* LEVIN, *supra* note 9, at 40–41.

59. Brett Wilkison, *Calpine to Pay $7.9 Million to Open Space District, Landowners for 2004 Geysers Fire*, PRESS DEMOCRAT, (Aug. 25, 2011), *available at* http://www.press democrat.com/article/20110825/ARTICLES/110829682.

60. *See id.*

61. *Id.*

62. *Id.*

natural resources from Calpine, the largest geothermal operator at the Geysers, which controlled the spliced line.[63] The conservation easements encumbering the property affected by the fire stated that any change or damage to the conservation values of the protected property would be an enforceable event covered by the enforcement provision of the enabling statute.[64] In addition to seeking costs for restoration, the lawsuit sought additional damages for the loss of wildlife habitat, scenic values, timber, and watershed functions pursuant to the special damages provision of California's conservation easement enabling statute.[65]

In August 2011, after several years of litigation, Calpine and the District Board entered into a settlement agreement requiring Calpine's insurers to pay the Sonoma County Open Space District and associated property owners $7.9 million – $3.77 million of which went to settle the county's claims.[66] The majority of the settlement money, more than $4.1 million, was directed to several private landowners and the National Audubon Society, who joined the district's lawsuit and whose property is protected by district-held conservation easements.[67] The deal between the plaintiffs designates most of the money paid to landowners for restoration of the burned areas.[68] The net amount to the district after paying for private legal representation and expert witnesses is estimated at nearly $2.7 million. The money will likely be used to compensate the county for conservation values that were lost to the fire and to support district activities in the Mayacamas Mountains, including additional land protection.[69] Although Calpine did not admit liability for damages caused by the fire as a condition of the settlement, the settlement tracks with the special damages provision of California's enabling act. This special damages

63. Sonoma Cnty. Agric. Preservation and Open Space Dist. v. Calpine Corp. Case No. SCV-245762 (Sonoma County Superior Court).

64. *Grant Deed of Conservation Easement*, Nevada Cnty. Land Trust (on file with author) [hereinafter *Grant Deed of Conservation Easement*].

65. *Id.*

66. *See* Wilkison, *supra* note 59.

67. *Id.*

68. *Id.*

69. *Id.*

provision allows easement holders to recover money damages for any injury to the easement, injury to the interest protected by the easement, and for violation of the terms of the easement.[70]

The county holding the conservation easements affected by the fire and the parties seeking enforcement learned important lessons through the enforcement of these third-party violations. The parties learned that in some cases, litigation is needed to prompt action, and without litigation, there will be no action. The parties also learned that it is prudent to assume that a case in litigation will go to trial, and to plan accordingly the amount of time and money required for trial preparation and for the trial itself. The parties learned that it is important for their attorneys to visit the easement-protected land prior to developing an approach to damages. The attorneys' visit inspired them to base their damages theory on skilled expert testimony proving specific damage to the conservation values protected by the conservation easements. The enforcing parties relied successfully on their damages theory and expert witnesses, emphasized the legal theory under California's special damages law, and proved the costs of the land's restoration or replacement pursuant to that applicable law. The parties seeking enforcement learned not to fear a jury or the public airing of information to the press in order to gain support for the cause. The parties also learned that by being neutral and reasonable in their approach to enforcement and damages, they would be confident in going to trial, and not motivated by fear to settle prematurely. Their prudence in estimating costs of pre-trial and trial preparation, reasonable approach to enforcement and damages theory, and lack of fear of litigation gave them the confidence to maintain the case through to settlement sufficient to reimburse the easements' lost conservation values. The overall result reveals the success of these approaches in compensating for the conservation losses associated with the fire.[71]

2. Neighbor Access Road v. Conserved Open Space

The Nevada County Land Trust and fee landowners of the conservation easement-protected land prevailed in a civil lawsuit

70. *Id.*

71. *See generally id.*

brought by an adjacent landowner who attempted to build a road across the protected land in order to gain access to his property.[72] The essence of the adjacent landowner's case was that historic homesteader trails crossed the conserved land, and, because they were public byways, he could use them as a more convenient way to access his 160-acre adjoining parcel.[73] Although the adjacent landowner claimed his property was landlocked, a different access route to his property that did not traverse the conserved land had been established by a prior owner through a road easement.[74] The adjacent landowner argued that the prior road easement was too costly to develop as an access road to his parcel and that the homesteader trails were a more practical option.[75]

The conservation easement at issue preserved rights in the trust to enforce any easement violation and specifically exculpated the landowner from third-party violations, provided that the landowner took reasonable steps to prevent such violation.[76] The land trust and the landowners instead argued that a road on their land would violate their conservation

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72. Garfinkel v. Nevada Cnty. Land Trust, Case No. 71098 (Cal. Super. Ct. Nevada Cnty. 2008), http://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-insurance/CDdocuments/trabucco-decision.pdf.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See Grant Deed of Conservation Easement*, *supra* note 64, at 9. ("[T]o enforce the rights herein granted, . . . D. Injunction. Grantee may enjoin any activity on, or use of, the Property that is inconsistent with this Conservation Easement and may enforce the restoration of such areas or features of the Property that may be damaged by any such activities or uses.").

> Grantee shall have all remedies available at law or in equity to enforce the terms of this Conservation Easement, including without limitation the right to seek a temporary or permanent injunction (ex parte, if necessary) with respect to such activity, to cause the restoration of that portion of the Property affected by such activity to the condition that existed prior to the undertaking of such prohibited activity, and/or to recover any damages arising from the violation, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Property to the condition that existed prior to any such injury.

Id. "Acts of Third Parties. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury to or change in the Property *resulting from acts by unrelated third parties* so long as Grantors have taken all reasonable steps to control such acts." *Id.* at 5–6.

easement, which preserved a working ranch as agricultural land.[77] At the time of the lawsuit, a local cattle rancher was leasing the conserved land for his business, which supplied several restaurants and markets with beef.[78]

The neighbor, landowner, and land trust were unable to reach any agreement, and the case proceeded to trial. During the trial, twenty-three witnesses were called during eight days of testimony over an eight-month period, in which 455 exhibits were admitted to the court. The judge and counsel made two site visits to the property.[79] The land trust conducted a special appeal campaign locally to raise a portion of their defense costs, which exceeded $300,000.[80]

The adjacent landowner based his case on two maps showing trails dating back to the 1850s.[81] The judge ruled that the historic homesteader trails portrayed on the adjacent landowner's maps could not be proven to be on the conserved land. The judge further ruled that the two maps, county tax records, and expert testimony were not enough evidence to prove that the roads ever crossed the conserved land. The judge dismissed the case.[82]

Easement holders across California can look to this decision and the precedent it sets for upholding conservation easements in the state.[83] The outcome of the case might deter other third parties from attempting to defeat conservation easements, given the tremendous investment made by the parties, the local communities, and the public in protecting this land for the public's benefit.[84]

The land trust attributed its success to the extensive community support for the effort, in terms of both advocacy for permanent land protection and contribution to the legal costs of

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77. ROBERT H. LEVIN, LAND TRUST ALLIANCE, Conservation Case Law Summaries, 24–25 (2011), *available at* http://tlc.lta.org/documents/6762/file [hereinafter LAND TRUST ALLIANCE].

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.* at 24–25.

84. *Id.*

the defense made by many donors.[85] California's conservation easement enabling statute provides a complex matrix for costs of litigation and attorneys' fees to be awarded to a prevailing party in certain cases, but attorneys' fees can still be unrecoverable, which can be a significant financial drain for a community-supported non-profit land trust enforcing a conservation easement violation.[86] The easement holder in this case learned that it is important to establish a means of defending the easements it holds outside of relying on the enabling act, and to seek the award of costs and fees through the terms of the conservation easement or pursuant to other applicable law. The easement holder learned that it needed to assemble adequate human and financial capital well before a violation ever occurred, in order to adequately pursue action or a violator when necessary, and not to rely on reimbursement from a prevailing party clause in a conservation easement. The easement holder also learned to draft their easements specifically in anticipation of third-party violations or attempts at violations. The easement holder learned to not fear press coverage, but to instead use the press and publicity to educate the public about conservation easements generally, and about potential or on-going violations specifically. Lastly, the easement holder learned that working together with the landowner in pursuit of a potential third-party violator creates an intimidating united front and can be much more effective than attempting to reach the violator alone.

B. *Vermont Cases*

Vermont's conservation easement enabling statute, like California's, precedes the UCEA. It identifies a conservation easement holder as eligible to enforce the easements it holds by seeking equitable injunctive relief as well as monetary damages. This is because pursuant to the enabling act, an easement holder can exercise all of the rights of a fee landowner.[87] Additionally, Vermont's criminal forestry trespass statute now includes severe

85. *Id.*

86. *See generally* Robert H. Levin, *A Guided Tour of Easement Enabling Statutes,* LAND TRUST ALLIANCE, (Jan. 2010), *available at* www.landtrust alliance.org/policy/cestatutesfinal report.pdf.

87. *See infra* Appendix, VT. STAT. ANN. tit. 10 § 6307(a).

penalties against anyone who knowingly cuts, destroys, or removes forest products without the consent of the owner.[88] A violator or offender is liable to the owner for triple damages or one thousand dollars for each tree, log, or sapling cut, destroyed or removed—whichever is greater. Penalties include jail time, damages, or both.[89]

1. Adverse Possession Claim by Neighbor Encroaching on Conserved Land

The Vermont Land Trust (VLT) accepted a conservation easement on twenty-eight acres of river bottom land in order to provide public access and reestablish a natural river ecosystem community.[90] The conservation easement at issue made no mention of third-party violations, trespass, or encroachments, and it placed responsibility for remedying violations on the landowner.[91] A few acres of the conserved land abutted a residential street, with one small residential lot and a home jutting into the conserved land.[92] VLT executed the conservation easement prior to receiving the final survey from the surveyor but after reviewing drafts of the survey. The final survey, when received, revealed two small encroachments from the neighboring residential lot: one of about five feet of a garden

88. *See infra* Appendix, VT. STAT. ANN. tit. 13 § 3602, 3606.

89. *Id.*

90. *See* LAND TRUST ALLIANCE, *supra* note 77, at 25–26.

91. *See Deed of Conservation Easement*, *supra* note 64, at 5.

> In the event that a Grantee becomes aware of an event or circumstance of noncompliance with this Grant, Grantee shall give notice to Grantor of such event or circumstance of non-compliance via certified mail, return receipt requested, and demand corrective action by Grantor sufficient to abate such event or circumstance of non-compliance and restore the Protected Property to its previous condition. In the event there has been an event or circumstance of noncompliance which is corrected through negotiation and voluntary compliance, Grantor shall, at Grantee's request, reimburse Grantee for all reasonable costs incurred in investigating the noncompliance and in securing its correction.

Id. Although VLT regularly requires the landowner to remedy third-party violations by not exculpating the landowner for acts of third parties, it also relies on the correspondence shown, which acknowledges that despite holding landowner responsible for acts of third parties, the land trust will work together with the landowner to resolve a third-party violation. *See* RATLEY-BEACH, *supra* note 8, at 8.

92. *See* LAND TRUST ALLIANCE, *supra* note 77, at 25–26.

shed, and one of about three feet by twenty feet of the porch and residence's foundation.[93]

VLT and the easement-protected property's landowner agreed to correct the error of the neighboring preexisting encroachments through a tenth-of-an-acre boundary adjustment with the neighboring lot owner.[94] The landowner was to confer with the neighbor, and VLT was to perform the necessary legal work.[95] The neighbor rejected the offer of a boundary adjustment and instead claimed adverse possession of not only the encroachment area, but also of an additional two acres of the land subject to the conservation easement, based on her mowing and regular use of that land.[96] The two acres had little conservation value to the conservation easement.

The owner of the conserved land disputed the adverse possession claim.[97] The parties filed suit and proceeded to mediation after discovery revealed weaknesses in the neighbor's adverse possession claim.[98] After eleven hours of discussions, in which the land trust articulated its legal restraints against giving away land protected with conservation easements and the overall value of the conserved land to the public, the parties agreed to a resolution addressing the size and situation of the encroachments.[99] The parties agreed to a boundary adjustment of one-tenth of an acre, removal of the encroachments from the conserved land, and lifetime mowing rights for the neighbor on an additional two-tenths of an acre.[100] The neighbor paid the landowner $7,000 for the land and paid all costs of mediation and document preparation – which VLT and the landowner had originally proposed to give the neighbor for free, at its own cost.[101] VLT obtained a nominal percentage of the payment attributable to the land released from the conservation

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

easement, and the landowner paid all costs of the litigation.[102] The landowner was pleased with the result and thankful to VLT for its assistance.[103]

VLT thought this result was the best course of action because of the nominal and noncontributing nature of the land to the conservation purpose. Additionally, the land's conservation values did not merit destruction of the neighbor's residence. VLT would have excluded the encroachment if it had the final survey prior to closing, so it viewed the adjustment as an error correction. After considering factors including public perception, media coverage, the small size and lack of conservation value of the land, and applicable legal requirements, VLT believed it could best serve the public interest and uphold its mission in the community by addressing the violation through the boundary adjustment rather than by attempting to force removal of the encroachments.[104] VLT could have permitted the encroachments to stay on the conserved land forever, but in that scenario VLT would have been faced with burdensome stewardship challenges and repeated third-party violations of future owners that would deplete its resources and impair protection the critical conservation land.

VLT learned many lessons from this interaction. The most important lessons VLT learned were the importance of obtaining a final survey *prior* to closing and addressing encroachments with an adjustment of the land *prior* to closing the conservation easement transaction. To resolve this violation, the parties needed a survey because the encroachments were within the error margin of the land trust GPS unit. Most GPS units have at least a three-foot error margin and some error margins as great as nine feet.[105] An easement holder must know the error margin for his or her equipment so that, if a potential violation is within the error margin, a survey may be needed to determine whether a violation really exists.

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

2. Chain Sawing Sunbather v. Conservation Land

A large utility company granted Vermont Land Trust a conservation easement in fulfillment of a federal regulatory requirement on a 16,000-acre parcel of land in Vermont.[106] The land bordered a river that contained its hydroelectric-generation facilities, encompassed two reservoirs, and was traversed by eighteen miles of river.[107] The conserved land stretched across six towns and was managed for sustainable timber production and public recreation.[108] The conservation easement at issue did not specifically address enforcement in the event of third-party violations or exculpate the landowner for such acts. The easement instead placed responsibility for all violations on the landowner.[109]

VLT and the utility company landowner had continuous problems with trespass on the conserved land.[110] As a result, VLT and the community relations manager for the landowner had to be vigilant in visiting the land and staying in touch with neighbors. The vast tract was open to the public, however, which presented many temptations to those who saw it as unmanaged and unsupervised.[111] One day, neighbors adjacent to one of the reservoirs heard a chainsaw running and saw smoke rising from the easement property.[112] When they went to investigate, they

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106. *See id.* at 27–28.

107. *Id.*

108. *Id.*

109. *See Grant Deed of Conservation Easement*, *supra* note 64, at 5. This easement contains the same provision as the prior VLT easement and both also include a provision for enforcement that places responsibility on the landowner for violations:

> Failure by Grantor to cause discontinuance, abatement, or such other corrective action as may be demanded by Grantee within a reasonable time after receipt of notice and reasonable opportunity to take corrective action shall entitle Grantee to bring an action in a court of competent jurisdiction to enforce the terms of this Grant and to recover any damages arising from such noncompliance.

Id. One VLT correspondence stipulates that despite the easement's language identifying the landowner as solely responsible for all violations occurring on the property, VLT will work together with the landowner to pursue third-party violators, in the event of such occurrence. *See* RATLEY-BEACH, *supra* note 8, at 8.

110. *See Enforcing Conservation Easements*, *supra* note 37, at 15.

111. *Id.* at 15–16.

112. *Id.* at 16.

discovered a woman in a bikini with her towel and suntan lotion nearby.[113] In her hand was a running chainsaw.[114] In the middle of the new clearing she had made with the chainsaw was a burning brush pile.[115] She had cleared a thirty-foot by twelve-foot area, approximately the size of a large conference room, near the water in order to obtain more sun for sunbathing.[116]

The neighbors noted the sunbather's license plate number and called the state police, who arrived a few hours later. The state police interviewed neighbors, viewed the site, and called the landowner, who called VLT. VLT's forester and the landowner's community relations manager viewed the site a few days later. The forester and community relations manager determined the cleared area was a gravelly site with slow-growing beech, spruce, and hemlock saplings. None of the stumps were larger than three inches in diameter, and much of what was cleared was brush.[117] Cutting trees and brush outside the scope of a VLT-approved forest management plan, however, was prohibited by the conservation easement.[118]

The forester and manager also found that in the intervening days, the sunbather had returned to the site and painted the stumps brown.[119] The forester photographed and measured the area, counted and categorized the stumps, evaluated the soil condition, assessed the likelihood of erosion and water quality issues, evaluated potential damage to other protected purposes, and noted the remaining tree quality and growth.[120] The landowner representative also reviewed and photographed the site and took the further step of interviewing the neighbors.[121] The two then compared notes and conferred on what steps to take next.[122] The timber value of the saplings only totaled

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *See Grant Deed of Conservation Easement*, *supra* note 64, at 4–5.
119. *See Enforcing Conservation Easements*, *supra* note 37, at 16.
120. *Id.*
121. *Id.*
122. *Id.*

$12.50.[123] The cut trees did not even merit firewood value, so the actual damages were nominal at best.[124] VLT and the landowner, however, had spent a fair amount of time dealing with the violation, which they both agreed was an intentional trespass that could not be ignored.[125] They saw this as an opportunity to educate the public that conserved land is supervised and that trespassers will be prosecuted.[126]

VLT and the landowner reviewed their options with legal counsel and evaluated the damage to the resource and to the purposes of the conservation easement.[127] They agreed that resource damage was minimal in the context of the larger parcel and that no water quality issues existed.[128] They also agreed that the violation did not adversely affect the conservation easement purposes of conserving woodlands and open lands, including wildlife habitat and other natural resource values for the scenic and recreational benefit of the public.[129] VLT classified this as a minor easement violation, according to its written violations policy and procedures.[130]

The police, however, had already tracked the car license plate and found the chainsaw and paint brush-wielding sunbather and easement violator.[131] They interviewed her, and she admitted to clearing the area and painting the stumps.[132] The police notified the landowner, who subsequently called VLT.[133] VLT and the landowner evaluated their options, which included filing a notice of trespass, fines, remediation, damages, and criminal charges against the violator. VLT and the landowner asked for restitution from the violator to VLT for the time expended on the violation.[134] The landowner did not want to deal with bookkeeping for receipt of such a small amount of money and

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *See Grant Deed of Conservation Easement*, *supra* note 64, at 2.
130. *See Enforcing Conservation Easements*, *supra* note 37, at 16.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 16–17.

dedicated it all to VLT. VLT pressed criminal charges of trespassing and property damage against the violator.[135] In addition, the state prosecutor required that the violator complete a court diversion program and thirty hours of community service.[136] As a result of the case, the landowner and VLT further solidified their partnership, built mutual respect and trust, and agreed to put further effort into general community education about the conserved land.[137]

VLT "concluded that it would best serve the public interest and uphold the land trust's mission in the community by addressing the violation [with] a combination of a monetary payment and criminal proceedings, rather than by attempting to recreate prior conditions."[138] VLT spoke with neighbors concerned by the violation in order to preserve the public trust in the land trust and conserved lands.[139] VLT considered this to be a critical step for an easement holder to maintain its credibility as it works to increase community visibility and reduce trespass.[140] The lessons learned by VLT through this violation include to emphasize public awareness and education of conserved properties (both to ward off violations as well as to prepare neighbors to observe and report violations), to partner and collaborate together with landowners in preventing or addressing third-party violations, and to be proportionate and creative in addressing violators and violations, consistent with the purposes of the violated easement.

3. Chain Saws on Big Jay

The Green Mountain Club (GMC) acquired 1,573 acres including Big Jay Peak in 1993 as part of its Long Trail Protection Program.[141] GMC transferred the land to the state, retaining a conservation easement restricting development and vegetation cutting.[142] The Long Trail, the nation's oldest long-

135. *Id.* at 17.
136. *Id.* at 21.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *See* LAND TRUST ALLIANCE, *supra* note 77, at 99.
142. *Id.*

distance hiking trail, crosses the property and climbs Big Jay Peak yielding spectacular views.[143] The State of Vermont owns and manages Big Jay Peak as part of Jay State Forest under the State of Vermont Department of Forests, Parks, and Recreation.[144]

State foresters and GMC personnel investigated conserved land on Big Jay Peak in northern Vermont after ski resort employees reported hearing chainsaws running on land protected with the conservation easement.[145] GMC discovered that two backcountry skiers had illegally cut nearly a thousand trees to create a ski trail measuring twenty to sixty feet wide and more than 2,000 feet long on the conserved property.[146] State officials estimated the value of the damaged timber to be nearly $50,000.[147] The conservation easement makes no mention of enforcing easements against third-party violators, but places responsibility for violations on the property's landowner.[148]

Following the damage, Big Jay Peak ski area officials collaborated with the Vermont Agency of Natural Resources and GMC and identified the two men responsible for the damage and forced them to pay restitution.[149] The two men pleaded no contest to felony unlawful mischief at trial and signed a confession.[150] They were later arraigned on felony charges of unlawful mischief greater than $1,000.[151] The men received a suspended eighteen to thirty-six month sentence felony conviction and served sixty days with a preapproved furlough community restitution program.[152] They were also barred from the Big Jay Peak

143. *Vermont Conservation Organizations Obtain Felony Conviction for Conservation Easement Violation*, LAND TRUST ALLIANCE, www.landtrustalliance.org/conservation/conservation-defense/documents/vermont-conservation-organizations-obtain-felony, (last visited Oct. 10, 2013).

144. *See* LAND TRUST ALLIANCE, *supra* note 77, at 99.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See Grant Deed of Conservation Easement*, *supra* note 64, at 5–6.

149. *See* LAND TRUST ALLIANCE, *supra* note 77, at 99.

150. *Id.*

151. *Vermont Conservation Organizations Obtain Felony Conviction for Conservation Easement Violation*, *supra* note 142.

152. *Id.*

property.[153]

Both men made restitution payments over two years, and one of the violators served some jail time for violating probation.[154] Both men also served sixty days with a work crew run by the Vermont Department of Corrections.[155] GMC and the co-holder of the conservation easement, the Vermont Housing and Conservation Board (VHCB), have received about $10,000 to date in restitution.[156]

GMC worked with the State of Vermont, the adjacent Jay Peak Ski Resort, and volunteers to re-vegetate the cut area. The same group worked to prevent skiing on the cut land while the area re-vegetated because young trees cresting the snow pack in winter are especially susceptible to damage from skiers.[157] Management of the area over the next decade will be critical to restoring and erasing the scar from the mountain.[158] GMC and the state are determined to see trees grow again on the scar, and continue to monitor the situation and assist as necessary.[159] An agreement signed by the Vermont Department of Forests, Parks, and Recreation, GMC, Jay Peak Resort, and the VHCB allows backcountry skiers and snowboarders responsible access from Jay Peak Resort to the backcountry terrain located in the Jay State Forest at Big Jay Peak.[160] While the scarred portion of the mountain will remain closed to skiers and riders at all times to ensure that re-vegetation is successful, the agreement provides a framework for allowing access to Big Jay peak during periods of adequate snow cover.[161]

Jay Peak Resort has agreed to enforce the closure of Big Jay Peak during low snow conditions, with penalties including the

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153. *Id.*

154. *Felony Conviction for Easement Violators*, LAND TRUST ALLIANCE (Feb. 16, 2011), https://www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-news/felony-conviction-for-easement-violators.

155. *Id.*

156. *Id.*

157. *Vermont Conservation Organizations Obtain Felony Conviction for Conservation Easement Violation*, *supra* note 142.

158. *Id.*

159. Susan Shea, *Protecting Big Jay*, GREEN MOUNTAIN CLUB (Nov. 20, 2008), http://www.greenmountainclub.org/news.php/include/news.php?id=153.

160. *Id.*

161. *Id.*

loss of skiing or riding privileges.[162] The state will enforce the no-cutting prohibition on the Big Jay Peak parcel consistent with the provisions of the conservation easement and Vermont law.[163] The agreement also addresses erosion control and restoration of the scar, as well as promotion of a "Leave No Trace" backcountry skiing ethic.[164] This incident is considered to be the most serious case of damage to public lands in Vermont's history. Lessons learned by GMC and the state include that relying on neighbors to report bad acts can be an effective way to monitor easements and their violations. Also, it is important to act quickly to identify easement violators, especially third-party violators, and to seek severe penalties in order to send a message to other potential wrongdoers. GMC also learned that collaborating with other entities and volunteers to restore the damaged area assists in the ongoing education of the public about the nature of the conservation easement and the boundaries of its coverage.[165]

C. Residential Development Trail v. Conservation Easement's Open Space

Colorado's easement enabling statute, like Vermont's, precedes the UCEA. It provides apparent rights for both the easement holder and landowner to seek injunctions to enforce its easements. The statute makes no mention of enforcing easements against third-party violators.[166] Colorado's statutory framework however, does create enforcement rights against third parties for any trespass against the real property of someone with a proprietary interest in the property, which an easement holder could argue is a conservation easement.[167]

Colorado Open Lands (COL), a statewide land trust in Colorado, initially successfully defeated construction by a third party of a twenty-foot wide trail on conserved land where the conservation easement only permitted construction of a footpath

162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *See infra* Appendix, COLO. REV. STAT. § 38-30.5-108.
167. *See infra* Appendix, COLO. REV. STAT. § 18-4-501.

with COL's prior consent.[168] The case arose from a one hundred acre conservation easement granted to COL by the landowner, who was the real estate developer of adjacent land being developed into ten residential lots.[169] The landowner reserved the right in the easement to grant access to the ten prospective adjacent lot owners for recreational purposes, including use of a footpath that did not exist at the time of the easement grant.[170] The conservation easement specifically allowed foot, bike, ski, and horse use on a footpath to be designed by the landowner and approved by COL prior to construction.[171] The conservation easement also specifically identified the developer as responsible for any and all third-party violations on the conservation property arising from the prospective landowners of the residential lots.[172] After selling the ten lots, the developer sold

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168. *See Enforcing Conservation Easements*, *supra* note 37, at 17–19.

169. *Id.*

170. *See id. Grant Deed of Conservation Easement*, *supra* note 64, at 3; Bolinger v. Neal, 259 P.3d 1259 (Colo. App. 2010), (on file with author) ("Rights Retained by Grantor. Grantor retains the right to perform any act not specifically prohibited or restricted by this Deed. These ownership rights include, but are not limited to, the retention of the economic viability of the Property provided that such acts and uses are not inconsistent with the preservation and protection of the Conservation Values. *Grantee acknowledges and agrees that Grantor may grant access to ten property owners located in the vicinity of the Property compromised of the owners of Lots 1 through 9 of the Mill Creek Subdivision as well as the owner of Lot A, #1061-29-3-RE-2835, Weld County (collectively, the 'Adjacent Landowners') for recreational uses permitted pursuant to Section 5.D.*") (emphasis added).

171. *See Grant Deed of Conservation Easement*, *supra* note 64, at 5–6 ("f. Other Improvements. Grantor may construct *non-paved footpaths on the Property to be used for permitted recreational uses as described in Paragraph 5.D so long as these improvements are not inconsistent with the protection and preservation of the Conservation Values. Grantor shall submit to Grantee for approval proposed locations for footpaths prior to constructing such footpaths.* Grantee's approval shall not be unreasonably withheld, conditioned, or delayed. Should more than 30 days elapse after Grantee's receipt of such written notice from Grantor without any response from Grantee, the construction of footpaths shall be deemed approved. . . . D. Recreation. Golf courses are prohibited on the Property. *Recreational uses such as bird watching, hiking, horseback riding, mountain biking, cross country skiing, hunting and fishing not inconsistent with the Conservation Values are permitted.*") (emphasis added).

172. *See id at 9. ("[G]rantor shall be liable to Grantee for the Adjacent Landowners' acts on the Property should their use be inconsistent with the preservation and protection of the Conservation Values of the Property. Nothing in this provision is intended to create any third party beneficiaries or to waive Grantor's rights to pursue any remedies against Adjacent Landowners for*

the conserved land to one of the new lot owners.[173] In December 2007, four of the ten lot owners and the homeowners association (HOA) filed a complaint against the developer and COL based on access and use of the lots, trail, and conservation area.[174]

The developer, unbeknownst to COL, had granted the HOA and lot owners a recreation license referencing a twenty-foot-wide trail on the conserved land, in violation of the conservation easement.[175] The developer did not consult with or obtain COL's approval before granting the license.[176] The trail license also specified a route that had not been approved by COL, as required by the language in the conservation easement.[177] The footpath reserved in the conservation easement, while not stating a width, was specific in being a footpath only, not a trail.[178] In addition, the conservation easement did not reserve a specific trail location.[179] The conservation easement required only that the footpath location be proposed by the landowner and approved by COL.[180]

In 2006, the developer reminded the HOA that the conservation easement required that COL approve the trail prior to construction. The lot owners were reportedly angry and believed they had been defrauded by the developer regarding their rights to access and use the conserved land.[181] The lot owners did not understand that because the conservation easement preceded their lot deeds, it controlled the arrangements that they could make with the trail.[182] Unable to resolve the situation with the developer, the lot owners sued the

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actions occurring on the Property. 8. Enforcement . . . *Should Grantee receive notice of Adjacent Landowner use that is inconsistent with the preservation and protection of the Conservation Values of the Property, Grantee agrees to notify Grantor of the alleged violation in accordance with this Paragraph, and to assist Grantor in investigating alleged Adjacent Landowner violations*.") (emphasis added).

173. *See Enforcing Conservation Easements*, *supra* note 37, at 21.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 21–22.
178. *Id.*
179. *See id.* at 21.
180. *Id.*
181. *Id.* at 22.
182. *Id.*

developer and named COL in an action to quiet title.[183]

COL's staff, board, and legal counsel decided that the fundamental issues in the case—trail location and width—were critical to the conservation easement, and that development of the proposed trail would be a major violation of the easement.[184] Additionally, COL did not want an adverse ruling from a court or a settlement contrary to the purpose, intent, or terms of the conservation easement. For these reasons, COL decided to remain involved in the case in lieu of petitioning the court to dismiss the case.[185]

In the process of responding to discovery requests, COL's staff reviewed all of the property files, including emails, and compiled over 400 documents, most of which were stored electronically.[186] Before it delivered any document in discovery, COL reviewed it thoroughly for accuracy and relevance, which took an enormous amount of time. However, COL believed that a complete understanding of the process was critical, particularly for newer staff members who were not working for COL prior to the lawsuit.[187] Much time was also spent on staff and legal counsel education as to respective issues related to the litigation and trial preparation.[188]

COL, with the help of an ecological consultant, prepared multiple trail locations it believed would be consistent with the requirements of the conservation easement in order to promote a resolution.[189] At a day-long mediation, experts spent significant time working with all the parties on trail design, location, and size.[190] The baseline consultant that COL retained to help with trail location and design played an important role in mediation and at trial in demonstrating how the easement purposes would be affected by various locations and widths.[191] At the end of the mediation, COL and the HOA reached a mutually acceptable

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

resolution regarding trail location and width. Ultimately, the HOA did not accept the settlement due to an irresolvable ongoing dispute between the HOA and the owners of the conserved land.[192] The landowners therefore proposed an alternative trail route and width, but never formally asked for trail approval.[193] The case proceeded to trial in which COL's mediation theories and proposals influenced the final result.[194]

The trial took three days, and COL staff were present the entire time.[195] COL staff testified and both parties' attorneys questioned them.[196] The staff provided background information for the judge and responded to specific questions about COL procedures and practices, including the content and conclusions of its monitoring visits.[197] They also answered many questions about what COL would and would not have approved for a trail.[198] According to COL's legal counsel, this was actually a simple case, but COL, being unfamiliar with litigation overall, found it to be exceedingly complex.[199]

The court addressed three major issues related to COL. First, that the conservation easement was first in priority and superior to any subsequent lot owner's interests. Second, that the lot owners only had a license, which was revocable and not a property interest in the manner of a conservation easement. Third, that the trail location and design was never approved by COL and therefore the lot owners did not have any access to the conserved land until that time at which the conserved land's owners submitted a proposal for trail design, which was approved by COL.[200]

The trial court ruled that COL prevailed on all counts, found that the developer had committed fraud, and awarded the lot owners only one dollar in damages because the lot owners should have known that the easement affected their right to use the

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 23.

conserved land.[201] The litigation, which was handled pro bono for COL, would have cost $125,000 in fees plus $10,000 in costs.[202] COL paid its costs, then recovered them from the lot owners. COL's proactive approach to the case likely reduced legal fees and costs to what easily could have been over $200,000 if there had been more discovery.[203]

The trial was not the end of the case, however, because the lot owners successfully appealed the trial court's judgment.[204] The appeal issues relevant to COL were that the lot owners had a trail *easement* rather than just a license, and that COL was not a prevailing party, so was not owed costs.[205] These arguments persuaded the appellate court, which reversed the trial court's rulings on both counts. The appellate court found that the lot owners possessed a trail easement and that COL was not a prevailing party and therefore could not be awarded costs.[206] The ruling that the conservation easement had priority over the trail easement stood on appeal.[207] However, numerous questions after the appeal remain unanswered, such as how the ruling will actually be applied. For instance, while it was made clear that the adjacent lot owners have a twenty-foot wide easement across the conservation easement and conserved landowner's property, the acceptable use of this trail easement is unclear. Do the adjacent lot owners or conserved landowners have to submit a trail request for approval to COL? What happens if COL rejects trail requests as inconsistent with the terms of the conservation easement? The underlying dispute with the lot owners continues, but COL concluded that it ultimately prevented damage to the land protected by its conservation easement and preserved the conservation purposes of the conservation easement.

COL learned many lessons through this case. First, the mediation and litigation allowed COL to educate all the parties and the judge about the conservation easement and the land trust's role in holding and enforcing the conservation

201. *Id.*
202. *Id.*
203. *Id.*
204. *See* Bolinger v. Neal, 259 P.3d 1259 (Colo. App. 2010).
205. *Id.* at 1268–69.
206. *Id.* at 1263.
207. *Id.*

easement.[208] It was crucial to be involved in the mediation process, even though it meant more time and effort on the part of COL. That involvement justified COL's decision to stay in the case.[209] Second, COL staff noted that because of the extreme difficulty recalling the details of site visits many years past, contemporaneous and clear documentation of site visits is crucial to being a credible witness in a trial.[210] COL now documents all approvals, denials, and interpretations in writing, and relies on accurate, thorough, and objective reports to document site visits because such documentation is crucial to being able to prove a case in court. Third, COL improperly assumed the case would settle and not go to trial, especially when the parties involved were emotional and had the resources to pursue litigation. COL also underestimated the time needed for the case, given that it did not think it would go to trial. The staff spent at least 120 hours and the attorney spent approximately 370 hours on the entire trial and appeal process, including mediation. Fourth, COL maintained a clear goal throughout the litigation and appeal, which was to reach an acceptable resolution for a trail alignment and trail characteristics, and not to dispute that the conservation easement allowed for a footpath. However, COL also made it clear that any trail proposal must come from the conserved land's owner and must be approved by COL. Fifth, COL's goal shaped the trial strategy to be neutral and reasonable in order to protect the land and to assist the court in resolving the dispute. Sixth, legal counsel visited the land in dispute, which allowed them to understand the context and importance of the land and the effect of the violation on the conservation purposes.

D. *Neighbor's Ford v. Conserved Land Streambed*

The State of North Carolina and the Southern Appalachian Highlands Conservancy (SAHC) prevailed against abutting landowners who entered onto a conservation easement-protected property and began constructing a new ford, moving rocks, digging out dirt and gravel, and otherwise disturbing a

208. *See Enforcing Conservation Easements*, *supra* note 37, at 22.
209. *See id.*
210. *Id.*

streambed.[211] North Carolina's state conservation enabling legislation includes additional easement purposes, permits private entities to hold conservation easements, and as relates specifically here, permits only the easement holder to enforce it. But the enabling act expressly affirms that a conservation easement holder has the right to enter the easement property at reasonable times in a reasonable manner during enforcement and can seek injunctive relief and monetary damages.[212]

A conservation easement granted jointly to the State of North Carolina and SAHC established a 300-foot-wide riparian corridor, which extended from either side of the middle of Crawford Creek and included 16.5 feet over the bank on either side.[213] The conservation easement expressly prohibited the "disturbance of natural features within the riparian corridor[,] and the removal of topsoil, sand, gravel, and rock within [it.]"[214] The conservation easement's enforcement provision is framed in terms of the landowner's violations, but also makes reference to acts of third parties contracting with the landowner in violation of the easement, and exculpates the landowner for acts of third parties beyond the landowner's control.[215]

Abutting landowners entered onto the protected property and began constructing a new ford across Crawford Creek, moving

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211. Woltz v. Taylor, 698 S.E. 2d 768 (N.C. Ct. App. 2010); *see also* LAND TRUST ALLIANCE, *supra* note 77, at 77.

212. Conservation and Historic Preservation Agreements Act, N.C. GEN. STAT. §§ 121-34 to -42 (1979); *see also* LEVIN, *supra* note 9, at 8, 10, 31, 40–41.

213. Deed of Conservation Easement, Recorded [at Reception Number 2912707 in the public records of the Clerk and Recorder of Weld County, Colorado] in Volume 1664 recorded in Book 503 at 399, 408[hereinafter Deed of Conservation Easement].

> Upon any breach of the terms of this Conservation Easement by Grantor that comes to the attention of the State or SAHC, the State or SAHC shall, except as provided below, notify the Grantor in writing of such breach. . . . A breach of this Conservation Easement can include actions that the Grantor has not completed but has begun to take through either action on the property itself or by taking such action, *such as a contract with a third party,* that could lead to a breach of this Conservation Easement should the contract be performed.

See also Book 508 at 409: "C. Acts Beyond Grantor's Control. Nothing contained in this Conservation Easement shall be construed to entitle Grantees to bring any action against Grantor for any injury or change in the Property *caused by third parties*[.]"

214. *Id.* at 404.

215. *Id.*

rocks, digging out dirt and gravel, and otherwise disturbing the streambed.[216] This new river crossing was upstream from an already existing and undisputed crossing, which predated the conservation easement.[217] The easement's grantor and fee landowner filed a trespass suit, to which the State and SAHC later intervened as additional plaintiffs.[218] The defendants, abutting landowners, asserted affirmative defenses of adverse possession and easement by prescription.[219]

The trial court granted a preliminary injunction against the defendants, and at trial a jury found for the plaintiff landowner and easement holders in all respects.[220] The defendants appealed, claiming various errors in the jury instructions.[221] In particular they claimed the jury had been wrongly instructed that a prescriptive easement could have been established only by vehicular traffic.[222] An appellate court affirmed, holding the defendants had not properly preserved the issue for appeal.[223]

The State and SAHC identified their lessons learned from the legal action. First, anticipate third-party violations through the language of the conservation easements they hold. Second, work jointly with the landowner against the third-party violators, as opposed to letting the landowner pursue the action alone. Third, do not be afraid to educate a judge and jury on critical conservation easement issues. And last, perseverance through a long and arduous process of litigation, while working diligently to identify legal issues for the court, including affirmative defenses against third-party violations.[224]

E. *Tire Dump v. Conserved Natural Area*

Over 1300 abandoned tires at the Point Creek Natural Area (PCNA) in the Wisconsin coastal zone of Lake Michigan evolved

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216. *See* LAND TRUST ALLIANCE, *supra* note 77, at 77–78.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*

from a conservation easement violation to playground surfaces and horse arena padding.[225] Glacial Lakes Conservancy (GLC) did not enforce the conservation easement against the owner of the natural area to remove the tires as a violation of the conservation easement on the property. Instead, GLC worked diligently with the landowner to find a creative solution to what has come to be a common and frustrating conservation easement dilemma: third-party dumping.[226]

Manitowoc County owns the thirty-nine acre Lake Michigan shoreline nature preserve, upon which it donated a conservation easement to GLC in order to save the land from development, and to preserve its estuary, wetlands, coastal bluffs, and wildlife habitat.[227] The natural area is used annually by thousands of migratory waterfowl along the Lake Michigan flyway, including a large annual congregation of great blue herons.[228] Unfortunately, over time a neighbor of the natural area had secretly and gradually deposited hundreds of tires on the property. The neighbor then died, leaving no legal recourse for the easement violation.[229]

The conservation easement covering the property prohibited depositing debris or refuse of any kind on the property, and provided an express right to the easement holder to enforce against a third party or the landowner for acts of third parties that violate the easement.[230] Further, Wisconsin's state

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225. *See Enforcing Conservation Easements*, *supra* note 37, at 12–13.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Deed of Conservation Easement, *supra* note 214, at 4, 5, 100, 103, 104; Volume 1664 at 4, 5, 100, 103, and 104, on file with author: "Placement or storage, temporarily or permanently, of any material, including animal feed and wastes, soil, ashes, trash, sawdust, brush, or any unsightly, offensive, or hazardous material on, under, or in the Property [is prohibited]"; and

> Violation by Other Party. If Grantee reasonably determines that a violation of the terms of this Conservation Easement has occurred or is threatened by another party, it shall give written notice to Grantor of such violation and request Grantor to take action to enforce this Conservation Easement, but may immediately proceed in its own name and by its own right against such other party to demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Conservation Easement . . . to restore the portion of the Property so injured to its prior condition, including without

conservation easement enabling act closely mirrors the UCEA.[231] Therefore, the enabling act defines a conservation easement interest as a real property interest, but does not articulate any express right to pursue third parties.[232] In order to uphold the conservation easement, the tires had to be removed.[233]

The landowner, Manitowoc County, and the easement holder, GLC, were both unsure about the boundary line, which was near the tire dump.[234] GLC raised money to conduct a survey of the area in question in order to determine the boundary line, which showed the tires were on the conserved property.[235] The county did not have any financial resources to pick up and dispose of the tires, except to provide in-kind volunteers for the project.[236] After a long search by GLC to find a no-cost way to dispose of the tires, the owners of a green company in Wisconsin offered to cover the tire disposal costs, donating time to work with other volunteers to load, haul, and pay for the proper disposal of what had been estimated to be about 500 tires, but in actuality amounted to over 1,300 tires.[237] As a result, the environmental cleanup at PCNA was much more expensive than first estimated, but was accomplished by partnering with the landowner and reaching out to the business community for funding and volunteer support.[238]

The parties resolving the third party violation learned that they needed to identify roles and responsibilities for managing third-party violations in the conservation easement itself. The parties learned to approach the violation collaboratively between the easement holder, landowner, business community, and general public, and thereby also collaborate to find an amenable resolution. The parties learned that their reliance on creative

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limitation bringing any action at law or in equity against such other party, including without limitation those actions described . . . below.

Id.

231. *Compare* WIS. STAT. § 700.40 (2011), *with* UNIF. CONSERVATION EASEMENT ACT.

232. *See* WIS. STAT. § 700.40.

233. *See Enforcing Conservation Easements*, *supra* note 37, at 12–13.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

thinking, instead of traditional enforcement avenues, enabled them to turn a challenging easement violation situation into one that could provide some public benefits, through the recycling of the offending tires.

F. *Fee Owned, Conserved Land Third-Party Violations*

The following two cases involve third-party violations of conservation lands, which are enforced by the land's owners and conservation organizations, as opposed to conservation easement holders enforcing conservation easements against third parties. Although these cases involve fee land violations, they still instruct in managing community relations, using the press and publicity, assessing damage to conservation values, and pursuing punitive damages against violators.

1. Adjacent Airport v. Forest Conservancy Land

The East Haddam Land Trust (EHLT) owns a floodplain forest preserve adjacent to the Goodspeed Airport, LLC (Goodspeed), a small one-runway operation.[239] For many years, the Goodspeed owner had trimmed trees on EHLT's land in order to maintain sight-line visibility and clearance for planes using the airport.[240] Goodspeed and EHLT were in negotiations over another round of cutting, when Goodspeed instructed a logging contractor to clear-cut 2.5 acres of EHLT's land without EHLT's knowledge or consent.[241] The logging contractor felled approximately 340 mature trees, some over 100 years old and seventy feet high, and innumerable shrubs.[242] Upon discovering the clear cut, one of EHLT's board directors reported being appalled by the tree cutting, and contacted the state police to report the action as a crime.[243] Meanwhile, Goodspeed's cutting triggered enforcement actions by the town's wetlands commission (Commission) and the State because the clear-cut area was a state-regulated wetland.[244]

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239. Ventres v. Goodspeed Airport, LLC, 881 A.2d 937, 943 (Conn. 2005).
240. *See* LAND TRUST ALLIANCE, *supra* note 77, at 100.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

EHLT's directors testified at hearings before the Commission regarding the clear cut, while Goodspeed responded by filing separate state and federal legal actions for claims of abuse of process, malicious prosecution, defamation, and tortious interference. Goodspeed filed these legal actions against the Commission, the Commission's individual members, the State, EHLT, and EHLT's board directors in their individual capacities.[245] The state supreme court dismissed all of Goodspeed's counterclaims against EHLT and its directors. Through its opinion, the court documented several other opinions showing that the Commission and the State also prevailed in their respective enforcement actions against Goodspeed.[246] The court found that the EHLT director's statement to the press about being appalled was an opinion, and therefore could not be the basis for defamation.[247] Moreover, other statements by EHLT directors at the Commission hearing were deemed by the court to be privileged, and therefore not actionable.[248] Finally, in a footnote, the court stated that the federal Volunteer Protection Act protected the EHLT directors from all tort claims.[249]

Although this action did not involve a conservation easement, the property was conserved through its ownership by a conservation organization. It still is important to note that Connecticut's state conservation enabling legislation is not modeled on the UCEA.[250] Nevertheless, the enabling legislation expressly identifies the attorney general to enforce conservation easements, and expressly affirms that the holder has the right to enter and inspect the easement property at reasonable times in a reasonable manner during enforcement and can seek injunctive relief and monetary damages.[251] In a separate statute enacted in 2006, the state legislature also created a prohibition on encroachments, which would have applied directly here had the

245. *Id.* at 101.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *See infra* Appendix, CONN. GEN. STAT. § 47-42.
251. *See infra* Appendix, CONN. GEN. STAT. § 47-42(c).

property at issue been protected by a conservation easement.[252] The statute also allows reimbursement of restoration costs up to five times the cost of restoration.[253] The encroachment language represents the most specific statement of any conservation easement enabling act targeting third-party violators and violations, stating:

> As used in this section, "open space land" includes, but is not limited to, any park, forest, wildlife management area, refuge, preserve, sanctuary, green or wildlife area owned by the state, a political subdivision of the state or a nonprofit land conservation organization and "encroach" means to conduct an activity that causes damage or alteration to the land or vegetation or other features thereon, including, but not limited to, erecting buildings or other structures, constructing roads, driveways or trails, destroying or moving stone walls, cutting trees or other vegetation, removing boundary markers, installing lawns or utilities, or using, storing, or depositing vehicles, materials or debris.[254]

Goodspeed appealed the case, but EHLT and its members were not included as parties to the appeal.[255] EHLT learned important lessons about enforcing trespass actions on conserved land, and attributes its success to its immediate response to the trespass in both criminal and civil venues; use of the press to educate the public about the offensive action; and sound legal theory in trespass, as owners of the property.[256]

2. Homeowner v. Surrounding Conservation Land

In *Western New York Land Conservancy v. Cullen,* a land trust that owned property protected by a conservation easement held by the State of New York collected a $500,000 damage award against a neighbor who had multiple intentional trespasses on the conserved land.[257] The Western New York Land Conservancy (WNYLC) had purchased a 130-acre land

252. *See infra* Appendix, CONN. GEN. STAT. § 52-560.

253. *See infra* Appendix, CONN. GEN. STAT. § 52-560(d).

254. *See infra* Appendix, CONN. GEN. STAT. § 52-560(a).

255. *See* Goodspeed Airport v. Ventres, 547 U.S. 1111 (2006).

256. *See* LAND TRUST ALLIANCE, *supra* note 77, at 101.

257. W. N.Y. Land Conservancy, Inc. v. Cullen, 886 N.Y.S.2d 303 (N.Y. App. Div. 2009).

parcel at a bargain sale price to ensure continuation of the land's previous use as a public education resource and nature preserve.[258] The property's original estate house, driveway, utility right of way, and a twelve-acre parcel of land, all of which were completely encircled by the conservation property, were separately sold to a private buyer.[259] Upon purchase of its portion of the property, WNYLC granted a conservation easement to the New York State Department of Parks.[260] New York's conservation-enabling legislation is not modeled on the UCEA, and permits only the holder, grantor, or expressly identified third-party enforcer to enforce an easement.[261] However, the legislation expressly affirms that the holder has the right to enter and inspect the easement property at reasonable times in a reasonable manner during enforcement and can seek injunctive relief and monetary damages.[262] No other general law of the state may defeat an easement's enforcement, unless expressly stated.[263]

The first buyer of the twelve-acre mansion parcel sold the inholding to a wealthy businessman after a fire destroyed much of the main building.[264] WNYLC attempted, to no avail, to contact the new owner to introduce themselves as the neighboring, encircling property owner.[265] The new owner began trespassing on the conserved property almost immediately, while rebuilding the main building and redesigning the landscaping on the twelve-acre inholding.[266]

The first trespass consisted of resurfacing a farm lane that ran off the main building's driveway through the conserved property

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258. *See* LAND TRUST ALLIANCE, *supra* note 77.

259. *Id.*

260. *See Grant Deed of Conservation Easement*, *supra* note 64.

261. *See infra* Appendix, N.Y. ENVTL. CONSERVATION L. § 49-0305. *See also* LEVIN, *supra* note 9, at 40–41.

262. *See infra* Appendix, N.Y. ENVTL. CONSERV. LAW § 49-0305. *See also* LEVIN, *supra* note 9, at 40–41.

263. *See infra* Appendix, N.Y. ENVTL. CONSERV. LAW § 49-0305(5)-(6)(6).

264. *New York Land Trust Wins $600,000 Lawsuit*, LAND TRUST ALLIANCE, (Feb. 29, 2008), *available at* www.landtrustalliance.org/conservation/conservation-defense/conservation-defense-news/new-york-land-trust-wins-600-000-lawsuit [hereinafter *New York Lawsuit*].

265. *Id.*

266. *Id.*

to the twelve acres.[267] The twelve-acre owner wanted to run heavy equipment and construction vehicles to reach the main building without damaging the existing permitted driveway.[268] Upon discovering this use of the property in violation of the conservation easement, the fee owner, WNYLC, attempted to resolve the issue in a non-adversarial manner by inviting the owner to meet and discuss the issue.[269] The owner did not respond to WNYLC's overtures.[270]

Soon thereafter, the new owner extended a new pond onto the conserved property by 120 feet.[271] Testimony at trial by the contractors working on the twelve acres confirmed that the owner not only knew he had crossed the conserved property's boundary, but had instructed the workers to cross the line, pull up boundary stakes, and clear-cut an eighty-year-old successional hardwood swamp there.[272] After this trespass, WNYLC again immediately attempted to contact the neighbor, but again, received no response.[273]

Contemporaneous with the pond construction, the twelve-acre owner's employees also removed trees, vegetation, and topsoil in order to cut a twenty-foot-wide road, complete with culverts and gravel, across the conserved property.[274] This road was intended to allow access between the new owner's adjacent farm staging area and the main building, in lieu of using a designated right-of-way and public road.[275] WNYLC made more attempts at contact through calls and letters to the new owner, still with no response, and provided notice to the property manager working at the site that all of these issues were a problem.[276] WNYLC then placed chains across the new road and demanded that the new owner cease all trespass against the conserved property.[277]

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267. *See id.*
268. *See id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*

In response, the new owner cut another twenty-foot wide road across the conserved property to reach the staging area.[278]

After providing written notice to the new owner that WNYLC would need to take legal action to protect the conserved property, the new owner beat WNYLC in the race to court, and sued them first.[279] The new owner alleged that WNYLC interfered with the quiet enjoyment of his property and claimed that WNYLC negligently violated the conservation easement on its own property.[280] WNYLC counterclaimed with what would have been its trespass claims.[281] The new owner's negligence claims triggered WNYLC's liability insurance coverage, and WNYLC's attorney convinced its insurance carrier to allow him to handle both the defense and enforcement actions against the new owner to reduce WNYLC's overall legal fees.[282]

WNYLC successfully argued for the dismissal of the new owner's original claims that it violated the state-held conservation easement, basing its argument on standing and using New York's statutory and common law.[283] Despite WNYLC's pleas for it to intervene and defend its conservation easement, the State refused to participate in the case or author a letter stating that that WNYLC was in compliance with the conservation easement.[284] Just before trial, the new owner dropped his remaining claims against WNYLC.[285]

In a unanimous decision, a jury awarded $98,181 in compensatory damages and $500,000 in punitive damages to WNYLC.[286] This is a first in conservation property enforcement from the standpoint of the amount of damages awarded. This award sends a message to potential easement violators and fee-land trespassers that not only might compensatory damages be awarded in full, violators and trespassers might also face

278. *Id.*
279. *Id.*
280. *See id.*
281. *Id.*
282. *See id.*
283. *See id.*
284. *Id.*
285. *Id.*
286. *Id.*

significant punitive damages.[287] The new owner appealed the jury verdict, and in December 2009, the New York Court of Appeals dismissed his appeal in a one-sentence decision without an opinion.[288] In 2010 just before he died, the new owner paid the award in full, with interest, to WNYLC.

WNYLC learned many important lessons from this litigation and attributes its success to a combination of respect for the new owner—despite his outrageous, intentional, and repeated bad acts—and strong efforts to communicate and stop the damage, rather than resorting to retaliatory actions.[289] WNYLC learned to be vigilant of its protected properties, their nearby landowners, and potential trespassers, and to create and maintain relationships with all the landowners and neighbors of its conserved lands. WNYLC learned the benefit of using independent engineers to visit the land and give a dispassionate assessment of the damage to the conserved land when that testimony was persuasive in court.[290] WNYLC learned the critical importance of the baseline documentation report to proving their case, when they were able to submit the report in court to provide the photos and narrative of the property's condition prior to its damage.[291] WNYLC learned to keep good records of the property's conservation, including the conservation transaction and supporting documents, as well as all correspondence with the potential violator so as to be able to produce all of its communication with the new owner in court and document its good faith attempts to resolve the matter amicably.[292] WNYLC also learned the importance of pursuing all violations in a timely manner and instituting its own legal action quickly, in order to protect conserved land from further destruction, and to avoid being sued first by the violator.[293] In this instance, however, WNYLC would not have been able to

287. *Id.*

288. W. N.Y. Land Conservancy, Inc. v. Cullen, 13 N.Y. 3d 904 (2009).

289. *See New York Lawsuit*, *supra* note 263.

290. *Id.*

291. *Id.*

292. *Id.*

293. In Favor of: How a Land Trust Won a Half Million Dollar Judgment, SAVINGLAND, Summer 2008 at 25, *available at* http://tlc.lta.org/documents/4693/file.

claim coverage under its liability insurance policy without the new owner's negligence claim against it, so that timing actually worked in WNYLC's favor.[294]

IV.
LEARNING LESSONS AND LOOKING AHEAD

The foregoing cases and case studies discussed in this Article demonstrate that addressing third-party violations requires even more persistence, diplomacy, and education than dealing with landowner violations. By using the lessons learned from the litigated cases and case studies to look ahead and anticipate violations by nonparties to the conservation easement, holders can prepare for and plan to steward, manage, and enforce conservation easement violations by third parties. The following lessons and suggestions, distilled from the easement holders involved in the foregoing cases and case studies, supply ample guidance for other easement holders to learn from their legal challenges, successes, and mistakes, and to stand on their shoulders in actions against, or resolution of violations by, third parties.

First, the same stewardship basics apply to third-party violations as apply to any conservation easement violation.[295] Holders beginning the stewardship process must make annual visits, and even multiple visits, to the conserved land.[296] Additionally, holders must have good documentation of the condition of the property, including thorough baseline documentation reports.[297]

Second, when a violation occurs, holders must evaluate the resource damage and damage to the purposes of the conservation easement.[298] Holders must consider early on all the factors that influence enforcement decision-making, including possible public perception, media coverage to date, the resource value of the land, any of their own errors, mitigating circumstances, and

294. *See W. N.Y. Land Conservancy, Inc.*, 886 N.Y.S.2d 303 (N.Y. App. Div. 2009).

295. MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 284–85.

296. *Id.* at 14.

297. *Id.*

298. *Id.*

what would best serve the public interest and uphold their own mission.[299] Holders should have and follow violations policies and procedures based on their own policies and *Land Trust Standards and Practices*.[300]

Third, holders need to take immediate and appropriate action to document all encroachments accurately, thoroughly, and objectively with writings, maps, photos, or videos.[301] They need to take stock of volunteer or staff capacity and know their equipment's margin of error.[302] Holders should make a habit of documenting all discussions, proposals, approvals, denials, and interpretations in writing so that nothing is left for verbal conversation without written backup.[303]

Fourth, holders may have to be creative when attempting to identify unknown third-party violators.[304] They may have to use a survey, camera, or other technology to learn who the violator is. This may include physically tracking marks such as all-terrain vehicle or automobile tire tracks.[305] If the landowner is not complicit in the violation, holders can rely on, and work closely with, the landowner to locate the violator.[306] If the violator is located and amenable, the parties and violator can all meet to discuss corrective measures, pursuit of a resolution, or joint efforts to correct the damage to the conserved property.[307] If the third-party violator cannot be found, or is found but unwilling to cooperate, and the violation represents criminal trespass or another violation of the law, a holder may decide to involve law enforcement officials.[308]

Fifth, holders should identify one person to manage communication with the community and the press.[309] Local

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299. *Id.* at 273–81.

300. *Id.* at 295.

301. *Id.* at 278–79.

302. *Id.* at 282.

303. *Id.* at 261, 362, 378, 384.

304. *Id.* at 284–85.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 284–86, 292; *see also Trespass and Third Party Violation Fact Sheet*, 2, THE LEARNING CENTER, *available at* http://tlc.lta.org/documents/6646/file, (last visited Nov. 4, 2013) [hereinafter *Third Party Violation*].

309. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note

communities, the public, landowners, and the holder have made enormous investments in conserving land for the many public benefits provided.[310] Including stakeholders in discussions and updates regarding the violation and other matters, which impact the community, can help maintain land trust credibility.[311] Holders should plan to increase community visibility and the visibility of protected properties to minimize third-party violations.[312]

Sixth, landowners and violators may seem endlessly creative in justifying trespass, so holders will have to be creative in response, especially when financial resources are limited.[313] If a holder takes the lead on resolution of a third-party violation, they can set the tone of the dispute resolution as a problem solver and pursue resolution with perseverance and diplomacy.[314] Holders should review all options with legal counsel before proposing resolution, negotiating, or embarking on enforcement action, and should use appropriate experts to determine resource value damages and the effect of violations.[315] Holders might consider a combination of approaches to address resource damage rather than attempt to recreate prior conditions.[316] For example, holders might consider a revocable license agreement for infractions, such as minor third-party encroachments that cannot be resolved in any other satisfactory manner and do not involve insiders or resource damage. A revocable license agreement could also be used for temporary activities, which have no negative impact on resource values or

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9, at 288; *Third Party Violation*, *supra* note 308.

310. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 285–86; *Third Party Violation*, *supra* note 308, at 4.

311. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 13, 193; *Third Party Violation*, *supra* note 308, at 4.

312. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 19, 295; *Third Party Violation*, *supra* note 308, at 4.

313. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 257; *Third Party Violation*, *supra* note 308, at 4.

314. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 275, 279–82; *Third Party Violation*, *supra* note 308, at 2.

315. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 275, 279–82; *Third Party Violation*, *supra* note 308, at 2.

316. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 275, 278–82; *Third Party Violation*, *supra* note 308, at 2.

conservation easement purposes.[317] A holder should involve legal counsel in any decision to use discretionary approvals or licenses.[318]

Seventh, holders will need to evaluate legal avenues to defend the conservation interest at law, including their own standing to reach the third party, together with or independent of the landowner.[319] Holders can consult with their attorney to identify the conservation easement interest as it is defined by state law and determine their state's law regarding an easement holder's standing to enforce their property rights.[320] Also, holders should closely examine the language of the subject conservation easement for enforcement clauses and guidance regarding third-party violations.[321] In practice, easement holders may find it difficult to enforce a violation against a landowner who did not personally cause the violation, regardless of the easement language. Therefore, holders should anticipate this possibility not only when drafting easements, but also when enforcing them.[322] Alternatively, a holder might only consider pursuing judicial remedies against a third party when the landowner is without fault in causing the violation *and* they want to avoid being a party to the suit.[323] If a landowner is also a violator or contributes in any way to the violation, the holder might pursue enforcement against the landowner, especially if other violation resolution techniques are not successful.[324] Even if the language of the easement places the legal responsibility for the violation only on the landowner, it is important for the holder to explore all methods to hold the third-party violator responsible for remediation of the violation, especially where the landowner had no involvement in the violation.[325] The holder could, for example, consider criminal prosecution or government civil enforcement

317. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 216, 299–301, 327, 344; *Third Party Violation*, *supra* note 308, at 2.

318. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 285.

319. *Id.* at 284–85, 309.

320. *See id.* at 285.

321. *Id.* at 279, 284, 333.

322. *Id.* at 285.

323. *Id.*

324. *Id.*

325. *See id.* at 284.

actions in appropriate circumstances, which also would shift much, if not all, of the enforcement burden away from the holder, and focus on the wrongdoer.[326]

Eighth, most holders know that while litigation may be necessary to inspire action, it can be very costly and time consuming.[327] Because legal challenges have the potential to establish precedent of upholding and enforcing conservation easements, they are worth the money and effort to handle well.[328] If a third-party violation goes to court, holders should be mindful that a judge may look to the conservation easement at issue to determine the intent of the parties and whether the original landowner intended the easement holder to have the ability to enforce third-party violations *per se*, or only against the landowner.[329]

Ninth, trial strategy starts with pretrial preparation, which is both time consuming and expensive.[330] Holders, together with legal counsel, need to develop a solid damages theory and rely on appropriate experts to establish resource values and the effect of the violations, and to assist in developing legal and damages theories.[331] Toward the end of developing the best theories, holders should bring their legal counsel and experts to the land and violation site to observe the impacts and resources at issue.[332] Holders should not underestimate the time needed for a case, and should assume that a case in litigation will go to trial. However, they should not settle prematurely.[333] When parties' emotions are inflamed and they have the resources to pursue a dispute through the judicial system, legal cases can become even more protracted and expensive.[334] Also, holders should be aware

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326. *Id.* at 284, 291, 305–06.

327. *Id.* at 294; *see also Third Party Violation*, *supra* note 308, at 5.

328. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 353, 363.

329. *Id.* at 285.

330. *Id.* at 253, 294; *see also Third Party Violation*, *supra* note 308, at 5.

331. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 339; *Third Party Violation*, *supra* note 308, at 5.

332. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 278, 286, 340; *Third Party Violation*, *supra* note 308, at 5.

333. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 304; *Third Party Violation*, *supra* note 308, at 5.

334. *See generally* MANAGING CONSERVATION EASEMENTS IN PERPETUITY,

that there is no guarantee that attorney fees will be recovered.[335] Property restoration—after all the court actions and appeals—will also require time and money.[336]

Last, holders should review and revise easement templates and models to address new situations and lessons learned from third-party violations.[337] Holders can evaluate their experiences and suggest internal systems changes.[338] Objective observations and perspectives can be gained by interviewing outside stakeholders to harvest their insights on a holder's management of a third-party violation.[339] Going forward, holders should draft easements consistent with state law and its definition of the conservation easement interest, and in anticipation of third-party violations.[340] Easements should define with specificity the legal basis of an easement holder's rights to pursue and reach third-party violators together with, independent of, or through the landowner.[341] Finally, if they do not already have them in place, holders should develop and implement written enforcement policies and procedures that guide resolution of third-party violations.[342]

V.
CONCLUSION

In meeting one of the most rapidly growing and challenging enforcement issues that perpetual conservation easement holders will inevitably confront, holders can take comfort in knowing that others have been tested by, survived, and learned from third-party violations of conservation easements and conserved properties. Holders can anticipate and prepare for the

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supra note 9.

335. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 294.

336. *See id.* at 294.

337. *Id.* at 295.

338. *Id.*

339. *Id.*

340. *See id* at 284–85.

341. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 330; *Third Party Violation*, supra note 308, at 2.

342. *See* MANAGING CONSERVATION EASEMENTS IN PERPETUITY, *supra* note 9, at 264, 269–72.

eventuality of third-party violations by arming themselves with applicable law and legal options. They can do so by drafting and stewarding conservation easements to explicitly address third-party violations, by looking to lessons learned from litigated cases and case studies where holders and conservation organizations confronted and resolved third-party violations and trespass, and by implementing enforcement policies to provide guidance for third-party violations going forward. In so doing, perpetual easement holders can make a difficult situation much easier to evaluate, negotiate, and resolve, which will benefit land protected with perpetual conservation easements or held in conservation.

VI.

APPENDIX

Statutory Definitions Applicable to Cases and Case Studies

CAL. CIV. CODE § 815.2(a)

A conservation easement is an *interest in real property* voluntarily created and freely transferable in whole or in part for the purposes stated in Section 815.1 by any lawful method for the transfer of interests in real property in this state.[343]

CAL. CIV. CODE § 815.7(b)-(d)

(b) Actual or threatened injury to or impairment of a conservation easement or actual or threatened violation of its terms may be prohibited or restrained, or the interest intended for protection by such easement may be enforced, by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated *by the grantor or by the owner* of the easement.

(c) In addition to the remedy of injunctive relief, *the holder of a conservation easement shall be entitled to recover money damages for any injury to such easement or to the interest being protected thereby or for the violation of the terms of such easement. In assessing such damages there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement.*

(d) The court may award to the prevailing party in any action authorized by this section the costs of litigation, including reasonable attorney's fees. [344]

COLO. REV. STAT. § 18-4-501

(1) A person who knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person *in which another person has a possessory or proprietary interest*, in the course of a single criminal

343. CAL. CIV. CODE § 815.2(a) (2012) (emphasis added).
344. CAL. CIV. CODE § 815.7(b) (2012) (emphasis added).

episode commits a class 2 misdemeanor where the aggregate damage to the real or personal property is less than five hundred dollars. Where the aggregate damage to the real or personal property is five hundred dollars or more but less than one thousand dollars, the person commits a class 1 misdemeanor. Where the aggregate damage to the real or personal property is one thousand dollars or more but less than twenty thousand dollars, the person commits a class 4 felony. Where the aggregate damage to the real or personal property is twenty thousand dollars or more, the person commits a class 3 felony.[345]

COLO. REV. STAT. § 18-4-503

(1) A person commits the crime of second degree criminal trespass if such person: (a) Unlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced; . . .

(2) Second degree criminal trespass is a class 3 misdemeanor, but: (a) It is a class 2 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated *as agricultural land* pursuant to section 39-1-102 (1.6), C.R.S.; and (b) It is a class 4 felony if the person trespasses on premises so classified *as agricultural land* with the intent to commit a felony thereon.[346]

COLO. REV. STAT. § 18-4-504

(1) A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another.

(2) Third degree criminal trespass is a class 1 petty offense, but: (a) It is a class 3 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated *as agricultural land* pursuant to section 39-1-102 (1.6), C.R.S.; and (b) It is a class 5 felony if the person trespasses on premises so classified as *agricultural land* with the intent to commit a felony thereon.[347]

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345. COLO. REV. STAT. § 18-4-501 (2012) (emphasis added).
346. COLO. REV. STAT. § 18-4-503 (2012) (emphasis added).
347. COLO. REV. STAT. § 18-4-504 (2012) (emphasis added).

COLO. REV. STAT. § 38-30.5-103

(1) *A conservation easement in gross is an interest in real property* freely transferable in whole or in part for the purposes stated in section 38-30.5-102 and transferable by any lawful method for the transfer of interests in real property in this state.

(2) A conservation easement in gross shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding that it may be negative in character.

(3) A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it.

(4) The particular characteristics of a conservation easement in gross shall be those granted or specified in the instrument creating the easement.

(5) A conservation easement in gross that encumbers water or a water right as permitted by section 38-30.5-104 (1)may be created only by the voluntary act of the owner of the water or water right and may be made revocable by the instrument creating it. [348]

COLO. REV. STAT. §38-30.5-108

(1) No conservation easement in gross shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed as running with the land.

(2) Actual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement *may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by an owner of the easement.*

(3) In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.[349]

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348. COLO. REV. STAT. § 38-30.5-103 (2012) (emphasis added).

349. COLO. REV. STAT. § 38-30.5-108 (2012) (emphasis added).

CONN. GEN. STAT. § 52-560a

> (a) . . . "Encroach" means to conduct an activity that causes damage or alteration to the land or vegetation or other features . . . . Any owner of open space land or holder of a conservation easement subject to the provisions of subsection (b) of this section or the Attorney General. . . the court may award damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars.[350]

CONN. GEN. STAT. § 47-42(a), (c)–(d)

> (a) "Conservation restriction" means a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.
>
> (b) No conservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas and no preservation restriction held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes.
>
> (c) Such conservation and preservation restrictions are interests in land and may be acquired by any governmental body or any charitable corporation or trust which has the power to acquire interests in land in the same manner as it may acquire other interests in land. Such restrictions may be enforced by injunction or proceedings in equity. The Attorney General may bring an action in the Superior Court to enforce the public interest in such restrictions.[351]

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350. COLO. REV. STAT. § 52-560(a) (2012) (emphasis added).

351. CONN. GEN. STAT. § 47-42a-c (West 2012).

CONN. GEN. STAT. ANN. § 52-560a

Damages for encroachment on state, municipal or nonprofit land conservation organization open space land. Attorney General enforcement civil action

As used in this section, 'open space land' includes, but is not limited to, any park, forest, wildlife management area, refuge, preserve, sanctuary, green or wildlife area owned by the state, a political subdivision of the state or a nonprofit land conservation organization and 'encroach' means to conduct an activity that causes damage or alteration to the land or vegetation or other features thereon, including, but not limited to, erecting buildings or other structures, constructing roads, driveways or trails, destroying or moving stone walls, cutting trees or other vegetation, removing boundary markers, installing lawns or utilities, or using, storing, or depositing vehicles, materials or debris.

(b) No person may encroach or cause another person to encroach on open space land or on any land for which the state, a political subdivision of the state or a nonprofit land conservation organization holds a conservation easement interest, without the permission of the owner of such open space land or holder of such conservation easement or without other legal authorization.

(c) Any owner of open space land or holder of a conservation easement subject to the provisions of subsection (b) of this section or the Attorney General may bring an action in the superior court for the judicial district where the land is located against any person who violates the provisions of said subsection with respect to such owner's land or land subject to such conservation easement. The court shall order any person who violates the provisions of subsection (b) of this section to restore the land to its condition as it existed prior to such violation or shall award the landowner the costs of such restoration, including reasonable management costs necessary to achieve such restoration. In addition, the court may award reasonable attorney's fees and costs and such injunctive or equitable relief as the court deems appropriate.

(d) In addition to any damages and relief ordered pursuant to subsection (c) of this section, the court may award damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars. In determining the amount of the award, the court shall consider the willfulness of the violation,

the extent of damage done to natural resources, if any, the appraised value of any trees or shrubs cut, damaged, or carried away as determined in accordance with the latest revision of The Guide for Plant Appraisal, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher, any economic gain realized by the violator and any other relevant factors.[352]

N.C. GEN. STAT. ANN. §§ 121-35

Definition.

(1) A 'conservation agreement' means a right, whether or not stated in the form of a restriction, reservation, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of land or improvement thereon . . . .[353]

N.C. GEN. STAT. ANN. § 121-39

Enforceability of agreements

(a) Conservation or preservation agreements may be enforced by the holder by injunction and other appropriate equitable relief administered or afforded by the courts of this State. Where appropriate under the agreement, damages, or other monetary relief may also be awarded either to the holder or creator of the agreement or either of their successors for breach of any obligations undertaken by either.

(b) Such agreements shall entitle representatives of the holder to enter the involved land or improvement in a reasonable manner and at reasonable times to assure compliance.[354]

N.M. STAT. ANN. § 47-12-3 E, F.

Creation, conveyance, recording, acceptance and duration

E. No land use easement may impair an interest in real property existing at the time the land use easement is created, unless the owner of that interest is a party to the land use easement and consents to it.

F. The rights, obligations and duties created by a land use

352. CONN. GEN. STAT. ANN. § 52-560a (2012).
353. N.C. GEN. STAT. ANN. § 121-35 (2012).
354. N.C. GEN. STAT. ANN. § 121-39 (2012).

easement shall only be enforceable upon and impact the land located within that easement.[355]

N.Y. ENVTL. CONSERVATION § 49-0303

1. Conservation easement means an easement, covenant, restriction or other interest in real property . . . .[356]

N.Y. ENVTL. CONSERVATION § 49-0305

5. A conservation easement may be enforced in law or equity by its grantor, holder or by a public body or any not-for-profit conservation organization designated in the easement as having a third party enforcement right, and is enforceable against the owner of the burdened property. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel or waiver. No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any conservation easement unless such general law expressly states the intent to defeat the enforcement of such easement or provides for the exercise of the power of eminent domain.

6. The holder of a conservation easement, its agents, employees, or other representatives may enter and inspect the property burdened by a conservation easement in a reasonable manner and at reasonable times to assure compliance with the restriction.[357]

32 PA. STAT. ANN. § 5054(e)

Existing interests.—An interest in real property in existence at the time a conservation or preservation easement is created, including easements intended to provide services of a public utility nature and operating rights and easements appurtenant to real property contiguous to real property burdened by the easement which are of record or which arise by operation of law, *may not be impaired unless the owner of the interest is a party to the easement or consents* in writing to comply with the restrictions of such easement.[358]

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355. N.M. STAT. ANN. § 47-12-3 E, F (1978).
356. N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney 2008).
357. N.Y. ENVTL. CONSERV. LAW § 49-0305 5, 6 (McKinney 2008).
358. 32 PA. STAT. ANN. § 5054(e) (2011) (emphasis added).

32 PA. STAT. ANN. § 5055

Judicial and related actions

(a) Persons who have standing.—A legal or equitable action affecting a conservation or preservation easement may only be brought by any of the following:

(1) An owner of the real property burdened by the easement.

(2) A person that holds an estate in the real property burdened by the easement.

(3) A person that has any interest or right in the real property burdened by the easement.

(4) A holder of the easement.

(5) A person having a third-party right of enforcement.

(6) A person otherwise authorized by Federal or State law.

(7) *The owner of a coal interest in property contiguous to the property burdened by the easement or of coal interests* which have been severed from the ownership of the property burdened by the easement.

(b) Limitation on actions.—*No action may be brought for activities occurring outside the boundaries of a conservation or preservation easement* except in circumstances where such activities have or pose a substantial threat of direct, physically identifiable harm within the boundaries of the easement;

(c) Enforceable interests not invalidated.—This act does not invalidate any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, enforceable under another law of this Commonwealth or the common law.[359]

32 PA. STAT. ANN. § 5059

Coal interests not affected and notice of mineral interests required

(a) Coal rights preserved.—Nothing in this act limits, expands, modifies or preempts the rights, powers, duties and liabilities of operators or other persons under the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act, or the act of April 27, 1966 (1st Sp.Sess., P.L. 31, No. 1), known as The Bituminous Mine

359. 32 PA. STAT. ANN. § 5055(a)–(b) (2011) (emphasis added).

Subsidence and Land Conservation Act. *This act does not limit or restrict any coal mining activity which was permitted or for which an application for permit was filed prior to the recording of a conservation easement under this act.*

(b) Prohibited action.—The *existence of a conservation easement on contiguous property may not serve as the sole grounds for designation of areas unsuitable for mining* pursuant to section 4.5 of the Surface Mining Conservation and Reclamation Act.

(c) Easements of necessity.—*Nothing in this act shall be construed to limit* the exercise of rights created by easements of necessity or inherent in the ownership of *property contiguous to the property burdened by the easement or of coal interests* which have been severed from the ownership of the property burdened by the easement.

(d) Notice of coal interests.—*A conservation easement affecting real property containing workable coal seams or from which an interest in coal has been severed may not be recorded or effective unless the grantor or donor of the easement signs a statement printed on the instrument creating the conservation easement stating that the easement may impair the development of such coal interest.* This statement must be printed in no less than 12-point type and must be preceded by the word 'Notice' printed in no less than 24-point type.[360]

VT. STAT. ANN. Tit. 10 § 821(a)

(a) "Conservation rights and interests" mean rights held by a qualified holder to restrict or condition the use, modification or subdivision of a land or water area and rights to perform, or require the performance of, specified activities with respect thereto. These rights and interests shall be for the purpose of maintaining, enhancing and conserving that land or water area, including improvements thereon, predominantly in its natural, scenic, or open condition, or in agricultural, farming, forest, wildlife or open space use, or for public recreation, or in other use or condition consistent with the purposes set forth in 10 V.S.A. § 6301.[361]

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360. 32 PA. STAT. ANN. § 5059(a)–(d) (2011) (emphasis added).

361. VT. STAT. ANN. tit. 10 § 821(a) (2012).

VT. STAT. ANN. Tit. 10 § 822

> Conservation and preservation rights and interests shall be stated in the form of a deed restriction, right, easement, covenant or condition. These rights and interests shall be valid, exercisable, and enforceable by the holder thereof and by the holder's successors and assigns, against the owner of the encumbered property and the owner's heirs, successors and assigns, whether or not such rights or interests are appurtenant to or benefit a specific parcel of real property, and regardless of privity of contract, or lack thereof, between the holder of such rights or interests and the owner of the encumbered property.[362]

VT. STAT. ANN. Tit. 10 § 823

> Conservation and preservation rights and interests shall be deemed to be interests in real property and shall run with the land. A document creating such a right or interest shall be deemed to be a conveyance of real property and shall be recorded under chapter 5 of Title 27. Such a right or interest shall be subject to the requirement of filing a notice of claim within the forty year period as provided in section 603 of Title 27. Such a right or interest shall be enforceable in law or in equity.[363]

VT. STAT. ANN. Tit. 10 § 6301

> It is the purpose of this chapter to encourage and assist the maintenance of the present uses of Vermont's agricultural, forest, and other undeveloped land and to prevent the accelerated residential and commercial development thereof; to preserve and to enhance Vermont's scenic natural resources; to strengthen the base of the recreation industry and to increase employment, income, business, and investment; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare.[364]

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362. VT. STAT. ANN. tit. 10 § 822 (2012).
363. VT. STAT. ANN. tit. 10 § 823 (2012).
364. VT. STAT. ANN. tit. 10 § 6301 (2012).

VT. STAT. ANN. Tit. 10 § 6303

(a) The rights and interests in real property which may be acquired, used, encumbered and conveyed by a municipality, state agency or qualified organization shall include, but not be limited to, the following:

(1) Fee simple.

(2) Fee simple subject to right of occupancy and use, which may be defined as full and complete title subject only to a right of occupancy and use of the subject real property or part thereof by the grantor for residential or agricultural purposes, subject to the provisions of section 6304 of this title and to such other terms as the legislative body of the municipality, the qualified organization, or the state agency may fix.

(3) Fee simple and resale of rights and interests, which may be defined as the acquisition of real property in fee simple and the subsequent reconveyance of rights and interests in such property to the former owner or to others, subject to the provisions of section 6304 of this title and to specified covenants, restrictions, conditions or affirmative requirements fixed by the legislative body of the municipality, the qualified organization, or the state agency in its discretion and designed to accomplish the purposes set forth in section 6301 of this title.

(4) Fee simple and lease back, which may be defined as the acquisition of real property in fee simple and the lease for the life of a person or for a term of years of rights and interests therein, subject to the provisions of section 6304 of this title and to specified covenants, restrictions, conditions or affirmative requirements fixed by the legislative body of the municipality, the qualified organization, or the state agency in its discretion and designed to accomplish the purposes set forth in section 6301 of this title.

(5) Less than fee simple. The acquisition and retention of any rights and interests in real property less than fee simple.

(6) Lease. The lease of land or rights and interests in land for a term, with or without an option to purchase.

(7) Option to purchase. The acquisition of an option to purchase land or rights and interests therein.

(b) The legislative body of a municipality, a state agency or a qualified organization, as the case may be, shall determine the types of rights and interests in real property to be acquired,

including licenses, equitable servitudes, profits, rights under covenants, easements, development rights, or any other rights and interests in real property of whatever character.

(c) Where less than fee simple ownership is acquired or retained, such right and interest may, in the discretion of the legislative body of the municipality, the state agency or the qualified organization, include a right to enter in order to accomplish the purposes of section 6301 of this title.[365]

VT. STAT. ANN. Tit. 10 § 6307

(a) The rights and interests in real property acquired by a municipality or state agency under the authority of this chapter shall be considered as municipal or state-owned land, as the case may be, with respect to taxation and state reimbursement in lieu of taxes.

(b)(1)The commissioner of the department of taxes may certify that real property acquired by a qualified organization under this chapter is being held and maintained for the purposes expressed in section 6301 of this title. As a condition of that certification, the commissioner may require that the qualified organization provide adequate assurances that the property is being so held and maintained, including but not limited to written agreements with the department of taxes, deeds, covenants or other conveyances. Property which is so certified:

(A) if in the nature of an interest in fee simple, shall be assessed on the basis of its actual use, or may be enrolled by the qualifying organization in a current use program under chapter 124 of Title 32; or

(B) shall be exempt from assessment and taxation, if in the nature of an interest other than fee simple.

(2) For purposes of this section, where a qualified organization holds a lease in the property for a term greater than ten years, including renewal terms, or holds such other interests as the commissioner shall determine to be substantially equivalent to an interest in fee simple, the organization shall be deemed to hold an interest in fee simple.

(C) After acquisition by a municipality, state agency or qualified organization of a right or interest in real property under the authority of this chapter, the owner of any

365. VT. STAT. ANN. tit. 10 § 6303 (2012).

remaining right or interest therein not so acquired shall be taxed, under the applicable provisions of chapter 123 of Title 32, only upon the value of those remaining rights or interests to which he retains title. The state agency or qualified organization, and the department of taxes, shall cooperate with that owner, and with the town assessing such tax, in the determination of the fair market value of any such remaining right or interest.

(D) Property held by a qualified organization and taxed or exempted under subsection (b) of this section shall be subject to a conversion tax if the commissioner determines that it is no longer being held and maintained for the purposes expressed in section 6301 of this title. The amount of the conversion tax shall be five times the amount of the taxes avoided by reason of the exemption in the most recent year. The conversion tax shall be paid to the municipality in which the property is located.[366]

VT. STAT. ANN. Tit. 10 § 6307

Enforcement.

(a) Injunction. In any case where rights and interests in real property are held by a municipality, state agency or qualified organization under the authority of this chapter, the [holder] may institute injunction proceedings to enforce the rights of the municipality, state agency or qualified organization, in accordance with the provisions of this chapter, *and may take all other proceedings as are available to an owner of real property under the laws of this state to protect and conserve its right or interest*.

(b) Liquidated damages. Any contract or deed establishing or relating to the sale or transfer of rights or interests in real property under the authority of this chapter may provide for specified liquidated damages, actual damages, costs and reasonable attorney fees *in the event of a violation of the rights* of the municipality, state agency or qualified organization thereunder.[367]

366. VT. STAT. ANN. tit. 10 § 6307 (2012).
367. VT. STAT. ANN. tit. 10 § 6307 (2012).

VT. STAT. ANN. Tit. 13 § 3602
Unlawful cutting of trees

(a) Any person who cuts, fells, destroys to the point of no value, or substantially damages the potential value of a tree without the consent of the owner of the property on which the tree stands shall be assessed a civil penalty in the following amounts for each tree over two inches in diameter that is cut, felled, or destroyed:

(1) if the tree is no more than six inches in stump diameter or DBH, not more than $25.00;

(2) if the tree is more than six inches and not more than ten inches in stump diameter or DBH, not more than $50.00;

(3) if the tree is more than 10 inches and not more than 14 inches in stump diameter or DBH, not more than $150.00;

(4) if the tree is more than 14 inches and not more than 18 inches in stump diameter or DBH, not more than $500.00;

(5) if the tree is more than 18 inches and not more than 22 inches in stump diameter or DBH, not more than $1,000.00;

(6) if the tree is greater than 22 inches in stump diameter or DBH, not more than $1,500.00.

(b) In calculating the diameter and number of trees cut, felled, or destroyed under this section, a law enforcement officer may rely on a written damage assessment completed by a professional arborist or forester.[368]

VT. STAT. ANN. Tit. 13 §3606
Treble damages for conversion of trees or defacing marks on logs

If a person cuts down, destroys, or carries away any tree or trees placed or growing for any use or purpose whatsoever, or timber, wood, or underwood standing, lying, or growing belonging to another person, without leave from the owner of such trees, timber, wood, or underwood, or cuts out, alters, or defaces the mark of a log or other valuable timber, in a river or other place, the party injured may recover of such person, in an action on this statute, treble damages or for each tree the same amount that would be assessed as a civil penalty under section 3602 of this

368. VT. STAT. ANN. tit. 13 § 3602 (2012).

title, whichever is greater. However, if it appears on trial that the defendant acted through mistake, or had good reason to believe that the trees, timber, wood, or underwood belonged to him or her, or that he or she had a legal right to perform the acts complained of, the plaintiff shall recover single damages only, with costs. For purposes of this section, "damages" shall include any damage caused to the land or improvements thereon as a result of a person cutting, felling, destroying to the point of no value, substantially reducing the potential value, or carrying away a tree, timber, wood, or underwood without the consent of the owner of the property on which the tree stands. If a person cuts down, destroys, or carries away a tree or trees placed or growing for any use or purpose whatsoever or timber, wood, or underwood standing, lying, or growing belonging to another person due to the failure of the landowner or the landowner's agent to mark the harvest unit properly, as required under section 3603 of this title, a cause of action for damages may be brought against the landowner.

2009, Adj. Sess., No. 147, § 5, rewrote this section, which read:

> "If a person cuts down, destroys or carries away any tree or trees placed or growing for any use or purpose whatsoever, or timber, wood, or underwood standing, lying or growing belonging to another person, without leave from the owner of such trees, timber, wood, or underwood, or cuts out, alters or defaces the mark of a log or other valuable timber, in a river or other place, the party injured may recover of such person treble damages in an action on this statute. However, if it appears on trial that the defendant acted through mistake, or had good reason to believe that the trees, timber, wood, or underwood belonged to him, or that he had a legal right to perform the acts complained of, the plaintiff shall recover single damages only, with costs."[369]

369. VT. STAT. ANN. tit. 13 § 3606 (2012).