

CONSERVATION EASEMENT VIOLATION/ENFORCEMENT POLICY

INTRODUCTION

The long-term effectiveness of Conservation Easements in protecting valuable lands depends on the easement holder's ability to enforce the terms of the easements. Strong enforcement builds public confidence in easements as a land protection tool. Moreover, in order to accept tax-deductible gifts and qualify for tax-exempt status, IRS regulations require that easement-accepting organizations commit to upholding the terms of an easement and maintain the financial capability to enforce the restrictions. (See Treas. Reg. 1.170A-14(c)(1).)

Each easement infraction and violation represents a unique situation and requires a tailored approach, with the objective of correcting the violation with the greatest degree of cooperation and the least expense to both the landowner and Utah Open Lands. One of the primary goals is making the landowner a better steward of their land by educating them to the terms of their easement. Any action that is not permitted in the Conservation Easement, expressly prohibited, or which materially impairs any of the conservation values protected by the Conservation Easement may constitute a violation of the terms of the Conservation Easement.

Utah Open Lands considers whether activities observed while monitoring appear to have the potential to or already have caused significant detrimental impact on the conservation values protected by the easement; and whether the activities will materially impair or interfere with the conservation values, regardless of whether the action is a permitted use or not. Utah Open Lands considers a major violation one which has a significant detrimental impact on the conservation values protected by the easement and/or will materially impair or interfere with the conservation values.

Several corrective actions may be necessary with respect to any enforcement action taken by Utah Open Lands. Specifically in the case of a major violation, Utah Open Lands may seek reimbursement of all costs relating to and arising from the violation.

OVERALL OBJECTIVES FOR RESPONSE AND ENFORCEMENT

- Maintain the conservation purpose(s) and conservation values of the Conservation Easement.
- Maintain public confidence in Utah Open Lands' ability to enforce easement restrictions, in part as a deterrent to other potential violators.
- Maintain Utah Open Lands' legal authority to enforce easements. Delayed enforcement of a violation may jeopardize Utah Open Lands' right to enforce particular provisions.
- Protect Utah Open Lands' legal rights and economic investment (if any) in the Conservation Easement.
- Maintain a positive and constructive working relationship with the landowner.
- Maintain the professionalism and integrity of Utah Open Lands.

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- Use litigation only when there is a meritorious legal basis for judicial action and other attempted remedies have failed or are apparently unlikely to succeed.
- Maintain consistent responses to similar Conservation Easement violations.

VIOLATION PREVENTION STRATEGIES

- Maintain good landowner relations and encourage communication and dialogue with the landowner.
- Staff shall conduct annual monitoring and provide a written monitoring report.
- Alert Landowner to practices or activities which have the potential to become future violations.
- Make every effort to remain informed of changes in property ownership or management.
- Promptly contact new owners (and work with real estate agents) to ensure that they understand Utah Open Lands' mission, the Conservation Easement for their property, and the concept and purpose of Conservation Easements in general.
- Work to ensure careful and consistent drafting of Conservation Easements.
- Consider encouraging easement landowners to ask for a review of a proposed action whether or not it is contemplated under the terms of an easement in order to avoid a potential violation.

CONSERVATION EASEMENT ENFORCEMENT PROCEDURE

Possible easement infractions or possible violations may be discovered in the course of annual monitoring inspections, or as reported by neighbors, new property owners, or other third parties. Steps to be followed by Utah Open Lands staff are as follows:

Review Terms of the Easement. Review the easement document, baseline inventory, and monitoring reports. Determine trajectory of activity. Determine if activity is not in compliance with the terms of the easement or poses a potential threat. Staff /Volunteers should not give a landowner an on-site opinion that a violation does or does not exist. Consult legal counsel for interpretation if necessary.

Documentation and Notification. Visit the site to inspect and carefully document activities in question. Describe location and observations and relevant information gathered on-site. Photos keyed to a photomap should be taken, dated and otherwise identified by the photographer. Quantitative measurements of the activities should be noted as appropriate. Monitoring Reports or field notes should include the date and the person conducting the inspection.

The potential problem, threat or violation is communicated to the landowner when appropriate; if the problem requires immediate action to avoid further disturbance or degradation, the Executive Director or Stewardship Director may notify the landowner of the issue upon discovery. Monitoring reports that go out to the landowners should be carefully reviewed if there is some issue that needs to be discussed.

Determination. Executive Director and Stewardship Director will make a determination of level of offense, technical, minor, moderate or major.

Technical: A procedural violation that has no impact upon or consequence to the conservation easement's purpose or the protected conservation values.

Such deficiencies are technical in nature and do not adversely affect the conservation attributes of the conserved land or conflict with the conservation purposes of the easement. Technical lapses may include failure to give notice before transferring an interest in the conserved property (generally acknowledged as the most frequent form of easement violation) or failure to seek approval prior to exercising a reserved right (such as constructing a permitted structure) when the activity is conducted consistently with the easement.

Minor: A violation or encroachment that has negligible impact upon or consequences to the conservation easement's intent, purpose, and/or protected conservation values. Typically defined as actions that have a measurable, negative effect on the conservation attributes protected by the easement and/or violate the conservation purposes and/or certain terms of the easement. These violations may be remediated through restoration, an amendment or other solution. Examples of minor violations may include construction of a building in such a way that a small portion extends outside the building envelop, or third-party trespass with negligible or transitory damage (such as prohibited ATV use, or trash dumping).

Moderate: A violation or encroachment that has a moderate and explicit impact upon or consequences to the conservation easement's terms, intent, purpose, and/or protected conservation values. Moderate violations can be transitory and severe, or permanent and less damaging to the resource, or affect a smaller area of the conserved land. As with minor violations, many moderate violations can be remediated, and often the solution includes a large component of landowner education. Examples of moderate violations may include construction of prohibited improvements, such as roads, ponds or utilities; the extension of utilities to structures allowed by the easement but for which no utility service is allowed, such as for hunting cabins or gazebos; but do not rise to the level of a major violation; third-party construction of structures, such as wells and cabins; and boundary encroachments from clearing or other activity.

Major: A violation or encroachment that has a serious and often permanent negative impact on the conservation attributes protect by the easement; they also violate one or more of the express conservation purposes and terms of the easement. Major violations can negatively affect a large area of the protected property and can be difficult or impossible to mitigate or remediate. A major violation can also drastically affect a small area of the conserved land. Sometimes an action is defined as a major violation only because the landowner refuses to cooperate in halting and resolving a lesser violation. Examples of major violations include construction of houses not permitted by the easement; construction of commercial or industrial structures; subdivision of the land when subdivision is not permitted by the easement; surface mining; forest harvests in violation of the management plan that affect a large area or a clear cut on a smaller area; clearing vegetation from large portions of riparian

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buffers or other sensitive, designated ecological or scenic areas; or activities that lead to a significant or continued degradation of protected resources.

Formulate Recommendations for Corrective action. For a violation deemed technical, moderate or major, the Executive Director and the Stewardship Director will determine a recommendation for curing the problem and forward this recommendation to the Conservation Committee.

The Stewardship Director has the discretion and authority to determine what action to take in response to a potential or actual problem, threat or violation that is deemed minor.

If staff is unsure of corrective action and remedy, or if a remedy and any deadline is not being adhered to by landowner, they will meet with Conservation Committee to gain recommendations for further action. The Conservation Committee will forward a recommendation to the full board.

All action taken in response to a violation, whether major, moderate or minor, shall be in accordance with the terms of the Conservation Easement.

Formulate TerraFirma assessment indicators. Additionally, the type of assessment to indicate when filing a claim or a place holder for TerraFirma are decided by Executive Director and the Stewardship Director, choices on their site are: 1) Violation; 2) Trespass or Encroachment; 3) Litigation Notice; 4) Verbal or Other Threat of Violation; 5) Disregard of Easement Obligations; 6) Mediation or Arbitration Notice or Demand; 7) Adverse Claim of Legal Right.

Challenge	Definition
Violation	includes prohibited structures and uses, excessive recreational activity (such as all-terrain vehicles), surface alteration, timber harvest, and dumping, violation of a management plan and anything else that explicitly violates the stated terms of a conservation easement
Trespass	includes actions by third parties (neighbors, developers, government and so forth) such as vegetation removal, structural encroachment, fences, topography change and so forth.
Litigation Notice	when you receive written notice that a lawsuit has been filed against the land trust
Verbal or Other Threat of Violation or Trespass	includes threats to violate the conservation easement or trespass on fee land or conservation easement
Disregard of Easement Obligation	this is a catch all section for when a legal challenge does not fit into any other category for example transfer of water rights on paper to a holding company that technically disregards the no severance provision of the conservation easement but functionally retains the water rights in the same ownership
Mediation or Arbitration Notice	when you receive written notice of mediation or arbitration action

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Adverse Claim of Legal Right	including adverse possession, contest by heir, boundary challenge, etc.
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How do you know when an everyday concern has transitioned into an issue that is a Terrafirma claim? What if you are not certain if you really have a boundary trespass or a conservation easement violation but an event occurred that raises the question? Lawsuit official notice is often too late! Filing a claim is a judgment based on many factors some of which are listed below.

Listen to your instincts. If your gut check indicates concern, file a placeholder claim. In addition, remember these examples of general indicators that the problem may become serious and you should consider, at the least, filing a placeholder claim promptly:

1. Violation or trespass assessment suggesting more than nominal or minor issues.
2. Persistent nuisance violations within the past year.
3. Refusal by the other person to meet with you or talk with you about an issue.
4. Any landowner financial trouble coupled with a violation or trespass, even a nominal one, because it often leads to bigger trouble.
5. Any violation that may require an amendment or discretionary action, even if it looks like you can work it out, because sometimes those talks fail. Filing later may be too late.
6. Any encroachment of a structure near a boundary line, even temporary.
7. Any new road or path that may become an issue.
8. Any prohibited vegetation clearing. If it is a trespass, then even a nominal clearing, as these tend to lead to more.
9. Any event potentially on, across or near a boundary.
10. Any prohibited structure.
11. Any prohibited land division.
12. Probate, bankruptcy, conservatorship, divorce, federal securities fraud action, any federal action.
13. Any verbal or written threats (if the threats are violent, call the police first).
14. Landowner or trespasser delay tactics.
15. Noncompliance issues that continue over the policy year with no measurable progress.
16. Any refusal to allow access for monitoring.
17. Anything that directly damages conservation purposes or attributes.
18. Any written notice of formal legal action.
19. Any unresolved matter still existing prior to the end of the Terrafirma policy year on March 1 of each year.
20. When the stakes are higher (even if the challenge is minor), the calculus changes, such as with a wealthy and aggressive or hostile neighbor or successor owner.