

Trespass and Third-Party Violations

- Both surveys and personal experience show that successor generation landowners and third parties are the largest sources of violations.
- In most states a land trust may prevail by arguing that what the land trust holds is a property right, against which the violator trespassed and so is a directly aggrieved party and thus has standing or sue landowner for a per se violation, regardless of cause.
- Both the enabling legislation for conservation easements and the common law regarding negative easements, restrictive covenants and equitable servitudes give land trusts a right of enforcement where there is interference with this interest.
- 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.
- If the owner is a violator or contributes in any way to the restriction violation, then the land trust can sue the landowner.
- If the landowner wants to join the suit, in most cases the land trust would not be able to prevent that and would be more likely to welcome the landowner in the suit since it would be more persuasive to the court.

Stewardship Suggestions

Land trusts may find that many of the conservation restriction violations (possibly as much as 40 percent, the average rate of third-party violations experienced by the Vermont Land Trust) 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. Write your conservation restriction to obligate landowners to prevent trespass or other actions that may lead to violations.
2. In practice, land trusts find it difficult to enforce an restriction violation against a landowner who did not personally cause the violation.
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.
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. A land trust would only consider 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 restriction 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. Land trusts may want to consider drafting restrictions to include explicit rights of entry to enforce restriction restrictions against third parties without joining the owner.
10. Land trusts may also want to consult with their attorney to determine the law in their state regarding the standing of a land trust to enforce its property rights in the conservation restriction if that state considers a conservation restriction a property right.
11. Consider dealing with nominal encroachments with a license (see sample below).
12. Have a written policy and procedures for addressing third party violations and trespass. 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 _____.

IN THE PRESENCE OF:

Witness to

Witness to

STATE OF VERMONT
_____ COUNTY, SS

At _____, this ____ day of _____, 200_, _____ personally appeared and they acknowledged this instrument, by them sealed and subscribed, to be their free act and deed, before me.

Notary Public:
My Commission Expires: 2/10/11

Easement Holder Standing

Uniform Conservation Easement Act

does not explicitly give standing to land trusts to sue a third party but it does not prohibit it either. ‘

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 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.

If a state does not create a real property right

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 partie

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 not be able to prevent that and would welcome the landowner would be more persuasive to the court.

Recent Court Cases

Some recent trespass cases successfully 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 by developer of land adjacent to conserved land to lot owners on the adjacent land 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) .

Lessons Learned

The land trusts involved in these cases report the following lessons learned:

1. **The same stewardship basics apply to third party.**
 - Evaluate the resource damage and damage to the purposes of the easement.
 - Consider all the factors.
 - Take immediate and appropriate action.
 - Document everything.
2. **Identifying unknown third party violators.**
 - Have to be creative
 - May need a survey or other technology
 - May need to back track ATVs or other marks
 - May need to involve policy, gov't enforcement or criminal system
3. **Community involvement.**
 - Have one person manage communication.
 - Consider the possible public perceptions of the various parties.
 - Leverage public investments in conserving land.
 - Make the landowners and the neighbors your allies.
4. **Creative problem solving.**
 - Neighbors, developers and others are endlessly creative in justifying trespass.
 - Set the tone of the dispute resolution; be a problem solver.

- Consider temporary uses that have no negative impact on resource values or conservation easement purposes in order to prevent further litigation and negative public perception.
- Consider criminal prosecution or government civil enforcement actions in appropriate circumstances.

5. **Litigation sometimes needed to get action, but is costly.**

- Have a solid damages theory and excellent experts.
- Have the attorneys visit the land before developing an approach.
- 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.
- Be neutral, reasonable and above any petty fights; protect the land and help resolve the dispute.
- Don't settle prematurely.

6. **Learning from problems.**

- Review and revise easement template to address new situations and lessons learned.
- Evaluate your experience, any systems changes suggested and things to do differently.
- Think about systems resiliency

Sample Conservation Easement Clauses Addressing Acts of Third Parties

In addition to addressing those situations for which the landowner will be responsible, land trusts may want to consider drafting easements to include explicit rights to enforce easement restrictions against third parties without joining the owner. The following is language from a sampling of a number of land trust conservation easement templates.

None of this language has yet been judicially reviewed or tested.

Colorado—Optional procedural and 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's 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.

Aspen Valley Land Trust

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.

Blackswamp Conservancy (See particularly section 7.7 below)

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.

7.1 If Grantee determines that Grantor is in violation of the terms of this Conservation Easement or that a violation is imminent, Grantee shall give written notice to Grantor of such violation and demand cessation of the offending activities and 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 in accordance with a plan approved by Grantee.

7.2 If 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 provision without prior notice to Grantor or without waiting for the period provided for cure to expire.

7.3 If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing such violation within the thirty (30) day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, to enjoin the violation, exparte as necessary, by temporary or permanent injunction, and to require restoration of the Property to the condition that existed prior to any such injury.

7.4 Grantee's rights under this section apply equally in the event of either actual or

imminent violations of the terms of this Conservation Easement. Grantor agrees that Grantee's remedies at law (damages) for any violation of the terms of this Conservation Easement are inadequate and that Grantee shall be entitled to the injunctive relief described above, both prohibitive and mandatory, in addition to such other relief to which Grantee shall be entitled, including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this Section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

7.5 If injunctive relief is inadequate to compensate Grantee fully for the loss of or damage to Grantee's rights hereunder, or if restoration is impossible, Grantee shall be entitled to recover any damages for violation of the terms of this Conservation Easement or injury to any Conservation Values protected by this Conservation Easement, including, without limitation, 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. Without limiting Grantor's liability therefor, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property.

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.

Jackson Hole Land Trust

The following language was added after the Jackson Hole Land Trust had a situation where a neighboring landowner cut 200 mature cottonwood trees on an easement property to improve his view.

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.

7.7. 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 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.

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.

Vermont Land Trust

V. Enforcement of the Covenants and Restrictions.

Grantee shall make reasonable efforts from time to time to assure compliance by Grantors with all of the covenants and restrictions herein. In connection with such efforts, Grantee may make periodic inspection of all or any portion of the Protected Property, and for such inspection and enforcement purposes, Grantee shall have the right of reasonable access to the Protected Property. In the event that Grantee becomes aware of an event or circumstance of non-compliance with this Grant, Grantee shall give notice to Grantors of such event or circumstance of non-compliance via certified mail, return receipt requested, and demand corrective action by Grantors sufficient to abate such event or circumstance of non-compliance and restore the Protected Property to its previous condition. If Grantee, in its sole discretion, determines that the event or circumstance of noncompliance requires immediate action to prevent or mitigate significant damage to the conservation values of the Protected Property as provided in the Purposes of this Grant, then Grantee may pursue its rights under this section

without prior notice to Grantors. In the event there has been an event or circumstance of non-compliance which is corrected through negotiation and voluntary compliance, but which has caused Grantee to incur extraordinary costs, including staff time, in investigating the non-compliance and securing its correction, Grantors shall, at Grantee's request, reimburse Grantee for all such costs incurred in investigating the non-compliance and in securing its correction.

Failure by Grantors 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 non-compliance. Such damages, when recovered, may be applied by Grantee to corrective action on the Protected Property. If the court determines that Grantors have failed to comply with this Grant, Grantors shall reimburse Grantee for any reasonable costs of enforcement, including court costs and reasonable attorneys' fees, in addition to any other payments ordered by such court. In the event that Grantee initiates litigation and the court determines that Grantors have not failed to comply with this Grant and that Grantee has initiated litigation without reasonable cause or in bad faith, then Grantee shall reimburse Grantors for any reasonable costs of defending such action, including court costs and reasonable attorneys' fees; provided, however, that this clause shall not apply to any Grantee protected by the doctrine of sovereign immunity.

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 noncompliance 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.

The parties to this Grant specifically acknowledge that events and circumstances of noncompliance constitute immediate and irreparable injury, loss, and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the court deems just and appropriate. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity, or through administrative proceedings.

No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantors shall impair Grantee's rights or remedies or be construed as a waiver. Nothing in this enforcement section shall be construed as imposing a liability upon a prior owner of the Protected Property, when the event or circumstance of non-compliance occurred after termination of said prior owner's ownership of the Protected Property.

Third Party Enforcement of Conservation Restrictions and Standing

- Steady trickle of third-party suits against conservation restriction holders in recent years with five since 2008
- 17 standing cases addressing right of third party (abutter, citizen, government agency) to

- bring action affecting conservation restriction
 - Standing rejected in 13 of these
 - Amendment the underlying issue in 6
 - Roads or other development underlying issue in 4
 - Extinguishment or rescission at issue in 5
- Chase v. Trust for Public Land, Docket No. Misc. 329075, 16 LRC 135; 2008 Mass. LCR LEXIS 27 (Mass. Land Ct. March 8, 2008)
 - 42-acre farm purchased by TPL, placed under conservation restriction that allowed subdivision.
 - Triggering event was an amendment.
 - Plaintiff claiming standing to challenge amendment was both former owner of entire 42-acre property and current owner of portion.
 - Massachusetts' conservation restriction enabling statute is silent on standing, but a nearby statute applying generally to restrictions on land expressly limits standing.
- Granara v. Stetson Kindred of America, Inc., Docket No. 10 MISC 429752 (Mass. Land Ct. Aug. 12, 2010)(Final Order)(UNPUBLISHED)
 - Triggering event was relocation of house from off-site onto protected property. Unpublished order, no analysis.
 - Trustees of Reservations still had to spend considerable resources on this case.
- Tallman v. Outhouse et al., Docket No. 08-E-0238 (Rockingham Cty. Super. Ct. Oct. 26, 2009)(Final Order)(UNPUBLISHED)
 - Again, triggering event was an amendment. Swap of parcels into and out of restriction.
 - Court denied pre-trial motion to dismiss for lack of standing.
 - NH's enabling statute is silent on standing.
- Rosenfeld v. ZBA of Mendon, Docket 10-P-341 (January 28, 2011)
 - Interpreting MGL c. 184 sec. 27 concluded that G. L. c. 184, § 27(a)(2), (10) should be interpreted so that an owner of land that adjoins restricted land is entitled to enforce a deed restriction, *whether or not the instrument imposing the restriction contains an express statement* that the adjoining land is intended to benefit from the restriction.
 - On appeal from a summary judgment of the Superior Court, the plaintiffs claimed error in the affirmance of a special permit issued by the defendant zoning board of appeals of Mendon in favor of the defendant
 - The appeals court found that the plaintiffs are entitled to seek enforcement of the deed restriction.
 - The Massachusetts enabling statute predates the UCEA, and is silent on standing.
 - The decision is dealing with a deed restriction, subject to MGL, chapter 184, Section 27. That statute and section does NOT address standing for all land use restrictions in general.
 - Conservation Restrictions (pursuant to MGL, Chapter 184, Sections 31-33) are specifically excluded from that general statement by virtue of Section 26(c).
 - The result here conflicts directly with the holding in Chase v. Trust for Public Land. Both cases purport to interpret and apply the *Brear* case.

Lessons Learned

- Holders are winning cases brought by third parties, but can still be costly.
- Aim is to get immediate dismissal without proceeding to facts.
- Head off any lawsuit at all.
- Include standing provision in restriction itself especially if statute silent?

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