

A10. Tackling Trespassers

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Room 607

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TACKLING TRESPASSERS

Land trusts can and should tackle trespassers. Trespass is the fastest growing class of conservation easement violations and encroachments on fee conservation land.



The key is how, what, when and who to involve.

This session explores how stewardship personnel manage the fastest growing class of conservation easement violations and fee land damage—those caused by third parties. We will establish the legal bases for reaching trespassers who are not parties to the conservation easement (with or without the landowner's participation) as well as dealing with the practical realities of fee land trespass.

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1. Trends and Overview of Workshop
2. Story 1 on CE trespass – **First Case Story Access Road through CE**
 - a. Brainstorm approaches
 - b. Other examples from group
 - c. Existing guidance
 - d. Drafting considerations and options
 - e. Stewardship
3. Story 2 on CE trespass – **Second Case Story**
 - a. Brainstorm approaches
 - b. Other examples from group
 - c. Existing guidance
 - d. Drafting considerations and options
 - e. Stewardship
4. Story 3 on CE trespass- **Third Case Study**
 - a. Brainstorm approaches
 - b. Other examples from group
 - c. Existing guidance
 - d. Drafting considerations and options
 - e. Stewardship
5. Story 4 on CE trespass – **Fourth Case Story** Fee Recreational Use on Deed Restricted Property
 - a. Brainstorm approaches
 - b. Other examples from group
 - c. Existing guidance and laws
 - d. Drafting considerations and options
 - e. Stewardship
6. What We Learned
7. Remember to complete the evaluations!

A. Overview

1. Conservation easements are a **property right** and implications of that point.
2. Fee land **trespass law well established** but land trusts still have perception obstacles.
3. Both the **state enabling legislation** for conservation easements and the **common law** regarding negative easements, restrictive covenants and equitable servitudes give land trusts a right of enforcement.
4. Land trust is a **directly aggrieved party** and thus has standing and other rights against the landowner for the violation, regardless of cause, or the third party.
5. **Standing** issues can sometimes play a role especially if the **land trust fails to enforce**.
6. A land trust would only be interested in pursuing judicial remedies against a third party where the **landowner is without fault** in causing the violation and the landowner wants to avoid being a party to the suit.
7. If **landowner is a violator** or contributes in any way to the violation, then the land trust can sue the landowner.
8. If the **landowner wants to join** the suit, land trust likely would not be able to prevent this and likely welcome landowner in the suit as more persuasive to the court.
9. Consider use of **criminal actions and statutes** and how they fit into the picture, don't threaten them.

B. The Law

1. **Statutory and common law** legal options (see **Appendix B**):
 - a. reaching the third party alone (without the landowner's participation/cooperation);
 - b. reaching the third party collaboratively (with landowner's participation);
 - c. education of the judiciary, lawyers, stakeholders and general public
2. **Cases** (see **Appendix C, D**)
 - a. *Board of Regents v. Roth*, 408 US 564, 577 (1972) established the principle that property interests are created by state law.
 - b. Tax court cases recognize state real property law to apply to conservation easements.
 - i. State law determines the nature of the property rights, and Federal law determines the appropriate tax treatment of those rights. (*Carpenter*)
 - ii. State law determines whether a baseline may be incorporated by reference into a conservation easement. (*Butler*)
 - iii. Annual monitoring is sufficient to uphold perpetuity and to ensure that reserved rights are not inconsistent uses with the protected conservation purposes. (*Butler, Friedberg*)
 - iv. Existing land-use and zoning regulations may render the donation of an easement as not rising to the level of a "qualified conservation contribution" (*Asser [1982 East LLC]*) or of no value. (*Turner, Herman, Dunlap*)
3. **Real estate principles provide greater protection** to conservation purposes and values and the authority of land trusts to administer conservation easements on a *conservation basis* rather than using commercial principles prevalent in contract law.
4. Reasonableness doctrine case in point; commercial **reasonableness is based on economics** and cost benefit analysis; reasonableness in the administration of a real estate interest by a land trust has greater deference and discretion in pursuing purposes that are not economically profitable.
5. Conservation easements should **not be subject to rules of the Uniform Commercial Code**. These are not commercial endeavors; indeed by their terms conservation easements generally prohibit all but de minimis or fully consistent commercial activities.
6. Traditional **real estate law has some overlap with contract law** so elements of covenants or mutual agreements in conservation easements are consistent with this principle.

C. Trends and Statistics

1. Surveys and anecdotal evidence shows that **successor generation landowners and third parties** are the largest sources of CE violations, and **neighbors and other stakeholders** are the biggest fee land trespassers. (See **Appendix F**)
2. Fee simple and easement properties are **equally likely** to be involved in a dispute.
3. **58%** of legal issues involved easements; **42%** involved fee land.
4. The total cost is only **partially attorney fees**:
 - a. **37%** attorney fees, **38%** other legal cost,
 - b. **25%** other costs (restoration, boundary surveys, monitoring, other on the ground expenses)
6. Trespass is **second highest violation** by type (structures are first)

First Case Story

Neighbor Improves Road Through CE Property

Background

Conservation easement encumbers 338-acre ranch in a rural agricultural area. A neighbor was given permission by the CE landowner to use an existing road that ran through the CE property to access his adjacent property. The neighbor significantly altered and improved the road through the CE property by using a bulldozer to widen the road and decrease the grade as the road went through a canyon. The CE landowner had only verbally given permission for the neighbor to use of the road. No improvements to the road were discussed, nor authorized.

Pertinent CE Language

“Roads. No portion of the Property shall be paved or otherwise be covered with concrete, asphalt, or any other paving material (except as authorized above has part of an Agricultural Structure or Residential Improvement or for patios adjacent to authorized buildings) without the prior written approval of Grantee, which approval may be withheld in the sole and subjective discretion of Grantee. If Grantor determines to pave or otherwise cover with concrete or asphalt the driveway to the Residential Building Envelope existing on the date of this Deed, then Grantee will consent to such paving unless Grantee reasonably determines that paving the driveway will have a material and adverse effect on the Conservation Values of the Property. Notwithstanding the foregoing, Grantor shall have the unfettered right to utilize unpaved, temporary or seasonal paths of travel, not to exceed fifteen (15) feet in width, across any portion of the Property in connection with Grantor’s agricultural operation on the Property.”

“Motor Vehicle Use. Motor vehicle use on the Property will be confined to established roads, except in connection with the agricultural operation on the Property. “

Challenges

- The CE road language is unclear as to what is permitted and prohibited regarding roads.
- CE landowner wanted Land Trust to participate in a lawsuit against the neighbor. Land Trust didn’t believe that improving the road was a clear violation of the CE.
- Landowner assumed that LT was responsible for enforcing the conservation easement terms against all parties.
- LT has to convince CE landowner of their commitment to uphold the conservation values even though they won’t file a lawsuit.

Lessons Learned

- It can be difficult to assure a landowner of your commitment to protect the conservation values when there is a disagreement over CE language. We tried to be supportive and offered our assistance.

Violations

- Bulldozing, widening road, changing grade?
- No Land Trust consent?
- Neighbor access not agriculture?
- Motor vehicle use not for agriculture?

Stewardship

- Document activity
- Conversations with landowner

Status/Progress

- Determination of no violation

Resolution?

Second Case Story

County Economic Development Council Constructs Recreational Pavilion on CE Property

Background

Conservation easement is 3,500 acres of open rangeland encompassing approximately 3 miles of river. The property is in a rural agricultural area just outside a small town (pop. 677) but is visible and adjacent to a well-traveled highway. In addition to the conservation easement, a fishing access easement was acquired on a portion of the property by the State for public access to the river. In cooperation with the State, the County and a national wildlife organization an easy access recreational trail was built within the fishing easement to provide fishing access for individuals with disabilities. The LT determined the trail was consistent with the CE and approved its construction. A year later, the LT received a request from a construction company and from the president of the County Economic Development Council to build a picnic pavilion and restrooms on the property to serve the public fisherman. A week after the LT received the initial request, and before it had received details on the project, the LT received word from a neighbor that construction had already begun on the pavilion. The LT visited the site to confirm that dirt had been excavated to level the area for a pad and materials were stockpiled for the pavilion. The LT determined the pavilion and restrooms were not consistent with the CE and did not approve the request. LT required the restoration of the disturbed area.

Pertinent CE Language

Conservation Values are agricultural, riparian, ecological, open space, scenic and wildlife. Limited agricultural improvements are permitted within a designated building envelope. In addition, "The construction of any other improvements is prohibited unless Grantee determines in its sole discretion that the proposed construction is not inconsistent with the preservation and protection of the Conservation Values."

Challenges

- Prior violations (significant overgrazing by buffalo) needed to be resolved with the landowner before any new improvements would be considered by the LT.
- The property had been foreclosed upon and the owner was in bankruptcy court at the time of the pavilion request. LT was unwilling to approve anything on the CE while ownership was in limbo.
- Request for the pavilion initially came from a construction company, then from the President of the County Economic Development Council. President stated County had given a permit for the construction and landowner had given permission for the project. LT followed up with landowner who stated that he did not give permission for the pavilion and the County stated they did not approve a permit for construction because there was not a landowner authorization letter with the application.
- Multiple articles were written about the project in the local newspaper, describing the value of the project. One article, published two months before the LT was made aware of the project, showed the president of a disabled veterans' organization helping to construct the pavilion.
- The LT required that the disturbed area be restored, but there was no one to enforce against.

Lessons Learned

- Always make sure that you are corresponding directly with the landowner, not just a third party.
- Don't approve anything if land ownership is in question.
- Keep an eye on local papers and media—you can learn a lot about what is going on and what information is being given to the community.
- It's hard to be in the line of fire, especially when it appears that you are not supportive of a population in need. Look for support from partners and the community.
- It is important to listen to the wants and needs of the community, but ultimately a decision must be made that is consistent with the conservation easement.

Violations

- Ag improvements only, inside BE
- Construction of improvements inconsistent with protection of the CVs
- No public recreation value

Stewardship

- Document activity—no one to enforce against!

Status/Progress

- Determination of violation

Resolution?

Third Case Story

Utility Line Installation to Neighbor's Property Across CE Property

Background

- Conservation easement on 125-acres that protects relatively natural habitat and scenic open space
- Property is covered by forest, mountain shrub, and riparian vegetation communities and provides habitat for big game and other species typical to the mountains of Colorado
- Land is cherished as a retreat by the family that has owned it for decades

Violation

- Contractors of a utility company installing a fiber optic line to a neighboring property trespassed and caused considerable ground damage to the conservation easement including:
 - Utility trench across 2,000+ feet (buried and exposed)
 - Disturbance of 1,500+ feet of ground and vegetation by an errant bulldozer driver
- Property manager discovered the trespass and immediately notified the contractor to cease work
- Property manager notified the owners and land trust
- Land trust documented extent of damage in a detailed report

Pertinent CE Language

- Grantor is not responsible for acts of third parties not authorized to access the property
- Standard language prohibiting unapproved surface disturbance
- Ability for trust to grant approval for installation of utility lines
- Restoration required from any surface disturbance
- Trusts ability to enforce and remedy third party violations
- Trusts financial interest in the fair market value of the property from proceeds arising from payment of damages

Resolution

- Neighbor felt terrible for trespass and took responsibility for remediation
 - Decided to go after violating party separately
- Neighbor hired a lawyer to negotiate with CE landowner and land trust to reach a settlement agreement
- Neighbor hired a survey to document fiber optic trench and bulldozer path
- Land trust and landowner agreed to grant a utility easement and to require extensive restoration
 - Pulling out the fiber optic line was deemed an additional disturbance
 - Landowner and land trust agreed to grant a utility easement
- Proceeds from utility easement and payments for nuisance/suffering were proportionally split between landowner and land trust based on price per acre from the CE appraisal
 - Followed condemnation protocol to avoid the granting of impermissible private benefit
- Detailed restoration plans were prepared and implemented by a consultant per the terms of the settlement agreement
 - Damage has been restored
- Land trust staff time and legal fees were also covered under the settlement agreement

Lessons Learned

- Got to love a good neighbor
- Careful documentation pays off
 - Detailed violation report with maps and photos
 - Legal memos documenting land trust position and possible remedies
 - Detailed letter from land trust to landowner documenting process to resolution
- Always contact TerraFirma and general liability insurance provider
 - Neighbor was immediately willing to remediate the situation so no claim was filed
 - Should have done so anyways as a fall back plan

Fourth Case Story **(if time permits) Hypothetical Fee Recreational Property Trespass**

Background

- Deed restricted property donated in fee to LT in early 1990s through will of landowner
- Ambiguous but seemingly restrictive public recreational uses allowed, only
- Local horseback/trail riding association claims their use of trail has preceded deed restriction of landowner, was always with landowner's permission, and that landowner always intended to allow continued use by horseback riders thereafter
- Light, ephemeral past use of trail by horseback riders apparent to LT from tracks and droppings
- LT never directly confronts use of trail by horseback riders, thinking such use was consistent with intent of deed or not considering direct language of deed
- Recent weather events have made other nearby public horseback riding trails dangerous to impossible to use
- LT trail and property now an important connector to other County-owned horseback trails and properties with public access for horseback riding
- Both public and County want trail to be used by horseback riders, citing public safety and access concerns
- LT reviews deed and states publicly that language of deed prevents it from allowing horseback riding at all, and especially increased horseback riding use of the property, so must close trail to horseback riding use
- Public backlash at trail closure expressed in various media outlets, public forums, and at public County meetings
- Local horseback trail riders form non-profit organization "Save Horseback Trails" to fight for access
- Threatens to file suit against the LT seeking a temporary restraining order, stay and judgement against closing the trail under two legal theories: (1) public prescriptive easement and (2) that the donor's intent was for the trail to be allowed
- County rejects pursuit of condemnation proceedings due to negative public perception of takings

Pertinent Deed Restriction language

- Deed requires public access for "passive recreational uses including meditation, reflection, picnicking, wildflower picking, bird watching, wildlife observation, walking, hiking, and when weather permits, snowshoeing and cross-country skiing".
- Deed restricts public use of the property to areas of "trail easement" and "picnic area", shown on hand-drawn map attached to deed.

Challenges? Options? Stewardship considerations?

- How do you manage public perception and public interactions?
- What can you do when the public entity is either an adversary or not a supporter of the LT position?
- How do you manage the stewardship of years of horseback riding use never challenged by the LT?

Legal Issues

- Is it ever okay not to fight a legal battle or to let the other side win?
- What kind of coverage might you have if you are defendant in a legal action?

Lessons to Learn

- Is there any way to manage or anticipate restricted fee gifts?
- Are you allowed to reject a restricted fee gift of which you've had no part in shaping the prospective enforcement and management?

D. Legal avenues/Options

- By **Holder Against Landowner**: violation of enabling statute or other legislation, trespass, nuisance, negligence, breach of contract, criminal trespass;
- By **Holder Against 3d Party, with** Landowner Cooperation: possibly violation of enabling statute or other legislation, trespass, possibly nuisance, negligence, possibly breach of contract though landowner contract relationship with 3d party, or assist landowner, or assign rights, possibly criminal;
- By **Holder Against 3d Party, without** Landowner Cooperation: possibly violation of enabling statute or other legislation, trespass, possibly nuisance, negligence, no contract relationship with 3d party; possibly criminal;
- Potential **Remedies** from Landowner or 3d Party: injunction, restoration, compensatory damages, possibly punitive damages, attorney fees, injunction, restoration, cease and desist, specific performance, monetary damages for value of harm caused by breach, liquidated damages, misdemeanor, felony charges, jail time.
- **Standing** is the right to bring a lawsuit.
 - Third parties have often/also sued land trusts for perceived failures to enforce
 - Generally denied except in a few instances
 - Possible Causes of Action: Statutory/Legislative, Property, Tort, Contract, Criminal (See **Appendix A**)
 - For full case listing (See **Appendix E**)

Options when the trespasser is unknown

1. **Enforce compliance and protection of conservation values on the CE landowner.**
 - a. Benefits include:
 - i. Continued protection of conservation values.
 - ii. Restoration of impacted habitats.
 - iii. Reduce likelihood of repeat trespass by third parties.
 - b. Ramifications include:
 - i. Lack of landowner participation.
 - ii. Costly effort to reduce working landowner relationship.
 - iii. High costs of site restoration.
2. **Do nothing**
 - a. Benefits include:
 - i. Maintain existing relationship with landowner.
 - ii. Safety of staff, volunteers and landowners.
 - b. Ramifications include:
 - i. Conservation values of protected land impacted.
 - ii. Repeated use or expansion of location by third party.
 - iii. Possible loss of confidence in organization's mission.
3. **Consider external factors that could assist land management approach**
 - a. Benefits include:
 - i. Reduction of black-market supply and demand.
 - ii. Increased safety to Land Trust staff and volunteers.
 - b. Ramifications include:
 - i. Land Trust taking political action.
 - ii. Possible PR difficulties in affected communities.
 - iii. Mission drift? Inconsistency with organizational mission?

E. Drafting: Sample CE language (from least to most landowner responsibility)

LESS LANDOWNER RESPONSIBILITY

1. General Easement Examples

- a. **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, including acts of third party trespassers.* 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.
- b. **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*

beyond Grantor's control; however, Grantor is responsible for guests, invitees, and other third parties within Grantor's control or authorized by Grantor to access the Property;

- c. **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.*

2. Aspen Valley Land Trust

Rights of Grantee.

5.3 The right, *as an interest owner in the Property* (as defined in Section 5.5 below) to prevent or enjoin Grantor or third parties (whether or not invitees of Grantor) from conducting any activity on or use of the Property that is inconsistent with the purposes of the Easement; and the right to require Grantor or third parties, as may be responsible, to restore such areas or features of the Property that are damaged by any inconsistent activity or use, subject to the qualifications of Section 13.5 herein; . . .

5.5. *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. The Trust's rights in participating in or defending the Property from mineral development agreements are more specifically described in Section 7.2 herein. ...*

13.5 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 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 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 Section 5.5 herein.*

3. Aspen Valley Land Trust Optional procedural/collaborative language

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 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 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.

MODERATE LANDOWNER RESPONSIBILITY

1. Legacy Land Conservancy

10.5 Acts Beyond Owner's Control. 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:*

10.5.1 *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.*

10.5.2 *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 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.

10.5.3 *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.*

SPLIT LANDOWNER RESPONSIBILITY

1. The Jackson Hole Land Trust

7.3. Right to Recover Damages. 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 ...

7.5. Right to Proceed Against Third Parties. *The Grantee has the right to proceed against any third party or parties whose 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.*

7.6. 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.

2. Blackswamp Conservancy

6. Rights of Grantee. To accomplish the purpose and to assure compliance with this Conservation Easement, Grantee shall have the following rights: * * *

6.2 *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. * * **

7. Grantee's Remedies. * * *

7.6 All reasonable costs incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, including, without limitation, costs and expenses of suit and reasonable attorneys' fees, and any costs of restoration, necessitated by Grantor's violation of the terms of this Conservation Easement, shall be borne by Grantor.

7.7 *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.*

7.8 If there is an actual or threatened violation, any delay or omission by Grantee in the exercise of its rights shall not be construed as a waiver or otherwise impair its rights.

8. Acts Beyond Grantor's Control. Notwithstanding Grantor's obligations under this Conservation Easement and Grantee's rights pursuant to Section 7, *Grantor shall have the following rights and obligations for acts or occurrences at the Property beyond the direct or indirect control of Grantor:*

8.1 *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.*

8.2 *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.

8.3 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.

3. Vermont Land Trust

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.

FULL LANDOWNER RESPONSIBILITY

1. Conservation Easement Handbook Template Easement

10.B. 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.*

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.

Columbia Land Conservancy

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

F. Legal Regime Guidance

1. Internal Revenue Code

- A. Require qualified contributions to be of qualified real property interests;
- B. Which are defined as interests in real property, including:
- C. A restriction (granted in perpetuity) on the use which may be made of the real property.

2. Uniform Conservation Easement Act (see your state's CE or other statutes):

- A. Identifies conservation easements as non-possessory property interests;
- B. Does not explicitly give standing to land trusts to sue a third party;
- C. But it does not prohibit it either.

3. Restatements of Law: Property/Servitudes; Torts; Restitution (see your state's common laws):

- A. Identified conservation easements as servitudes
- B. Does not explicitly give standing to land trusts to sue a third party;
- C. But does not prohibit it either, and
- D. Encourages courts to vigorously defend conservation easement enforcement through the full panoply of legal and equitable remedies, and damages designed to deter bad acts/actors.

4. **State Enabling Acts:** A land trust may have standing to sue, depending on state laws if the state enabling act treats conservation easements as a property interest (and almost all do so):
 - A. Land trust may have standing under real estate laws; land trust may prevail by arguing that it holds a property right; against which the violator trespassed; so the land trust is a directly aggrieved person and has standing to sue.
 - B. If a state does not create a real property right, then argue that legislative intent of the enabling act allows standing;
 - C. Most enabling legislation gives a land trust a right of enforcement but not always clear if that right applies to third parties
 - D. Objections to land trust exclusive involvement may be based upon:
 - i. The failure to include an indispensable person (the landowner);
 - ii. And/or the land trust's possible lack of standing to sue the third party.
 - E. If the landowner wants to join the suit, land trust:
 - a. Not be able to prevent that;
 - b. Would welcome the landowner; and
 - c. Would be more persuasive to the court.
6. See Colorado, Connecticut acts for special provisions relating to enforcement and as relate to case studies (**Appendix B**)

G. Forty stewardship suggestions

Land trusts may find that anywhere from 10 to 40 percent of the conservation restriction violations they must address are caused by third parties. Addressing third-party violations requires even more persistence, diplomacy and education than dealing with landowner violations.

1. Draft conservation easement to **obligate landowners to prevent** trespass or other actions that may lead to violations. (See VLT Letter Explaining Enforcement **Appendix D**), but recognize that in practice, land trusts find it difficult to enforce a restriction violation against a landowner who did not personally cause the violation.
2. **Draft easement to include property interest and explicit rights of entry** to enforce restrictions against third parties without joining the owner.
3. **Work closely with the landowner** to locate the trespasser and pursue a resolution or jointly correct the damage to the property.
4. **Hold a meeting** with all parties to discuss corrective measures.
5. If the third-party violator cannot be found, or can be found but is unwilling to cooperate, and if the violation also represents criminal trespass or otherwise is a violation of the law, it may be desirable to **involve law enforcement officials** to discuss resolution options (but do not threaten criminal response).
6. Even if the language of the restriction places the legal responsibility for the violation on the landowner, it is important to **try every possible method** to hold the third-party violator responsible for remediation of the violation.
7. **Consider who is at fault** pursuing judicial remedies against a third party when the landowner is without fault in causing the violation *and* the landowner wants to avoid being a party to the suit. If the owner is a violator or contributes in any way to the restriction violation, then the land trust can sue the landowner, if other violation resolution techniques are not successful.
8. If a third-party violation winds up in court, the **judge may look to the conservation easement** to determine the intent of the parties and whether the original landowner intended the land trust to have the ability to enforce third-party violations.
9. Consider dealing with nominal encroachments **with a license** (See Sample, **Appendix D**).
10. Have a **written policy** and procedures for addressing third party violations and trespass, and implement *Land Trust Standards and Practices*.
11. Make **annual visits** and even multiple visits during the year to the conserved land.
12. Have a **great baseline** documentation report.
13. Evaluate the **resource damage and damage to the purposes** of the conservation easement.
14. **Consider all the factors**, including possible public perceptions, media coverage to date, the resource value of the land, any errors by the land trust, mitigating circumstances, what would best serve the public interest and uphold the land trust mission.
15. Take **immediate and appropriate action**.
16. Have **one person manage communication**.
17. Financial resources may be limited, so the land trust will need to **be engaged and creative**.
18. **Document all encroachments** and resolution with maps, text and photos or video. Know the error margin of your equipment. Most GPS units have a 3 foot error margin.
19. **Document all discussions**. Have in writing all approvals, denials and interpretations. Nothing is left for only a verbal conversation without written backup. Accurate, thorough and objective reports documenting visits is critical.

20. Review **your options with land trust legal** counsel before starting on enforcement. Get a lawyer involved at the very beginning to take advantage of the attorney client privilege. If a lawyer requests documents, they are protected from discovery under the attorney client or attorney work product exceptions.
21. **Use appropriate experts** to determine resource values and obtained expert advice on the effect of the violations.
22. Consider **criminal prosecution** in appropriate circumstances; caution in threatening the same.
23. Evaluate **government civil enforcement** actions in appropriate circumstances.
24. Consider **combination approaches** to address resource damage rather than attempting to recreate prior conditions.
25. Consider **public perceptions** of the various parties.
26. Have a **solid damages theory**, excellent experts and pay attention to legal theory.
27. **Don't be afraid** of the jury or the press.
28. **Don't settle prematurely.**
29. Trial and trial preparation is time consuming and expensive. **Don't underestimate** the time needed for a case. Assume that a case in litigation will go to trial.
30. Trial strategy starts with pre-trial preparation. **Be neutral, reasonable and above** any petty fights; protect the land and help resolve the dispute. Be methodical and relentless in legal prosecution of case.
31. Have the **attorneys visit the land** before developing an approach.
32. **Attorney fees** may not be not recoverable and are a major financial drain for a community supported non-profit, as are unrecovered staff time and fees.
33. **Restoration** after all the appeals will take time and money.
34. Legal challenges are very important to **establish a track-record** of courts upholding conservation. So they are worth the effort to handle well.
35. Make the **landowners and the neighbors your allies**. This is a critical step for a land trust to maintain its credibility. Have a plan to increase community visibility to minimize violations. PR strategy both with supporters and after settlement. Neighbors watching and reporting for land trust is critical; earlier proactive efforts in neighborhood can be effective in monitoring
36. **Review and revise easement template** to address new situations and lessons learned.
37. **Use hindsight**, evaluate your experience, any systems changes suggested and things to do differently.
38. **Build partnerships** to be ready for the next challenge. Plan for effective publicity strategy
39. **Pick up the phone** don't email
40. Effective strategy to **leverage insurance** including Terrafirma, title insurance, CGL insurance if LT is defendant

Action Steps to Take When Faced with an Encroachment:

1. Conduct regular monitoring of preserves and easements.
2. Make sure you have excellent baseline documentation.
3. Enlist neighborhood support to report problems.
4. Call the police (essential, if not always helpful).
5. Demand Publicity!
6. Develop written policies and procedures for responding to potential encroachments

When faced with an encroachment, do the following:

1. Photograph the encroachment;
2. Document the encroachment's precise location and areal extent using GPS/GIS technology;
3. Interview neighbors or potential witnesses (a land trust may consider contacting the local police as a part of this process);
4. If the encroachment involves significant tree or shrub felling, hire a licensed forester to appraise the loss using The Guide for Plant appraisal, as published by the International Society of Arboriculture, Urbana, Illinois, or a succeeding publisher;
5. Send a certified letter to the encroaching party notifying it of the violation and the obligation to restore the property and to inform their insurance carrier of the claim;
6. If the land trust does not receive a response to the aforementioned letter or the response inadequately ensures the restoration of the property, refer matter to environmental counsel.

APPENDIX A. LEGAL AVENUES

Cause of Action	Statutory/Legislative	Property	Tort	Contract	Criminal
By Holder Against Landowner	Violation of Enabling Statute or other Legislation	Trespass	Nuisance, Trespass, Negligence	Breach of Contract	Criminal Trespass
By Holder Against 3 ^d Party, with Landowner Cooperation	Possibly Violation of Enabling Statute or other Legislation	Trespass	Possibly Nuisance, Trespass, Negligence	Possibly Breach of Contract though landowner contract relationship with 3 ^d party, or assist landowner, or assign	Possibly Criminal
By Holder Against 3 ^d Party, without Landowner Cooperation	Possibly Violation of Enabling Statute or other Legislation	Trespass	Possibly Nuisance, Trespass, Negligence	No, no contract relationship with 3 ^d party	Possibly Criminal
Potential Remedies from landowner or 3 ^d Party	Injunction, restoration, compensatory damages, possibly punitive damages, attorney fees	Injunction, restoration, compensatory and punitive damages, attorney fees, cease and desist	Injunction, restoration, attorney fees, cease and desist, compensatory or punitive damages	Specific performance, monetary value of harm caused by breach, liquidated damages	Misdemeanor or felony charges, jail time, monetary damages

APPENDIX B. RELEVANT LAWS

1. State Laws: A land trust may have standing to sue, depending on state laws

If the state enabling act treats conservation easements as a property interest, land trust may have standing against which the violator trespassed so the land trust is a directly aggrieved person and has standing to sue. If a state does not create a real property right, or not clear holder has right to sue in trespass, then argue that legislative intent of the enabling act allows standing; most enabling legislation give a land trust a right of enforcement; not always clear if that right applies to third parties. Objections to land trust exclusive involvement may be based upon the failure to include an indispensable person (the landowner) and/or the land trust's possible lack of standing to sue the third party. If the landowner wants to join the suit, land trust likely not able to prevent that and might welcome the landowner, if not culpable, would be more persuasive to the court.

2. State Statutes: (represented by case-studies and location Minnesota, Wisconsin, Connecticut)

COLORADO REVISED STATUTES

38-30.5-103. Nature of conservation easements in gross.

(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.

38-30.5-108. Enforcement - remedies.

(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.

18-4-501. Criminal mischief.

(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 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.

Trespass: Second Degree Criminal Trespass 18-4-503. Second degree criminal trespass.

(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.

Trespass: Third Degree Criminal Trespass 18-4-504. Third degree criminal trespass.

(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.

Trespass: Definition of Premises 18-4-504.5. Definition of premises.

As used in sections 18-4-503 and 18-4-504, "premises" means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

CONNECTICUT GENERAL STATUTE 47-42a, 52-560a

Sec. 47-42a. Definitions. For the purposes of sections 47-42b, 47-42c and 47-42d, the following definitions shall apply:

(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.

Sec. 47-42b. Enforcement of conservation and preservation restrictions held by governmental body or charitable corporation. 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.

Sec. 47-42c. Acquisition of restrictions. Enforcement by Attorney General. 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.

Sec. 52-560a. Damages for encroachment on state, municipal or nonprofit land conservation organization open space land. Attorney General enforcement. Civil action. (a) 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.

APPENDIX C. SUMMARY TRESPASS COURT CASES

Trespass cases litigated by land trusts include the following:

- \$300,000 spent to defend a conservation easement in California to prevent an adjacent developer from build a road. Garfinkel vs. Nevada County Land Trust, Mary S. Trabucco as Trustee, William J. Trabucco, et al., CA Superior Court (Nevada County), Case No. 71098, Decision CRC 3.1590, 8/21/08 (UNPUBLISHED).
- \$500,000 damage award collected by a land trust against a neighbor who had multiple intentional trespasses on land owned by the land trust. Cullen v. Western New York Land Conservancy, Inc., 2009 NY Slip Op 7036; 886 N.Y.S.2d 303 (N.Y. App. Div. 2009).
- A land trust in Colorado successfully defeated *construction* of a 20-foot wide trail (but not the use of such a trail) by developer of adjacent land to the lot owners without the land trust consent. Bolinger et al. v. DeWolf et al., Docket. No. 07CV1084 (Colo. Dist. Ct., Weld Cty., March 12, 2009)(Findings of Fact and Conclusions of Law) (UNPUBLISHED). See also the appeal at Bolinger v. Neal, 2010 Colo. App. LEXIS 1536, Docket. No. 09CA1314 (Ct. App. Colo. 4th Div. Oct. 14, 2010).
- The State of North Carolina and the Southern Appalachian Highlands Conservancy prevailed against abutting landowner's construction of a new ford on protected property, moving rocks, digging out dirt and gravel, and otherwise disturbing a stream bed. The defendants asserted affirmative defenses of adverse possession and easement by prescription. A jury found for the plaintiffs in all respects. The defendants appealed and the appellate court affirmed. Woltz v. Taylor, 2010 N.C. App. LEXIS 1617, Docket. No. COA09-847 (N.C. Ct. App. Aug. 17, 2010)(UNPUBLISHED).
- The East Haddam Land Trust (EHLT) owned a floodplain forest preserve adjacent to the Goodspeed Airport, LLC (Goodspeed). Goodspeed instructed a contractor to clear-cut 2.5 acres of EHLT's land, without EHLT's knowledge or permission. One of EHLT's board directors contacted the state police to report the action and was quoted in a newspaper article as being "appalled" by the tree cutting. Goodspeed responded aggressively. The court dismissed all of Goodspeed's causes of action against EHLT and its directors. Ventres et al. v. Goodspeed Airport, LLC, et al., 2008 Conn. Super. LEXIS 1363 (Super. Ct., Hartford 2008), *aff'd on other grounds*, 301 Conn. 194 (Conn. 2011).
- State of Tennessee v. Duberry, No. M2013-02121-CCA-R3-CD, 2014 WL 2568849 (Ct. Crim. App. Tenn. June 9, 2014)(UNPUBLISHED). Bass owned a 403-acre parcel of land in Maury County, managed for recreation and conservation purposes; granted a conservation easement on the parcel to the Land Trust for Tennessee (LTT). Duberry inherited an abutting parcel; proceeded to cut through a cable and lock across an access road and hired a logger to clearcut a three-acre area on Bass' property. Duberry instructed the logger to ignore certain flags that marked the Stevens boundary line. Duberry claimed he had a seventh grade education and could not read

or write, and that if he had trespassed he had done so by mistake. Criminal charges were brought against Duberry, and a jury convicted him of theft of property and criminal trespassing. The trial court sentenced him as a multiple offender (four prior felony convictions and numerous misdemeanor convictions) to eight years for the theft conviction and to thirty days for the criminal trespassing conviction. Duberry appealed, claiming that the verdict was in error and that the sentence was too harsh. The appellate court affirmed in all respects. Rare case in which a criminal action is brought against a third party violator of a conservation easement. It does not appear that LTT had any role in pressing charges, but a staff forester was called as a witness at the trial to offer evidence as to the extent of the timber cutting.

- Rosa Nulman Park Foundation v. Four Twenty Corp., 93 A.3d 25 (R.I. 2014). The Rosa Nulman Park Foundation (Foundation) is a nonprofit corporation established in 2006 to own and maintain a four-acre park for the benefit of the public. From 2009 through 2011, Robert Lamoureux, through his closely held entity, the Four Twenty Corporation, built a house on what he thought was an abutting parcel, as indicated by a survey he had commissioned. However, when he sought to sell the house, the prospective buyer discovered that the entire structure was located on the Foundation's property. The total encroachment was approximately 13,000 square feet, about 7% of the Foundation's parcel, on an area that had been covered with shrubs and was not widely used by the public. Lamoureux contacted the Foundation to see if a resolution could be negotiated, but the Foundation demanded that the house be removed and filed suit seeking this injunctive relief. At a bench trial, Lamoureux testified that the cost of removal would be \$300,000 to \$400,000, if the requisite permits could be obtained. The trial court ruled for the Foundation, finding that the encroachment was not de minimis and that a balancing of the equities was not required, and ordering that the house be removed. Lamoureux appealed. The Rhode Island Supreme Court affirmed, holding that the general remedy for a continuing trespass is injunctive relief, and the facts in this case did not justify an exception to that general rule. The fact that Lamoureux reasonably relied on a survey and that the error was unintentional did not require the denial of injunctive relief. Finally, the Supreme Court noted the public benefit in keeping the entirety of the Foundation land undeveloped as an additional reason to order the removal of the house. This opinion is important insofar as it represents the latest example in which a court has required the removal of a structure that violates a conservation organization's fee land or conservation easement. It is all the more compelling because the opinion comes from Rhode Island's high court, and the structure at issue is a completed house that would cost hundreds of thousands of dollars to relocate.
- Martha's Vineyard Land Bank Commission v. Taylor, 2017 WL 2971866 (Mass. Land Ct., Dukes Cty. July 11, 2017). The Martha's Vineyard Land Bank Commission (Land Bank) owned a remote parcel of land known as Steamboat Landing on the Gay Head peninsula of Martha's Vineyard. The nearest public road was quite a distance away, and the parcel was not visible from any roads. Since 1990, Hugh and Jeanne Taylor owned and operated a nearby inn. Unbeknownst to the Land Bank (or the prior landowners) until 2010, the Taylors encouraged their guests to use a footpath that crossed a small section of the Steamboat Landing parcel in order to reach a public but secluded beach. In fact, use of the footpath was part of their online marketing materials, even though their guests also have easy and legitimate access to at least two other nearby beaches. Meanwhile, local residents have occasionally used the footpath across Steamboat Landing to reach the beach, but with the permission of the Land Bank and prior owners, and with minimal impact. Concerned about erosion issues, the Land Bank filed suit seeking a declaration that the Taylors and their guests have no right to use the footpath across the parcel, and an associated injunction prohibiting such use. The Taylors objected, contending that they have an appurtenant prescriptive easement for unrestricted pedestrian use by them and their paying guests. After conducting a bench trial, the judge found that the Taylors' and their guests' past use of the Steamboat Landing path was effectively undetectable due to the remote and thickly wooded character of the parcel, and thus was not "notorious" as the law required for establishing a prescriptive easement.

APPENDIX D. VERMONT LAND TRUST ENFORCEMENT LETTER AND LICENSE

Re: VLT Enforcement, Monitoring and Costs Policy, Conserved Land in _____, VT

Dear _____:

I am writing to explain VLT's philosophy and approach to costs, monitoring and enforcement of our conservation easements. VLT views our relationship with landowners as being a conservation partnership. Folks in our Stewardship office do not think of themselves, nor do they want others to think of them, as the "VLT police." Rather, we value and strive to maintain an open relationship with owners of conserved land. We welcome inquiries and our Conservation Field Assistants visit each conserved property annually to keep the landowner relationship current and mutually satisfying.

We have been fortunate over the years to enjoy excellent landowner relationships, especially with "first generation" landowners, those who negotiated and signed the conservation easement. Inevitably, however, some situations emerged which necessitated VLT invoking its rights under a conservation easement. In the overwhelming majority of these situations, simple communication with the landowner does the trick. A willful or malicious violation of an

easement is virtually unheard of; third party incursions being the more likely source of such a violation in which case we are usually allied with the landowner in seeking a resolution.

We recognize that voluntary resolution is the most effective, quick and cost-effective way to arrive at a mutually agreeable solution to issues and, common sense directs us to strive to achieve resolution in those ways. We frequently hear landowners express confidence in VLT's willingness to work amicably with a landowner in the event an issue arises under the conservation easement, but that future VLT staff or a successor holder of the easement might not adhere to current VLT policy. Our response is that it is only reasonable to assume that simple cost/benefit analysis dictates that the holder of a conservation easement, unless confronted with a truly egregious, immediate, ongoing violation, to seek resolution first through the more cordial and cost-effective means of communication and negotiation.

For a third party violation of the conservation easement of which the landowner has no knowledge or control, our expectation is that the landowner will cooperate in good faith with VLT 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, VLT expects the landowner to take full responsibility for stopping and correcting the third party violation. As long as VLT 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, VLT 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.

You asked about the potential for VLT asking for payment of costs associated with voluntary resolution of violations. Again, given the philosophy I outlined above, you can expect that VLT will be reasonable. VLT has resolved almost all violations to date without asking for payment of costs. VLT 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 VLT in the event of a third party violation. VLT 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 VLT 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 VLT. Since you own the land and agreed to the conservation easement that seems equitable. Examples of items which VLT 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.

While uncommon, the most egregious easement violations may necessitate immediate legal action. An obligation in the easement to provide an egregious violator with a lengthy notice period within which to cure a violation or mandatory mediation or arbitration provisions may delay our ability to take the immediate steps required to curtail an activity which, if allowed to continue, might result in serious or irreversible harm to the conserved land. I'm sure you wouldn't want a successor owner of your land to be able to damage what you have worked so hard to steward because a technicality in the conservation easement prevented VLT from stopping a violation.

It is for this reason that we do not care to include mandatory alternative dispute resolution provisions in our conservation easements. The lack of such mandatory provisions should not be viewed as a strategy to avoid resolution of easement issues through communication, negotiation, mediation or arbitration. We recognize that these are the most efficient and cost-effective ways to arrive at a mutually agreeable resolution to conflict and, as a matter of common sense, VLT would always strive to achieve resolution in those ways.

I hope this letter gives you adequate assurance of VLT's policy regarding enforcement of conservation easements to permit you to comfortably proceed to conserve your land without further concern. If you have additional questions, we can discuss this further or call our Stewardship Director.

VLT SAMPLE TEMPORARY LICENSE
LIMITED LICENSE TO USE PORTION OF FARMLAND

_____ and _____ - (the "_____") both of _____, Vermont, and _____ - (the "_____") both of _____, Vermont, hereby agree to the following:

1. The _____ have continuously owned and used _____ acres of land situated on _____ Road and _____ Road in _____, Vermont, as part of their _____ since _____. This land is also shown as Lot _____ on a survey entitled _____ (the "Survey")
 2. The _____ conveyed a Grant of Development Rights and Conservation Restrictions on the _____ by _____ dated _____ and recorded in the _____ Land Records in Book _____ Page _____.
 3. The _____ who own _____ shown on the Survey adjacent to the _____ asked to use a strip of the _____ - land of varying dimensions contiguous to the _____ lot _____ for the limited purpose of maintaining a lawn buffer between their lot and the _____ land (the "strip"). The _____ hereby agree to this lawn buffer on the following conditions:
 - a. _____ is for a lawn only and does not include planting trees, bushes, shrubs or other vegetation and does not include any license for any structure, fencing or surfacing of any kind;
 - b. _____ is on a year to year basis and is terminable by the _____ at will without notice;
 - c. _____ each spring the _____ may decide if the said strip needs to be plowed, used for farm machinery access or otherwise used again for agriculture and if the _____ so elect, they may use said strip for agriculture without notice to the _____;
 - d. The _____ acknowledge that the _____ on the _____ land were not planted/built by the _____ and they make no claim to them so the _____ may remove them in the _____ - sole discretion; and
 - f. _____ the _____ waive all claims of ownership, possession or use of said strip for themselves and their heirs, successors and assigns.
- WITNESS our hands and seals at _____, Vermont, this ____ day of _____.

APPENDIX E: STANDING COURT CASES

Standing By Third Party to Bring an Action Affecting a Conservation Easement
Standing Denied (22)

Berkshire-Litchfield Environmental Council, Inc. v. Daniel Esty, et al. (trespass)

58 Conn. L. Rptr. 528, 162 Conn.App. 481 (Conn. Super. Ct. July 9, 2014)(UNPUBLISHED), affirmed 162 Conn. App. 478 (Ct. App. Ct. Jan. 19, 2016)

Bleier v. Board of Trustees of Village of East Hampton (violation)191 A.D.2d 552, 595 N.Y.S.2d 102 (2d Dept. 1993)

Burgess v. Breakell (violation) No. 95-0068033, 1995 Conn. Super. LEXIS 2290 (Conn. Aug. 7, 1995)

Carrillo v. Uplands-Aptos, L.P. et al. (third party beneficiary) Docket No. CV162827, Santa Cruz County Superior Court, (Order on Summary Judgment, Jan. 26, 2011) (Order on Attorneys' Fees, May 25, 2011)

Chase v. Trust for Public Land (amendment) Docket No. Misc. 329075, 16 LRC 135; 2008 Mass. LCR LEXIS 27 (Mass. Land Ct. March 8, 2008)

City of Dallas, Texas v. Hall (rescission) 562 F.3d 712 (5th Cir. 2009), affirming 2007 U.S. Dist. LEXIS 78847, 2007 WL 3125311 (N.D. Texas October 24, 2007)(UNPUBLISHED) and 2008 U.S. Dist. LEXIS 49944, 2008 WL 2622809 (N.D. Texas June 30, 2008)(UNPUBLISHED)

Cluff Miller v. Gallop (violations)

No. RE-03-022 (York Cty. Super. Ct. July 8, 2003)(Order Granting Rule 12(b)(6) Dismissal)(UNPUBLISHED)

Friends of Shawangunks v. Knowlton (amendment)

64 N.Y.2d 387 (1985), reversing 475 NYS2d 910 (NY App.Div. 1984)

Granara v. Stetson Kindred of America, Inc. (road and development)

Docket No. 10 MISC 429752 (Mass. Land Ct. Aug. 12, 2010)(Final Order)(UNPUBLISHED)

Hicks v. Dowd (extinguishment) 157 P.3d 914 (Wyo. 2007)

Huber v. Dept. of Transportation (sale of public land) Mem. 11-67, 2011 Me. Unpub. LEXIS 67 (Me. 2011)(Unpublished)

Johann v. Town of East Hampton (sale of public land) 2011 NY Slip Op 30717U, 2011 N.Y. Misc. LEXIS 1247 (Supr. Ct. N.Y., Suffolk Cty. March 9, 2011)(Unpublished)

Long Green Valley Ass'n v. Bellevale Farms, Inc. (discretionary approval) 2012 Md. App. LEXIS 19 (Md. Ct. Spec. App. Feb. 14, 2012), modifying 2011 Md. App. LEXIS 154 (Md. Ct. Spec. App. Nov. 30, 2011) and affirming lower court the Court of Appeals of Maryland, No. 65, September Term, 2012, June 24, 2013 (standing arguments dismissed)

McClure v. Epsilon Group, LLC et al. (enforcement of preservation easement) Misc. No. 10 MISC 438570, 2011 Mass. LCR LEXIS 80 (Mass. Land Ct. July 28, 2011)

McEvoy v. Palumbo (exercise of reserved rights) No. CV106002253S, 2011 Conn. Super. LEXIS 2939 (Conn. Super. Ct. Nov. 16, 2011)
Prime v. ZBA of Norwell (agriculture farm stand) 42 Mass. App. Ct. 796 680 N.E.2d 118 (1997)
Spirit of the Sage Council v. City of Pasadena (re-development) 2006 Cal. App. Unpub. LEXIS 10132 (Cal. App. Nov. 7, 2006) (UNPUBLISHED)
Tallman v. Outhouse et al. (amendment land swap) Docket No. 08-E-0238 (Rockingham Cty. Super. Ct. Oct. 26, 2009)(Final Order)(UNPUBLISHED)
Van Liew v. Board of Selectmen of Chelmsford (public right doctrine) No. 12-1581 (Mass. Super. Middlesex Cty. Nov. 9 2012)
Wolf Creek Ski Corporation v. Board of County Commissioners of Mineral County (land swap) 170 P.3d 821 (Colo. App. Ct. September 20, 2007)
Wolfe et al. v. Gormally et al. (adjacent development) 14 LCR 629 (Mass. Land Ct. 2006)
Zagrans v. Elek (amendment land swap) 2009 Ohio 2942 (Ohio Ct. App. 2009)

Standing Granted (6)

Lyme Land Conservation Trust, Inc. v. Platner (legal name dispute, standing granted to land trust after name corrected, AND Attorney General standing granted) Docket No. CV096001607, 2010 Conn. Super. LEXIS 1571 (Sup. Ct. Conn. Jud. Dist. New London June 24, 2010)(UNPUBLISHED) 2013)(Lyme II); (Super. Ct. Conn. Jud. Dist. New London March 27, 2015)(Decision on liability, damages and attorney fees)(Lyme III) (ON APPEAL)
Spanish Lake Restoration, LLC v. Petrodome St. Gabriel II, LLC (mineral extraction with natural gas pipeline on CE property not a trespass) No. 2015-CA-0451, --- So.3d --- (La. App. 4th Cir. Jan. 13, 2016)
Daly v. McCarthy (Town held open space easement termination) McCarthy v. Town of Sudbury, 780 N.E.2d 970, 57 Mass. App. Ct. 1101 (Mass. App. Ct. 2002)(McCarthy I) Daly et al. v. McCarthy et al., 823 N.E.2d 434, 63 Mass.App.Ct. 1103 (Mass. App. Ct. 2005), affirming 11 LCR 367 (Mass. Land Ct. 2003)(McCarthy II). Ten taxpayer standing under Massachusetts specific statute
Friends of the Shawangunks, Inc. v. Clark (amendment) 585 F. Supp. 195 (N.D.N.Y. 1984), reversed on other grounds 754 F.2d 446 (2nd Cir. 1985)
New Jersey Department of Environmental Protection v. Huber (state enforcement of municipally-held easement) No. A-5874-07T3 (N.J. App. Div. Jan. 20, 2010) (UNPUBLISHED)
Rosenfeld v. ZBA of Mendon (enforce a deed restriction) Docket 10-P-341 (January 28, 2011) interpreting MGL c. 184 sec. 27
Tennessee Environmental Council, Inc., et al v Bright Par 3 Associates, LP, et al (extinguishment) 2004 Tenn. App. LEXIS 155 (Tenn. Ct. App., 2004) Later overturned by legislative enactment of no standing statute.

Miscellaneous Standing Cases

Conn. v. Amer. Elec. Power Co. (federal common law nuisance) 582 F.3d 309 (2nd Cir. 2009), reversing 406 F.Supp.2d 265 (S.D.N.Y. 2005)
Desert Foothills Land Trust, Inc. v. Olsen et al. (intervention) 1 CA-CV 03-0644 (Ariz. Ct. App. Jul. 29, 2004)(UNPUBLISHED)
Historic Green Springs, Inc. v. Louisa County Water Authority (CE holder has standing under clean water act to sue government) Docket No. 3:09-cv-00079, 2011 U.S. Dist. LEXIS 70515 (W. D. Va. June 30, 2011)(Memorandum Opinion)
Knowles v. Codex Corp (misrepresentation)426 NE2d 734 (Mass. Ct. App. 1981)
Nature Conservancy v. Congel (extinguishment; privity) 253 A.D.2d 248 (N.Y. App. Div. 1999); Nature Conservancy v. Congel, 296 A.D.2d 840 (N.Y. App. Div. 2002)
Rosenfeld v. ZBA of Mendon (zoning special permit non-conservation restriction) 78 Mass. App. Ct. 677, 682, 940 N.E.2d 891 (2011) Docket 10-P-341 (January 28, 2011)
United States of America v. 74.05 Acres of Land (federal forfeiture) 2006 U.S. Dist. LEXIS 17060 (D. Conn. Feb. 9, 2006)(UNPUBLISHED)
Warwood v. Norman Bypass Trust (land trust intervention) 2005 ML 2038 (Mont., June 16, 2005)
Compiled by Leslie Ratley-Beach, Land Trust Alliance Conservation Defense Director

APPENDIX F: TERRAFIRMA SURVEY RESULTS

Highlights from TerraFirma Aggregate Data

1. **California, Florida and New Jersey have significantly higher numbers** of challenges per conserved parcel than other states. Colorado has significantly fewer challenges per parcel.
2. **California, Colorado and Washington have higher than average external challenge costs** than other states.
3. The **frequency of challenges dramatically rose from 2000 through 2011**. In 2011, a parcel of land was more than twice as likely to have a challenge as that same parcel of land would have been in 2001.
4. **The external costs of a challenge in 2006 over four times** as costly as a comparable challenge from 2000 or prior. External costs continued a gradual rise from 2006 to date.
5. In **urban and suburban service areas, challenge frequencies per parcel are almost fifty percent higher** than rural areas and the average external challenge costs are almost ninety percent higher. Land in rural areas is less likely to lead to challenges.
6. **Unaccredited land trusts are over twenty percent more likely to have a challenge** per parcel and pay over fifty percent more in external costs per challenge than accredited land trusts.
7. Challenges brought by the **original landowner have external cost severities that are approximately one third** the external cost of successor landowner challenges.
8. Parcels of land held by organizations **five years old and less are half as likely to produce a challenge** as those that have been in existence for ten years or longer.
9. Land Trusts who have experienced even **one challenge in the past five years are twice as likely “per parcel”** to experience a challenge in the following year than a Land Trust that has experienced no challenges in its past five-year history. Organizations that have experienced over five challenges in the previous five years are four and a half times more likely per parcel to experience another challenge the following year than those trusts that have been challenge-free during that same time.
10. A challenge that has taken **four or more calendar years to close is on average almost seven times** as costly in regards to external expenses as a challenge that has closed in the same year it opened.
11. Anecdotally, the Alliance is aware of **three legal challenges that cost in excess of one million dollars** to resolve (CA, NY and PA) and is aware of several others that cost in excess of \$250,000 to resolve.
12. Data gathered under different assumptions, definitions and objectives over time by the Land Trust Alliance, while they cannot precisely forecast exact legal defense funding requirements, however, when considered together, do provide a framework for planning legal defense costs:
 - An average land trust can expect violations, including technical, minor and major violations, at a rate of around **one easement violation per 20** easements held. (This rate is the total number of easements violated compared to the total number of easements held in the portfolio, as considered over the lifetime of the easement portfolio. It is not an annual rate of new violations.)
 - While many of these violations may be resolved without significant expense, **roughly one-tenth of them may require an investment of \$1,000 or more.**
 - Around **one-hundredth of the violations may result in a major expense** (costing more than \$5,000 to resolve) to the land trust for legal defense.
 - The trends suggest that the **frequency and severity of violations will increase** over time