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Conservation Easement Violated: What Next - A Discussion of Remedies

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I. INTRODUCTION

Nonprofit organizations and government agencies with conservation missions often must compete with private developers for lands that have natural value.[1] These organizations operate on tight budgets,[2] and they are wise to find ways to leverage their dollars to achieve maximum conservation results. At the same time, many natural area owners have an emotional connection with their land and want to ensure its protection through the years,[3] but they may be tempted by offers from developers. They could be facing financial difficulties, ready for retirement, or concerned about creating estate tax problems for their heirs.

Conservation easements have become very popular because they meet the needs of conservation organizations and landowners. Easements appeal to conservation organizations because many landowners are willing to donate them, allowing the organizations to

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1. Robert I. McMurry, *The Intelligence of Growth: If the Future is "Smart Growth", What Have I Been Doing the Last 30 Years?*, SE11 A.L.I.-A.B.A. 125, 135 (1999).

2. Mike Lee, *It's a Buyer's Market for Land Preservation*, UNION-TRIB. (San Diego), Nov. 24, 2008, at A1.

3. R. Christopher Anderson, Note, *Some Green for Some Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act*, 99 W. VA. L. REV. 617, 636 (1997).

protect land at little or no cost.[4] Conservation easements are attractive to landowners because they often provide substantial tax benefits,[5] and they allow owners to protect their land in perpetuity while still maintaining ownership of it.[6]

As of 2005, land trusts had preserved 6,245,969 acres in the United States through conservation easements, more than doubling the number of acres protected by easement since 2000.[7] That number increased dramatically between 2006 and 2010,[8] during which time a special tax incentive was in place which allowed conservation easement donors to deduct greater percentages of the value of conservation easements than for charitable contributions and carry forward any excess for fifteen years.[9] Although that legislation expired in 2009, conservation groups are lobbying Congress to renew it and make it permanent.[10]

Reported violations of conservation easements are relatively rare,[11] but as the many conservation easements created in the last decade "age" and the burdened land changes owners, the new owners may have different ideas about land use than the owner who created the easement.[12] If these new owners do not understand or respect the easement, enforcement issues may arise.

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4. Daniel L. Aaronson & Michael B. Manuel, *Conservation Easements and Climate Change*, 8 SUSTAINABLE DEV. L. & POL'Y 27, 27 (2008).

5. GERALD J. ROBINSON, FEDERAL INCOME TAX'ATION OF REAL ESTATE § 11.13, at 8 (2009).

6. Adam E. Draper, Comment, *Conservation Easements: Now More than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 254 (2004).

7. ROB ALDRICH & JAMES WYERMAN, THE 2005 LAND TRUST CENSUS REPORT 5 (2005), *available at* http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf.

8. Land Trust Alliance, Working for a Permanent Easement Incentive, http://www.landtrustalliance.org/policy/taxincentives/federal (last visited Feb. 15, 2010).

9. Land Trust Alliance, How the Easement Incentive Works, http://www.landtrustalliance.org/policy/taxincentives/federal/incentive-info (last visited Feb. 15, 2010).

10. Land Trust Alliance, *supra* note 8.

11. J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 URB. LAW 19, 35 (2007).

12. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 334 (2004).

Some land trusts do not have the resources to monitor easements properly or to mount legal challenges when they find violations.[13] As a solution, some academics and concerned practitioners advocate that states institute third-party enforcement of conservation easements, which would allow state attorneys general, private citizens or other conservation organizations to step in where a land trust may not have the resources to challenge a violation.[14]

While third-party easement enforcement will bring more alleged easement violators into court, it is also important to ensure that courts award meaningful remedies once they have found a violation. Without proper enforcement, the public benefit of easements is at risk. Legislatures can ensure proper enforcement by enacting conservation easement enabling statutes that have strong purpose statements and clear remedies. Courts should not hesitate to apply the remedies allowed by law. Land trusts and government conservation agencies must prepare to litigate these violations by understanding how judges are making decisions in the courtroom and taking lessons from the few cases that are available to date.

This Note focuses on the remedies available for conservation easement violations and how courts determine which remedies to award. Part I provides a brief explanation of conservation easements, including their history and an overview of the recent controversy surrounding them. Part II explores the remedies allowed by the various states' conservation easement statutes. In Part III, this Note suggests action the state legislatures and the National Conference of Commissioners on Uniform State Laws should take to strengthen conservation easements by making available remedies stronger and clearer. Part IV reviews several court opinions resulting from conservation easement litigation. In Part V, this Note suggests steps that courts should take to ensure that they preserve the public value of conservation easements. In Part VI, this Note suggests some factors that land trusts should consider when they are litigating a conservation easement violation. These suggestions will help land trusts prepare to influence a judge's balancing test, whether the judge

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13. Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System*, WASH. POST, Dec. 21, 2003, at A1.

14. *E.g.*, Carol Necole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85 (2005).

is deciding whether to grant an injunction or is awarding a remedy after a conservation easement violation.

II. HISTORY AND CONTROVERSY

A. Background

In its Uniform Conservation Easement Act, the National Conference of Commissioners on Uniform State Laws defines a conservation easement, also known as a conservation servitude or restriction,[15] as follows:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[16]

Conservationists began using common-law conservation easements in the late 1800s but did not use them regularly until the 1930s.[17] Courts were reluctant to enforce common-law conservation easements for several reasons.[18] First, conservation easements are "easements in gross"[19] because no dominant estate is associated with

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15. Land Trust Alliance, FAQ: Conservation Easement, http://www.landtrustalliance.org/conserve/faqs/faq-conservation-easement (last visited Feb. 17, 2010).

16. UNIF. CONSERVATION EASEMENT ACT § 1.1 (amended 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm (last visited Feb. 17, 2010).

17. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.02 (1987).

18. National Conference of Commissioners on Uniform State Laws, Summary: Uniform Conservation Easement Act, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucea.asp (last visited Feb. 17, 2010).

19. BLACK'S LAW DICTIONARY 589 (8th ed. 2004) (explaining that an easement in gross benefits "a particular person and not a particular piece of land").

the easement.[20] Traditionally easements in gross were valid between the original parties but did not survive transfer of the underlying estates to third parties.[21] Second, conservation easements are also "negative easements"[22] because the easement prohibits, rather than allows certain activities as an "affirmative easement" would.[23] Historically the law disfavors negative easements.[24] Third, the common law did not recognize conservation or historic preservation as a valid purpose for a negative easement.[25] An overarching concern of many courts was the "dead hand" problem, which is the public policy concern against allowing a few private individuals to make decisions about resource use that will stand long after their deaths.[26]

With the goal of addressing the shortcomings of common-law conservation easements, the National Conference of Commissioners on State Laws created the Uniform Conservation Easement Act ("UCEA") in 1981.[27] The UCEA is a model act designed to guide states in creating conservation easement enabling statutes.[28] To date, twenty-two states and the District of Columbia have adopted the

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20. National Conference of Commissioners on Uniform State Laws, *supra* note 18.

21. *Id.*

22. BLACK'S LAW DICTIONARY, *supra* note 19, at 550 (defining a negative easement as "an easement that prohibits the servient-estate owner from doing something, such as building an obstruction").

23. *Id.* at 548-49 (defining an affirmative easement as "an easement that forces the servient-estate owner to permit certain actions by the easement holder, such as discharging water onto the servient estate").

24. National Conference of Commissioners on Uniform State Laws, *supra* note 18.

25. Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 91 (2006).

26. *Id.* at 89-90.

27. UNIF. CONSERVATION EASEMENT ACT § 1.1 (amended 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm (last visited Feb. 17, 2010).

28. *See id.* at Prefatory Note.

UCEA,[29] and other states have adopted their own conservation easement enabling statutes.[30]

A landowner may sell or donate conservation easements to a qualified organization.[31] A landowner who donates a conservation easement usually will enjoy the benefit of an income tax deduction and other tax advantages.[32] If he sells the easement, he will receive a cash payment from the conservation organization.[33] The conservation easement is binding on future owners of the land.[34]

Conservation easements are popular with land trusts, which are nonprofit organizations with conservation missions,[35] because they allow the trusts to protect more land with less money.[36] Most easements are donated,[37] and even purchased conservation easements are much less expensive than buying land in fee simple[38] because only the development rights are purchased.[39] Easements allow land trusts to protect land without having to own or manage it.[40] The caveat is that some land trusts underestimate the financial commitment associated with the monitoring, stewardship, and enforcement of conservation easements.[41]

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29. National Conference of Commissioners on Uniform State Laws, *supra* note 18.

30. *See, e.g.*, CAL. CIV. CODE § 815 (West 2007); MICH. COMP. LAWS ANN. § 324.2140 (West 2007).

31. Land Trust Alliance, *supra* note 15.

32. *Id.*

33. Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 687 (2007).

34. Land Trust Alliance, *supra* note 15.

35. Marc Campopiano, Note, *The Land Trust Alliance's New Accreditation Program*, 33 ECOLOGY L.Q. 897, 902 (2006).

36. Neil Gunningham & Mike D. Young, *Toward Optimal Environmental Policy: The Case of Biodiversity Conservation*, 24 ECOLOGY L.Q. 243, 265 n.92 (1997).

37. Land Trust Alliance, *supra* note 15.

38. William C. Means, Jr., Note, *The Economic Value of Conserved Land: Examining Whether Conservation Easements Represent a Sufficient Source of Land Value to Influence the Outcome of Regulatory Takings Claims*, 69 OHIO ST. L.J. 743, 777 (2008).

39. Engel, *supra* note 11, at 73.

40. Aaronson & Manuel, *supra* note 4, at 27.

41. Land Trust Alliance, *supra* note 15.

Another benefit to easements is their flexibility.[42] The parties can carefully draft each easement to the needs of the landowner and goals of the land trust.[43] For example, one easement might prohibit the building of additional structures, while another restricts the use of the land to agricultural purposes only.[44] This allows the parties to tailor the easement to the natural area targeted and the needs of the landowner.[45]

B. Recent Controversy

In recent years, perceived abuses and large tax benefits to easement donors have stirred controversy around conservation easements.[46] In 2003, the *Washington Post* ran a series of articles about The Nature Conservancy and other land trusts, criticizing them for accepting conservation easements on golf courses and parts of luxury home developments.[47] They discovered some easements that had benefited the easement donors with large tax deductions but had questionable natural value.[48] Congress responded by launching an investigation of The Nature Conservancy and land trust activity in general.[49] As a result, The Nature Conservancy made changes in its governance, policies, and procedures,[50] which several senators praised.[51] In 2006, the Land Trust Alliance developed the Land Trust Accreditation Commission, with a goal to "uphold the public trust and ensure that

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42. Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Movement*, 27 STAN. ENVTL. L. J. 477, 495 (2008).

43. Land Trust Alliance, *supra* note 15.

44. *Id.*

45. *Id.*

46. Brad Wolverton, *Senators Question Tax Breaks Taken By Donors to Conservation Groups*, THE CHRON. OF PHILANTHROPY, June 8, 2005, http://www.philanthropy.com/free/update/2005/06/2005060801.htm.

47. Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1.

48. *Id.*

49. *Id.*

50. Joe Stephens, *Nature Conservancy's President Abruptly Announces Resignation*, WASH. POST, Oct. 2, 2007, at A4.

51. Joe Stephens, *IRS Starts Team on Easement Abuses*, WASH. POST, June 9, 2005 at A6.

conservation efforts are permanent."[52] The Land Trust Accreditation Commission works to improve professionalism in the conservation field by creating standards in the field for organizational administration, fundraising practices, and land stewardship practices.[53] It also encourages land trusts to have resources available to litigate conservation easement violations.[54] The Commission administers a voluntary accreditation program for land trusts that requires participating land trusts to implement established best practices in their conservation work.[55] The accreditation review encompasses all aspects of a land trust's work, including how it monitors and enforces conservation easements, relates to landowners who have land subject to a conservation easement, and raises money for conservation easement stewardship endowments.[56] The Land Trust Alliance is also developing a conservation defense insurance program, which would protect land trust assets in the event that a trust needed to litigate an easement violation.[57]

The storm of controversy around conservation easements also prompted academics and practitioners to debate the validity of these easements as a conservation tool and to look for ways to ensure that easements serve the public good.[58] Academics have written many articles discussing the permanency of conservation easements and appropriate methods of modifying and terminating easements.[59] Fewer scholars have studied the challenges to the enforcement of

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52. Land Trust Accreditation Commission, The Accrediation Seal, http://www.landtrustaccreditation.org/why-accreditation-matters/about-the-seal (last visited Feb. 17, 2010).

53. LAND TRUST ALLIANCE, LAND TRUST: STANDARDS AND PRACTICES, at i, 3-7, 13-15 (2004), *available at* http://www.landtrustalliance.org/learning/sp/lt-standards-practices07.pdf.

54. *Id.* at 13.

55. Campopiano, *supra* note 35, at 913.

56. Land Trust Accreditation Commission, Indicator Practices, http://www.landtrustaccreditation.org/getting-accredited/indicator-practices (last visited Feb. 17, 2010).

57. Land Trust Alliance, Conservation Defense Insurance, http://www.landtrustalliance.org/about-us/programs/conservation-defense/cd-insurance (last visited Feb. 17, 2010).

58. *See, e.g.*, Draper, *supra* note 6.

59. *See, e.g.*, C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005).

existing conservation easements. With more than six million acres already under conservation easement, and more than one million new acres coming under easement every year,[60] the question of enforcement of existing conservation easements will grow in importance. If governments and land trusts want to prove the benefits of conservation easements to the public, they must demonstrate they can properly monitor and enforce existing easements to ensure that they serve the public good.

III. A STUDY OF THE REMEDIES ALLOWED BY VARIOUS STATES' CONSERVATION EASEMENT ENABLING STATUTES

As mentioned above, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") passed the Uniform Conservation Easement Act ("UCEA") in 1981,[61] after six years of debate.[62] The project developed out of a study funded by the American Bar Association ("ABA") and completed by the Conservation Law Foundation of New England in 1975.[63] Before the UCEA was passed, at least twenty-nine states had passed their own conservation easement legislation.[64] The ABA was concerned about the lack of uniformity among state laws, the problems caused by the common law treatment of conservation easements, and the lack of understanding of these problems among lawyers and legislators.[65] Federal organizations such as the Council on Environmental Quality, the National Park Service, and the Department of Transportation, and large nonprofit organizations like The Nature Conservancy and the National Trust for Historic Preservation supported the project.[66] The NCCUSL designed the UCEA to promote uniformity among state

60. ALDRICH & WYERMAN, *supra* note 7, at 4-5.

61. UNIF. CONSERVATION EASEMENT ACT (amended 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm.

62. King & Fairfax, *supra* note 25, at 74.

63. *Id.* at 73.

64. *Id.* at 71.

65. *Id.* at 72-74.

66. *Id.* at 74.

statutes[67] and to provide a solution to the problems associated with common law conservation easements.[68]

The UCEA provides definitions of key terms,[69] makes conservation easements perpetual unless the agreement says otherwise,[70] determines who may bring an action to enforce a conservation easement,[71] and expressly removes many of the restrictions placed on conservation easements by common law.[72] It does not, however, address the issue of how to remedy conservation easement violations. Among the twenty-three adopting jurisdictions, only two altered the language to include a remedy for violation.[73] The Arkansas statute adds a clause to UCEA section 3 which states "conservation easements may be enforced by injunction or other proceeding in equity."[74] The Maine statute goes a little further, allowing courts to "enforce a conservation easement by injunction or proceeding at law and in equity,"[75] but also adds the following:

> A court may deny equitable enforcement of a conservation easement only when it finds that change of circumstances has rendered that easement no longer in the public interest or no longer serving the publicly beneficial conservation purposes identified in the conservation easement. If the court so finds, the court may allow damages as the only remedy in an action to enforce the easement.[76]

Among the states that have not adopted the UCEA but have adopted their own conservation easement statutes, Colorado and

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67. *Id.* at 72.

68. National Conference of Commissioners on Uniform State Laws, *supra* note 18.

69. UNIF. CONSERVATION EASEMENT ACT § 1 (amended 2007).

70. *Id.* § 2(c).

71. *Id.* § 3(a).

72. *Id.* § 4.

73. ARK. CODE ANN. § 15-20-409(c) (2003); ME. REV. STAT. ANN. tit. 33 § 478(3) (1999).

74. ARK. CODE ANN. § 15-20-409(c) (2003).

75. ME. REV. STAT. ANN. tit. 33 § 478(3).

76. *Id.*

California are the only two that create strong remedies.[77] The Colorado statute allows injunctive relief for "actual or threatened injury to or impairment of a conservation easement."[78] It goes further, allowing the courts to award an easement holder damages for a violation of that easement.[79] In factoring the damages, the courts may consider "in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values."[80]

Using language similar to that of the Colorado statute, the California statute also provides for injunctive relief and damages where appropriate, allowing the court to include restoration costs and the loss of scenic and environmental values in determining awards.[81] It goes even further than the Colorado statute by allowing the court to award litigation costs, including attorney's fees, to the prevailing party in any conservation easement litigation.[82]

IV. SUGGESTED ACTIONS FOR STATE LEGISLATURES AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

State legislatures are in the best position to ensure the long-term viability of conservation easements. Legislatures should take a number of steps to ensure that conservation easements continue to serve the public interest long into the future by strengthening their conservation easement enabling statutes. First, they should give these statutes clear purpose statements that emphasize that conservation of natural and historical resources is an important public policy. Second, they should make clearer the civil remedies that are available when conservation easements are violated. Third, they should authorize punitive damages and criminal sanctions in cases of egregious violations. Finally, they should require the disgorgement of profits in cases where the damage created by an easement violation is irreparable.

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77. CAL. CIV. CODE § 815.7(b)-(c) (West 2007); COL. REV. STAT. ANN. § 38-30-108.5(2)-(3) (2008).

78. COL. REV. STAT. ANN. § 38-30-108.5(2).

79. *Id.* § 38-30-108.5(3).

80. *Id.*

81. CAL. CIV. CODE § 815.7(b)-(c).

82. *Id.* § 815.7(d).

A. Make Clear the Public Interest in Preserving Agricultural, Historical, and Natural Resources

Many states acknowledge the public policy interest in conservation easements expressly in their statutes.[83] California's statute provides a good example:

> The Legislature finds and declares that the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California. The Legislature further finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.[84]

Rhode Island's statute expressly acknowledges the discount that the state enjoys through the support of conservation easements, as compared to buying conservation lands outright: "This chapter is . . . intended to provide the people of Rhode Island with the continued diversity of history and landscape that is unique to this state without great expenditures of public funds."[85]

Some courts already have relied on these statements of legislative purpose when analyzing conservation easement cases.[86] In *Tennessee Environmental Council v. Bright Par Associates*, the Tennessee Court of Appeals considered whether an environmental organization, not a party to the conservation easement, had standing

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83. *See* CAL. CIV. CODE § 815.7 (West 2007); IOWA CODE ANN. § 457A.1 (West 2004); MO. ANN. STAT. § 67.870 (West 2007); N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney 2008); OHIO REV. CODE ANN. § 5301.67 (West 2004); 32 PA. CONS. STAT. ANN. § 5052 (West 1997); R.I. GEN. LAWS § 34-39-1 (1995); TENN. CODE ANN. § 66-9-302 (2004); VT. STAT. ANN. tit. 10, § 6301 (2007); WASH. REV. CODE ANN. § 84.34.200 (West 2004); W. VA. CODE ANN. § 20-12-2 (West 2008).

84. CAL. CIV. CODE § 815.

85. R.I. GEN. LAWS § 34-39-1.

86. *See, e.g.*, Vill. of Ridgewood v. Bolger Found., 517 A.2d 135 (N.J. 1986); Tennessee Envtl. Council v. Bright Par 3 Assoc., No. E2003-01982-COA-R3-CV, 2004 WL 419720 (TENN. CT. APP. Mar. 8, 2004); United States v. Blackman, 613 S.E.2d 442 (Va. 2005).

to sue for its enforcement.[87] The easement agreement gave only the grantee of the easement standing to sue for enforcement.[88] In evaluating whether third parties might have standing to sue for enforcement, the court looked to the Tennessee conservation easement enabling statute's purpose.[89] It says that a conservation easement "is held for the benefit of the people of Tennessee."[90] The court interpreted that statement of purpose to mean that every Tennessee citizen has standing to sue for enforcement of any conservation easement.[91] The Tennessee legislature reacted to that decision by passing legislation that, while preserving the purpose statement, also clarified that only government entities or qualified conservation easement holders were eligible for third-party standing.[92]

In *Village of Ridgewood v. Bolger Foundation*, the court looked to the New Jersey legislature's statement of purpose for its conservation easement enabling act when determining whether the property tax assessment of a piece of property should be lowered after the owner grants a conservation easement.[93] Interpreting the legislature's findings and declaration,[94] the court said "[t]he public benefits of conservation easements are beyond debate."[95] It held that grantors of

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87. *Tenn. Envtl. Council*, 2004 WL 419720, at *3.

88. *Id.*

89. *Id.*

90. TENN. CODE ANN. § 66-9-303 (2004).

91. *Tenn. Envtl. Council*, 2004 WL 419720, at *3.

92. 2005 Tenn. Pub. Acts 348-349 §§ 1-3 (adding subsection (7) to Tenn. Code Ann. § 66-9-303 which limits "third-party right of enforcement" to "a right expressly provided in a conservation easement to enforce any of its terms granted to a public body, charitable corporation, charitable association, or charitable trust that, although eligible to be a holder, is not a holder").

93. Vill. of Ridgewood v. Bolger Found., 517 A.2d 135, 136 (N.J. 1986).

94. N.J. STAT. ANN. § 54:4-3.63 (West 2002). The statute states:

> The Legislature hereby finds and declares that natural open space areas for public recreation and conservation purposes are rapidly diminishing; that public funds for the acquisition and maintenance of public open space should be supplemented by private individuals and conservation organizations; and that it is therefore in the public interest to encourage the dedication of privately-owned open space to public use and enjoyment as provided for in this act.

Id.

95. *Vill. of Ridgewood*, 517 A.2d at 137.

conservation easements are entitled to a reduction in the assessed value of property encumbered by conservation easement.[96]

In *United States v. Blackman*, the Virginia Supreme Court considered the validity of a conservation easement that was created before the Virginia legislature had enacted its modern conservation easement enabling statute.[97] Before holding that the easement was valid,[98] the court emphasized Virginia's strong public policy of supporting both historical and natural conservation, as expressed in its "Open Space Land Act"[99] and, more importantly, in Virginia's constitution.[100] Article XI, section 1 of the Virginia constitution declares Virginia's commitment to conservation:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.[101]

Thus, by making clear the public policy of supporting conservation, the Virginia legislature made it easy for the Virginia courts to uphold a conservation easement.

B. Make Clear Which Remedies are Available for Conservation Easement Violations

If states want to ensure that conservation easements serve the public good over the long term, they must create clear and meaningful consequences for those who violate easements. Having clear and meaningful consequences is also fairer to easement grantors

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96. *Id.* at 138.
97. United States v. Blackman, 613 S.E.2d 442, 443 (Va. 2005).
98. *Id.* at 449.
99. VA. CODE ANN. § 10.1-1700 (2006).
100. *Blackman*, 613 S.E.2d at 447.
101. VA. CONST. art. XI, § 1.

and grantees because they are better able to predict the legal outcome of their actions and can plan accordingly.

The Colorado and California legislatures have made the public interest in conservation clear by creating meaningful statutory remedies for the violation of conservation easements. Other states should follow their lead. The Colorado and California statutes rightfully make equitable relief the first choice for actual or potential conservation easement violation.[102] The best way to protect an easement's value is to enjoin any activity that threatens it.[103] Like California,[104] states also should authorize payment of attorney's fees to the prevailing party in conservation easement violation litigation. This would encourage cash-strapped land trusts to pursue easement violators when they know their case is strong because they could be fairly certain of recovering their legal costs. It would also reward attorneys who take easement violation cases, in the same way that 42 U.S.C. § 1988 encourages attorneys to take civil rights cases by allowing prevailing plaintiffs to collect reasonable attorney's fees.[105]

C. Authorize Punitive Damages and Criminal Sanctions for Egregious Easement Violations

State legislatures should go even further than providing for injunction and money damages. They should authorize punitive damages and criminal sanctions in extreme cases, where the violation is willful and the natural value of the easement is irreparably harmed. Real estate developers may be attracted to properties under conservation easement for their scenic beauty and make a business decision to violate the easement and pay damages in the hope of making a handsome profit through building and selling improvements. In the law of contracts, no stigma attaches to parties who choose to break a contract and pay damages rather than fulfill the contract.[106] Allowing parties to do this often serves the public

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102. COL. REV. STAT. ANN. § 38-30.5-108(2) (West 1989); CAL. CIV. CODE § 815.7(b)-(c) (West 2007).

103. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Public Lands*, 41 NAT. RESOURCES J. 373, 389-90 (2001).

104. CAL. CIV. CODE § 815.7.

105. 42 U.S.C. § 1988 (2000).

106. Robin Paul Malloy, *Advertising and the Commodification of Law(yers)*, 14 LAW & LITERATURE 197, 200-01 (2002).

policy interests in efficiency and allowing markets to operate freely.[107] Legislatures should not apply this line of legal thinking to conservation easements. Conservation easements serve a different public interest, which is preserving land and buildings with important natural or historical value. That public interest should weigh heavily where easements are concerned. By creating the possibility of punitive damages or criminal sanctions for easement violations, state legislatures can prevent many egregious violations.

Punitive damage awards could help land trusts more fully mitigate the loss of conservation values in a particular easement where actual damage awards are inadequate. Actual damages are difficult to prove in easement violation cases. It is difficult to prove how much an endangered wildflower is worth, or what it would take to restore a complex ecosystem. Punitive damages would give easement grantees the opportunity to mitigate the damage to the natural value of the property in a meaningful way.

D. Provide for Disgorgement of Profits Where Damage is Irreparable

Finally, when owners of land under conservation easement violate the easement and cause irreparable harm, state legislatures should require the disgorgement of profits for easements that were sold and restitution of tax benefits for donated easements.[108] Failing to do so cheats the public of the benefits that the grantor promised when entering into the conservation easement. Conservation easements usually lower the market value of the underlying land by restricting its use.[109] For this reason, it is fair to hold later-generation owners just as accountable as the original grantor because the price they paid for their property reflected the restrictions created by the easement.

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107. *Id.*

108. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. a (2000).

109. Faith R. Rivers, *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*, 15 S. E. ENVTL. L. J. 147, 166 (2006).

V. CASE HISTORY REVIEW

This section provides an overview of cases in which courts made enforcement decisions,[110] focusing on the reasoning courts used to determine remedies awarded or whether to grant an injunction. Due to the dearth of cases about conservation easements, this Note will discuss a few cases that are unpublished or still active. These cases provide valuable insight into the attitudes and thought processes of judges in various jurisdictions around the country.

A. Courts Ordering Remediation

1. *Conservation Commission v. DiMaria*

In this Connecticut case, a trial court examined a conservation easement that prohibited excavation, filling, removal of vegetation or the construction of buildings on a two-thirds acre wetland area.[111] The two-thirds of an acre was part of a larger 2.82 acre plot with a residence.[112] DiMaria wanted to build a horse barn in the area not subject to the conservation easement.[113] She failed to seek the proper permits from the Fairfield Conservation Commission, the municipal regulatory agency with jurisdiction over wetlands.[114] In the process of preparing the site, her contractor put 350 cubic yards of fill dirt

110. *See* United States v. Blackman, 2007 U.S. App. LEXIS 12572 (4th Cir. May 31, 2007); United States v. Peterson, 178 F. App'x 615 (8th Cir. 2006); United States v. Vesterso, 828 F.2d 1234 (8th Cir. 1987); Fox Chapel v. Walters, No. CV 07-8008-PCT-JAT, 2007 WL 2265684 (D. Ariz. Aug. 6, 2007); United States v. Ponte, 246 F. Supp. 2d 74 (D. Me. 2003); Feduniak v. Cal. Coastal Comm'n, 148 Cal. App. 4th 1346 (Cal. Ct. App. 2007); Conservation Comm'n v. DiMaria, No. CV054009431S, 2008 WL 3307154 (Conn. Super. Ct. July 21, 2008); Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110 (D.C. 1994); Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct. 2008); Windham Land Trust v. Jeffords, No. RE-07-077, 2007 Me. Super. LEXIS 140 (Super. Ct. June 29, 2007), *aff'd*, 2009 ME 29, 967 A.2d 690; W. N.Y. Land Conservancy, Inc. v. Cullen, 886 N.Y.S.2d 303 (App. Div. 2009); W. N.Y. Land Conservancy, Inc. v. Town of Amherst, 773 N.Y.S. 2d 768 (App. Div. 2004); LaBarbera v. Town of Woodstock, 814 N.Y.S. 2d 376 (Sup. Ct. 2006).

111. *DiMaria*, 2008 WL 3307154, at *1.

112. *Id.*

113. *Id.*

114. *Id.*

into the area covered by the conservation easement.[115] The Conservation Commission also claimed that DiMaria had clear-cut trees in the conservation easement area.[116] The Commission ordered DiMaria to remove the fill from the wetland area and to plant at least 100 trees and 100 shrubs that were native to Connecticut in the upland area.[117]

The trial court found that the evidence showed that DiMaria inadvertently put the fill dirt into the conservation easement area but that her actions were not deliberate or willful.[118] The court also highlighted DiMaria's efforts to stabilize the upland area to prevent further erosion into the conservation easement.[119] The court found that the evidence did not support the claim that DiMaria engaged in clear-cutting of trees.[120] She had cut trees on the upland area not subject to the conservation easement, but this activity did not adversely affect the area protected by the conservation easement.[121]

The trial court's opinion is sympathetic to DiMaria, finding testimony that she did not know permits were required credible, that her actions were not willful or deliberate, and that she had offered to remove the fill that her contractor had deposited in the area covered by the conservation easement.[122] The opinion is also critical of the Fairfield Conservation Commission's "rush to judgment and immediate resort to legal process."[123]

Nonetheless, the trial court ordered remediation by removing the fill dirt but did not order tree planting or attorney fees to the Fairfield Conservation Commission.[124] It noted that removing the fill might not produce conservation benefits but still ordered DiMaria to remove it because not imposing a sanction "could have the effect of encouraging unauthorized filling of wetlands."[125] The court declined to require DiMaria to plant trees or shrubs as requested by the

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115. *Id.* at *6.
116. *DiMaria*, 2008 WL 3307154, at *6.
117. *Id.* at *7.
118. *Id.* at *6.
119. *Id.* at *7.
120. *Id.* at *6.
121. *DiMaria*, 2008 WL 3307154, at *9.
122. *Id.*
123. *Id.* at *10.
124. *Id.* at *9-10.
125. *Id.* at *9.

Conservation Commission,[126] noting that this would have resulted in more trees on the property than existed before the work began and that the law does not allow the Commission to order property improvements in the name of restoration.[127]

2. *Bjork v. Draper*

This Illinois case arose from a dispute about a conservation easement that protected the gardens surrounding a historic home in a neighborhood that is included in the National Register of Historic Places.[128] Previous owners granted a conservation easement to the Lake Forest Open Lands Association, agreeing to preserve the land-use patterns existing at the time the land was restricted.[129] The new owners worked with the Association to amend the conservation easement to allow them to make landscaping changes and build a new driveway.[130] Neighbors sued to enforce the easement, alleging that the Association and homeowner could not amend the easement without a court order and asking for a declaratory judgment declaring the amendment invalid.[131]

The trial court judge in *Bjork* visited the property in order to make findings about the changes.[132] After walking the property, the trial judge determined that while the driveway did not interfere with the conservation purposes of the easement,[133] the new landscaping did not conform to the agreement the new owners had made with the Association.[134] Accordingly, the trial court ordered the new owners to remove certain vegetation within ninety days and awarded the plaintiffs their costs, but it did not declare the amendment invalid.[135]

The court of appeals affirmed that the Association and homeowner could amend the easement without court order because the easement agreement's language contemplated the possibility of amendment.[136]

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126. *Id.* at *7.
127. *DiMaria*, 2008 WL 3307154, at *7.
128. Bjork v. Draper, 886 N.E.2d 563, 566 (Ill. App. Ct. 2008).
129. *Id.*
130. *Id.* at 568.
131. *Id.* at 569.
132. *Id.* at 570.
133. *Bjork*, 886 N.E.2d at 571.
134. *Id.*
135. *Id.*
136. *Id.* at 572.

The appellate court noted that the easement's true purpose was to preserve the property's conservation values in perpetuity, and the conservation values of the property were not synonymous with the language of the easement.[137] One clause in the easement agreement, however, expressly prohibited improvements on the restricted property.[138] The appellate court found the amendments to be invalid due to that clause.[139]

The appellate court here noted that a court may grant whatever relief it deems equitable to enforce an easement.[140] It stated that it is appropriate for a trial court to balance the equities between the parties in determining relief but that it may refuse to do so if the easement violation is intentional or culpably negligent.[141] It also issued an important caution about balancing the equities between parties in this situation:

> [I]f a landowner could avoid complying with the terms of a conservation easement by making alterations and then claiming it would be too costly (and, thus, inequitable) to return the property to its original condition, then the restrictions placed in a conservation easement could be rendered meaningless. . . . [W]e must avoid interpreting an easement such that any provision becomes superfluous.[142]

The appellate court remanded the case to the trial court to consider equitably what the new owners must do to remediate the violation.[143] Finally, the appellate court wrote that the trial court acted appropriately in denying attorney's fees to the plaintiff neighbors because the grantee of the easement was the Association, not the neighbors.[144] The easement agreement contained a fee-shifting clause, but it addressed only the fees of an enforcing grantee and not a third-party enforcer.[145]

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137. *Id.*
138. *Bjork*, 886 N.E.2d at 572.
139. *Id.* at 574.
140. *Id.* at 575.
141. *Id.*
142. *Id.*
143. *Bjork*, 886 N.E.2d at 575.
144. *Id.* at 576.
145. *Id.*

3. *Feduniak v. California Coastal Commission*

In this California Court of Appeals case, the owners had purchased a luxury home for $13,000,000, unaware that it was encumbered by a conservation easement that the previous owners had violated when they built a golf course on the property.[146] The previous owners did not disclose the easement, and the title company did not find it in its search.[147] The golf course had been in place for eighteen years when the California Coastal Commission first learned of it in 2002 and ordered the owners to remove it and replace it with native vegetation, per the conservation easement agreement.[148] The owners refused to do so because the golf course was the reason they purchased the home.[149] They offered to mitigate by funding restoration work elsewhere at a financial cost greater than removing the golf course from their land, but the Commission refused this offer and ordered that the owners remove the golf course.[150] The trial court agreed with the owners, holding that the Commission was equitably estopped[151] from enforcing the conservation easement.[152] The appellate court reversed, finding that the public interest in the easement outweighed the harm done to the owners by removing the golf course.[153] It criticized the trial court for devaluing the "strong public interest in the natural state of the coast and its native vegetation"[154] and for ignoring the evidence the Commission produced to show that "the golf course itself represented ongoing developmental damage to the coast that continued to frustrate the public interest in having the parcel restored to its natural state."[155] The court was sympathetic to the "inadequate funding and staff"[156] that the Commission's enforcement division had, as the Commission

146. Feduniak v. Cal. Coastal Comm'n, 56 Cal. Rptr. 3d 591, 597 (Ct. App. 2007).
147. *Id.*
148. *Id.* at 599-600.
149. *Id.* at 600.
150. *Id.* at 599.
151. *Feduniak*, 56 Cal. Rptr. 3d at 600.
152. *Id.* at 599.
153. *Id.* at 615.
154. *Id.*
155. *Id.*
156. *Feduniak*, 56 Cal. Rptr. 3d at 598.

accepted more than one thousand new easements each year.[157] It did not consider the financial injury to the owners to be very great because they had offered to pay more money to mitigate the problem off-site.[158] While acknowledging that the loss of the enjoyment of the golf course is a real harm, the court said that three public policy concerns outweighed their harm: (1) eliminating an unpermitted development that had been present for twenty years, (2) the public interest in having the property returned to native vegetation, and (3) protecting the Commission's future ability to enforce conservation easements.[159]

4. *United States v. Ponte*

In this case, the Maine federal district court considered whether to force the owner of land subject to a conservation easement to remove a platform that the owner had constructed.[160] The easement prohibited new structures, "except those for which immediate proximity to the water is essential."[161] The owners built a twenty by twenty-four foot platform along the water, claiming that it was essential for unloading supplies from a boat because the ground along the water was uneven and wet, and the property was accessible only by water.[162] The court did not agree that these reasons made the platform's immediate proximity to the water essential.[163] In its opinion, the court also noted the defendants' continued bad behavior during the case. They had refused to hire counsel despite warnings from the court that legal entities (the property was owned by a trust) must be represented by a licensed attorney in federal court.[164] They also failed to appear in court on multiple occasions, which resulted in a default order against them.[165] The court ordered the defendants to remove the platform and restore the land to its pre-construction condition.[166] Further, it authorized the government to remove the

157. *Id.*
158. *Id.* at 616.
159. *Id.* at 617.
160. United States v. Ponte, 246 F. Supp. 2d 74, 75 (D. Me. 2003).
161. *Id.* at 75.
162. *Id.* at 79-80.
163. *Id.* at 79.
164. *Id.* at 75.
165. *Ponte*, 246 F. Supp. 2d at 75.
166. *Id.* at 81.

platform if the defendants did not do so by a specified date, and it permanently enjoined and restrained the defendants from trespassing on the conservation easement.[167]

5. *Bagley v. Foundation for the Preservation of Historic Georgetown*

In this case, the landowner built two air-conditioning towers that violated a historic conservation easement agreement with the Foundation for the Preservation of Historic Georgetown.[168] The easement agreement required the landowner to get the Foundation's consent in writing before building any structures on his property.[169] When the Foundation learned of the additions, the landowner admitted that he should have asked permission to build the towers and requested that the Foundation work with him to negotiate an acceptable remedy, without requiring him to tear down the structures.[170] The Foundation refused to negotiate a design until he tore down the structures.[171] When the landowner refused, the Foundation sued to enforce the easement. It sought an injunction to remove the structure in addition to declaratory relief and attorney's fees.[172] The trial court granted summary judgment to the Foundation, ordering the landowner to demolish the structure and awarding attorney fees.[173] The appellate court upheld the trial court ruling, noting that the easement agreement was clear on its face, and it prohibited the construction of new structures on the property without the written consent of the Foundation.[174] It also rejected the landowner's argument that it was unreasonable for the Foundation to refuse to negotiate with him until he had demolished the new structure.[175] It emphasized the fact that the Foundation had not

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167. *Id.*

168. Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110, 1111 (D.C. 1994).

169. *Id.* at 1110.

170. *Id.* at 1112.

171. *Id.*

172. *Id.*

173. *Bagley*, 647 A.2d at 1112.

174. *Id.* at 1113.

175. *Id.*

exercised its right to enter the property and tear down the structure itself, which would have been a more extreme remedy.[176]

B. Courts Deciding Whether to Grant an Injunction

1. Fox Chapel v. Walters

In this case, the plaintiff was a nonprofit conservation organization that owned natural land upon which it had granted a conservation easement to the United States Department of Agriculture ("USDA").[177] The defendants owned an affirmative easement for use of the property, and the plaintiff alleged that the defendants repeatedly went beyond the boundaries of their affirmative easement and trespassed onto the part of the property encumbered by conservation easement.[178] The defendants sought to work directly with the USDA to amend the conservation easement to allow the defendants' continued use of the property.[179] The plaintiff sued for a temporary restraining order to prevent the defendants from going beyond the easement in their deed and from negotiating with the USDA without including the plaintiff in the negotiations.[180] In balancing the equities between the parties,[181] the trial court found that the plaintiff had not proved the possibility of irreparable harm if the temporary restraining order was not granted.[182] The plaintiff made only general allegations of harm to wildlife,[183] and the court suggested that it needed more details to agree that irreparable damage was imminent:

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176. *Id.*

177. Fox Chapel v. Walters, No. CV 07-8008-PCT-JAT, 2007 WL 2265684, at *1 (D. Ariz. Aug. 6, 2007).

178. *Id.* at *1-*2.

179. *Id.* at *2.

180. *Id.*

181. *Id.* at *3. The court defines its test for temporary injunction as follows: "[T]he moving party must show: 1) a strong likelihood of success on the merits, 2) the possibility of irreparable injury to the moving party if injunctive relief is not granted, 3) a balance of hardships favoring the moving party, and 4) advancement of the public interest." *Id.*

182. *Fox Chapel*, 2007 WL 2265684, at *2.

183. *Id.*

> Plaintiff has not stated if the alleged damage rises to the level of killing plants and animals or is simply the bruising of a plant branch due to the occasional misstep . . . . A blanket claim of disruption of wildlife, without any specific facts, is not enough for Plaintiff to satisfy its burden of showing irreparable harm.[184]

The court concluded that, without such details, the plaintiff could not prove that the balance of the hardship tipped sharply in its favor.[185] It denied the plaintiff's motion for a temporary restraining order.[186] The denial was made without prejudice if the plaintiff determined it could meet its burden.[187]

2. *Windham Land Trust v. Jeffords*

The approach of a Maine trial court to a request for temporary injunction differs sharply from the approach the *Fox Chapel* court took. In *Windham Land Trust v. Jeffords*, the defendants purchased eighty-five acres subject to a conservation easement and fifteen adjacent, unencumbered acres.[188] They began using both for music festivals, camping, and other profit-making activities that brought as many as one thousand people to the site at one time.[189] In evaluating the land trust's request for injunction, the court acknowledged that the trust had produced sparse evidence of irreparable harm.[190] The court, however, went on to infer the harm, saying that having so many people on the property would "disturb the condition and natural environment of the easement area in such a way that it would take many years to return the land to its current state."[191] It also rejected the defendant's claim of economic harm, saying that the defendants could hold the music festival on the fifteen unencumbered acres that they owned.[192] This would minimize the economic impact, meaning

184. *Id.*
185. *Id.*
186. *Id.* at *3.
187. *Id.*
188. Windham Land Trust v. Jeffords, No. RE-07-077, 2007 Me. Super. LEXIS 140 (Super. Ct. June 29, 2007), *aff'd*, 2009 ME 29, 967 A.2d 690.
189. *Id.* at *2.
190. *Id.* at *13.
191. *Id.* at *13-14.
192. *See id.* at *14.

the potential damage to the natural area outweighed any harm to the landowners.[193] The court issued the injunction, restricting festival-goers from entering the encumbered eighty-five acres but allowing the festival to continue on the fifteen unencumbered acres.[194]

C. Courts Enforcing Challenged Conservation Easement Agreements

In a pair of New York cases, citizens and town leaders challenged conservation easements on public park lands that towns had donated to land trusts.[195] In *Western New York Land Conservancy v. Town of Amherst*, the Amherst town board passed two resolutions to enter into a conservation easement agreement with the Western New York Land Conservancy ("WNYLC") in which it would donate a conservation easement on a town-owned park and pay WNYLC $69,000 to monitor and manage the easement.[196] After an election and change in membership, the town board later voted to rescind those resolutions.[197] The WNYLC sued for specific enforcement of the contract.[198] Amherst argued that WNYLC had not provided any consideration for the contract.[199] The New York appellate division disagreed, finding "legally sufficient consideration . . . in the form of conservation benefits and monitoring and reporting services to be provided by WNYLC."[200] It affirmed the lower court's ruling, which ordered the enforcement of the contract.[201] In *LaBarbera v. Town of Woodstock*, a case bound by the precedent set by *Amherst*, a trial court judge found that consideration could take the form of public benefit and that "the preservation of [a public] property as an undeveloped park and recreational facility provides a clear public benefit . . . ."[202]

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193. *Windham Land Trust*, 2007 Me. Super. LEXIS at *14-15.

194. *Id.* at *15.

195. W. N.Y. Land Conservancy v. Town of Amherst, 773 N.Y.S.2d 768 (App. Div. 2004); LaBarbera v. Town of Woodstock, 814 N.Y.S.2d 376 (Sup. Ct. 2006).

196. *Amherst*, 773 N.Y.S.2d at 769.

197. *Id.*

198. *Id.*

199. *See id.* at 770.

200. *Id.*

201. *Amherst*, 773 N.Y.S.2d at 770.

202. LaBarbera v. Town of Woodstock, 814 N.Y.S.2d 376, 379 (Sup. Ct. 2006).

D. Courts Imposing Criminal Sanctions for Conservation Easement Violations

1. *United States v. Blackman*

In this federal case, the defendant owned a home that was subject to a historic preservation easement that the National Park Service ("NPS") monitored.[203] The easement required the landowner to get NPS approval for any changes made to the exterior of the home.[204] When he and the NPS could not agree on renovation plans for the home, he decided to proceed without NPS approval and removed the front porch of the home.[205] NPS sought and obtained a temporary restraining order that prevented the owner from doing any further renovations until their disagreement was resolved.[206] Despite the restraining order, the owner removed the siding from three exterior walls of the home and covered the newly exposed parts with a commercial moisture barrier.[207] At the Government's request, the trial court found the defendant to be in criminal contempt through his willful violation of the temporary restraining order and fined him $4,000.[208]

2. *United States v. Peterson*

In this case, the Eighth Circuit upheld the district court's misdemeanor conviction of a landowner who drained four wetlands that were subject to conservation easements.[209] The appellate court noted that the Government produced sufficient evidence to support the conviction, and it especially noted a map that clearly showed the wetlands were within the easement boundaries.[210]

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203. United States v. Blackman, 2007 U.S. App. LEXIS 12572, at *1 (4th Cir. May 31, 2007).

204. *Id.* at *2.

205. *Id.*

206. *Id.* at *3.

207. *Id.* at *4.

208. *Blackman,* 2007 U.S. App. LEXIS at *4.

209. United States v. Peterson, 178 F.App'x 615, 616 (8th Cir. 2006).

210. *See id.* at 617.

3. *United States v. Vesterso*

In this case, members of a local water board wanted to undertake two drainage projects that would cross private lands upon which the United States Fish & Wildlife Service ("USFWS") owned conservation easements for the protection of wetlands.[211] The North Dakota Water Commission granted permits for the projects but warned the members of the water board to follow the requirements of the conservation easements.[212] The project went forward with members of the water board on-site supervising construction.[213] Despite this supervision, the construction violated the terms of the conservation easement.[214] Once the USFWS learned of the violation, it charged the three members of the water board with the petty offense of damaging federal easements.[215] The district court convicted them and gave them two years of probation, which was terminable if they restored the area covered by the easements to its original condition.[216] The Eighth Circuit upheld the conviction on appeal,[217] rejecting the defendants' argument that they could not be convicted of a criminal offense because they were acting in their official capacities.[218] The court noted that officials are immune from civil suit for acts taken in official capacity, but this immunity does not protect officials from criminal prosecution.[219] It also pointed out the potential danger in making officials immune from criminal prosecution for the violation of easements:

> If these officials could avoid prosecution, pressure from citizens might convince the County Water Board to do what the citizens could not. Or, it is possible that County Water Board officials might themselves have an interest furthered by the destruction of wetlands on federal easements. The district court found in this case that two of

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211. United States v. Vesterso, 828 F.2d 1234, 1237 (8th Cir. 1987).
212. *Id.*
213. *See id.*
214. *Id.* at 1238.
215. *Id.*
216. *Vesterso*, 828 F.2d at1238.
217. *Id.* at 1236.
218. *Id.* at 1243.
219. *Id.*

> the appellants had private farming operations which were benefited by the County Water Board projects. If the ultimate goal of the Act is to prevent the destruction of wildfowl habitat, that goal would be significantly hampered if state officials were not subject to its criminal provisions.[220]

E. Court Awarding Compensatory and Punitive Damages for an Egregious Conservation Easement Violation

An extensive search revealed just one published opinion in which a court awarded civil damages for the violation of a conservation easement. In February 2008, *Cullen v. Western New York Land Conservancy* made headlines, after a New York trial court awarded a land trust $98,181 in compensatory damages and $500,000 in punitive damages after the defendant neighbor blatantly and repeatedly violated a conservation easement held by the Western New York Land Conservancy ("WNYLC"), and trespassed on an adjacent nature preserve owned by the Conservancy.[221] Despite repeated warnings from the land trust, he clear-cut forested areas that had eighty years of growth, cut two roads through the natural area, and knowingly encroached on the adjacent nature preserve by building a new pond.[222]

The defendant appealed the verdict, and the appellate court affirmed the lower court's decision.[223] The defendant challenged the compensatory damage award, arguing that the WNYLC's damage calculations were speculative.[224] In rejecting that challenge, the appellate court pointed out that the defendant's actions had made it impossible for the WNYLC to make more accurate calculations because the defendant's contractor had removed both the trees and the stumps.[225]

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220. *Id.* at 1244.

221. Sheila McGrory-Klyza, *In Favor of: How a Land Trust Won a Half Million Dollar Judgment*, SAVING LAND, Summer 2008, at 25, 25.

222. *Id.*

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

224. *Id.* at 305.

225. *Id.*

In affirming the award of punitive damages, the court listed many facts that justified the award, including the defendant's statement to a contractor, who expressed concern about encroaching on the WNYLC's land, that "he had 'an attorney who loved to fight' and that he could 'drag this out for a while.'"[226] The court further justified its decision by acknowledging the dual motivations of punishing the wrongdoer and deterring similar behavior in the future.[227] Finally, the court affirmed the amount of the punitive damages, concluding that the amount of the award was in "reasonable relation of the harm done and the flagrancy of the conduct causing it."[228]

VI. RECOMMENDATIONS FOR COURTS

Courts must be vigilant in ordering appropriate remedies for conservation easement violations. They must take a holistic view of a conservation easement and be mindful of the public policy in favor of natural area conservation and easements. Courts should take several steps to ensure appropriate enforcement of easements. First, courts should look beyond the interests of the parties to a conservation easement and consider the interest that the public has in easements. Second, they should view harm to protected nature as important as harm to economic interests. Third, courts should honor the conservation intent of an easement by ordering restitution wherever feasible. Fourth, courts should award damages where restitution is impossible. Finally, courts should apply criminal sanctions where easement violations are willful and have done irreparable damage to the natural values of a property.

A. Courts Should Consider the Public Interest When Balancing the Equities of the Parties

When balancing the equities between parties after a violation, courts must begin expressly acknowledging and considering the interest that the public has in conservation easements. Whether landowners donate, sell, or "inherit" conservation easements from

226. *Id.*
227. *Id.*
228. *Cullen*, 886 N.Y.S.2d at 306.

previous owners, they benefit, both directly and indirectly, from owning land under conservation easement.

Reduced taxes are the most obvious benefit of conservation easements. Owners who donate conservation easements may deduct their value for federal income tax purposes.[229] Further, in recent years Congress has made temporary changes to the tax code that give more generous income tax incentives to easement donations than other types of charitable donations.[230] A taxpayer who donates stock (or another asset held for more than one year) may deduct any part of that amount up to 30% of his adjusted gross income ("AGI") and may spread the deduction over six tax years.[231] Until the end of 2009, a taxpayer who donated a conservation easement could deduct up to 50% of her AGI[232] and spread the deduction over sixteen tax years.[233] In addition, she could deduct up to 100% of her AGI if most of her income was derived from farming, ranching, or forestry activities.[234] While these special tax benefits expired at the end of 2009, conservation groups are lobbying Congress to extend them and make them permanent.[235]

These added income tax incentives make it easier for many middle-income farmers and ranchers to benefit from donating conservation easements,[236] thereby encouraging more landowners to make conservation easements. The incentives represent a large public stake in those conservation easement donations. Different government agencies have calculated the lost tax revenue anywhere from $245 million to $761 million over ten years.[237] Courts must protect this type of public investment.

Conservation easement donors also enjoy substantial estate tax benefits. An estate may deduct an additional 40% of the value of

229. 26 U.S.C. § 170(h) (2000).

230. Land Trust Alliance, How the Easement Incentive Works, http://www.landtrustalliance.org/policy/taxincentives/federal/incentive-info/?searchterm=None (last visited Feb. 17, 2010).

231. 26 U.S.C. § 170(b)(1)(B)(i) (2000).

232. *Id.* § 170(b)(1)(E)(i).

233. *Id.* § 170(b)(1)(E)(ii).

234. *Id.* § 170(b)(1)(E)(iv-v).

235. Land Trust Alliance, *supra* note 8.

236. Land Trust Alliance, *supra* note 230.

237. *Id.*

encumbered land from the estate, up to a maximum of $500,000.[238] The estate of a landowner who donates an easement worth $500,000 on a piece of land with pre-easement value of $1,500,000 may be able to deduct up to $900,000 from the value of that land for estate tax purposes.[239] The estate tax incentive makes it possible for many land-rich, cash-poor farmers and ranchers to pass family farms to their children and grandchildren rather than forcing them to sell land to pay estate taxes.[240]

Finally, some conservation easement donors or sellers may also enjoy state and local income tax benefits. Some states have enacted income tax credits for conservation easement donors.[241] For example, Maryland provides an income tax credit up to market value to landowners who donate easements to the Maryland Environmental Trust or the Maryland Agricultural Preservation Foundation.[242] Landowners may take a credit of up to $5,000 each year and may carry over any excess for fifteen years.[243] In addition, property owners may enjoy property tax savings due to the lowered market value of the property.[244]

The *Amherst*[245] and *LaBarbera*[246] cases provide good examples of a court's weighing the public benefit appropriately. These New York courts recognized the public benefit inherent in conservation easements. The *Amherst* court found that conservation benefits were legally sufficient consideration to make a valid contract between a town and a land trust.[247] Bound by the *Amherst* precedent,

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238. *See* 26 U.S.C. § 2031(c) (2000).

239. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 36-37 (2004).

240. Land Trust Alliance, Conservation Easements, http://www.landtrustalliance.org/conserve/have-land-to-save/how-to-conserve-your-land-1/conservation-easements/?searchterm=None (last visited Feb. 17, 2010).

241. McLaughlin, *supra* note 239 at 39.

242. MD. CODE ANN. TAX–GEN. § 10-723 (2002); *see also* COLO. REV. STAT. ANN. § 39-22-522 (1989).

243. MD. CODE ANN. TAX–GEN. at § 10-723.

244. McLaughlin, *supra* note 239 at 39.

245. *See* W. N.Y. Land Conservancy v. Town of Amherst, 773 N.Y.S.2d 768 (App. Div. 2004).

246. *See* LaBarbera v. Town of Woodstock, 814 N.Y.S.2d 376 (Sup. Ct. 2006).

247. *See Amherst*, 773 N.Y.S.2d at 770.

LaBarbera also built on that legacy by making clear that preserving a public property for park and recreational purposes served the public good.[248] More courts should follow this example in recognizing the value of undeveloped public lands.

B. Courts Should View Harm to Nature as a Real Harm

The different outcomes in the *Fox Chapel*[249] and *Windham Land Trust*[250] cases illustrate how a judge's understanding of and appreciation for nature can affect his or her view of a case. The *Fox Chapel* decision is unfortunate, given the plaintiffs' claims that defendants had repeatedly violated the conservation easement.[251] The defendants also attempted to modify the easement without including the plaintiff (who was the original grantee) in the negotiations, suggesting that they knew they were regularly violating the easement.[252] This court should have been more willing to infer environmental harm from this evidence that defendants were misusing the property. The *Windham Land Trust* court took a much more reasonable approach. Although it recognized that the plaintiffs had done a poor job of showing evidence of environmental harm,[253] it was willing to infer the obvious harm that hundreds or thousands of festival-goers could cause by descending on a natural area at one time.[254] More courts should take this common-sense approach.

C. Order Restitution Where Possible

Despite its sympathy for the defendant and concern about the conservation benefits of removing fill from the wetland, the trial court in *DiMaria* did an admirable job of safeguarding the public interest.[255] That court wisely recognized that allowing one defendant

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248. *LaBarbera*, 814 N.Y.S.2d at 379.

249. Fox Chapel v. Walters, No. CV 07-8008-PCT-JAT, 2007 WL 2265684 (D. Ariz. Aug. 6, 2007).

250. Windham Land Trust v. Jeffords, No. RE-07-077, 2007 Me. Super. LEXIS 140 (Super. Ct., June 29, 2007), aff'd, 2009 ME 29, 967 A.2d 690.

251. *Fox Chapel*, 2007 WL 2265684, at *1.

252. *Id.*

253. *Windham Land Trust*, 2007 Me. Super. LEXIS 140, at *13.

254. *Id.* at *14.

255. Conservation Comm'n v. DiMaria, No. CV054009431S, 2008 WL 3307154, at *9 (Conn. Super. Ct. July 21, 2008).

to fill a wetland, even inadvertently, might lead others to do the same.[256] The *Bjork* court echoed this concern in its opinion.[257] It warned trial courts not to render conservation easement agreements meaningless by allowing easement violators to win a balancing test by making expensive alterations and then arguing that it would be too costly to undo them.[258] That court ordered remediation despite the expense.[259]

The *Feduniak* court ordered restitution despite the facts that the previous owners had created the violation, the violation had been in place for many years, and restoration would be expensive.[260] The appellate court's criticism of the trial court for devaluing the public interest in conservation[261] is a warning to California trial courts. Courts in other states should follow the California example.

The *Ponte* decision is notable because the court went even further than ordering the defendant to remove the violating platform.[262] Recognizing the defendants' lack of cooperation and good faith in previous proceedings, the court also gave the government permission to remove the platform if the defendants did not do so within a specified time period.[263] This very practical decision helped to ensure a conservation benefit where the defendants were unlikely to do so, even under a court order. Similarly, in *Bagley*, the appellate court did not have patience for a defendant who knowingly violated an easement.[264] If the court had not forced the demolition of the air conditioning towers, it would have set a precedent of allowing easement grantors to first violate their easements and then negotiate a settlement. A precedent of allowing easement violations to stand while the parties negotiate would put grantee organizations in a weak negotiating position and would not uphold the public's interest in conservation.

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256. *Id.*

257. Bjork v. Draper, 886 N.E.2d 563, 575 (Ill. App. Ct. 2008).

258. *Id.*

259. *Id.*

260. Feduniak v. Cal. Coastal Comm'n, 56 Cal. Rptr. 3d 591, 599 (Ct. App. 2007).

261. *Id.* at 615.

262. United States v. Ponte, 246 F. Supp. 2d 74, 81 (D. Me. 2003).

263. *Id.*

264. Bagley v. Found. for the Pres. of Historic Georgetown, 647 A.2d 1110, 1113 (D.C. 1994).

D. Order Damages Where Restitution is Impossible or Incomplete

Courts should not hesitate to order damages where defendants have violated easements willfully and/or have caused permanent damages to protected natural areas. News stories about the *Cullen* case reveal that the defendant is a wealthy and powerful businessman.[265] He may have believed that the resources he had available for litigation would outlast those of a small land trust or that he could buy his way out of the problem by making a settlement offer to the trust. The trust benefited from at least 1,000 hours of time donated by a local attorney,[266] but it also benefited from a judge and jury who were willing to award meaningful damages where complete restitution was impossible. More courts should follow their example and ensure that conservation easement violators are penalized appropriately, thereby deterring future violations. Easement holders can also use the damage awards to restore the damaged area as completely as possible, thus preserving the public investment in the easement.

E. Impose Criminal Sanctions Where Appropriate

Finally, courts should follow the lead of the *Blackman*,[267] *Peterson*,[268] and *Vesterso*[269] courts and impose criminal sanctions where the conservation easement violation is willful. In all three cases, the evidence showed that the defendants willfully violated the conservation easements at issue.[270] Imposing criminal sanctions for willful violations is another way to deter those who might hope to buy their way out of a knowing violation. The *Vesterso* decision is very important in showing that when public officials violate conservation easements, their office will not protect them from prosecution.

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265. *Id.* at 25.

266. *Id.* at 26.

267. United States v. Blackman, No. 06-4167, 2007 U.S. App. LEXIS 12572 (4th Cir. May 31, 2007).

268. United States v. Peterson, 178 F.App'x 615 (8th Cir. 2006).

269. United States v. Vesterso, 828 F.2d 1234, 1236, 1238 (8th Cir. 1987).

270. See *Blackman*, 2007 U.S. App. LEXIS 12572, at *4; *Peterson*, 178 F.App'x at 616-17; *Vesterso*, 828 F.2d at 1236-38.

VII. SUGGESTED ACTIONS FOR CONSERVATION ORGANIZATIONS

Land trusts, government agencies, and other environmental advocates must be prepared to prevent conservation easement violations from occurring and to take action when they do occur. The case law review provides lessons in effective conservation easement litigation. Of course, the conservation community should continue to study the outcome of future cases and learn lessons from each litigation experience.

A. Good Easement Drafting

The best way to prevent easement violations is to draft a good easement agreement. Easement drafters should take care to draft easement agreements that discourage violations by clearly stating the terms of the agreement and the remedies available for violating the agreement. Easement agreements should include a clear statement of purpose.[271] They should clearly spell out what activities are prohibited. Finally, they should specify what remedies are available to the easement holder in case of violation. These remedies should include damages clauses that require violators to pay for restoration costs and, in cases where the damage is permanent, for diminishment of natural, scenic or recreational value. This also could be accomplished through a stipulated damages clause, which would relieve the land trust of the burden of proving the amount of damages but still provide a significant sum of money for restoration.

Easement agreements should also contain a fee-shifting clause that allows both easement holders and third parties to collect attorney's fees after successfully suing for easement enforcement. The *Bjork* court stated explicitly that it did not allow the plaintiffs (who were neighbors and not a party to the original easement) attorney's fees, despite giving them other relief they desired, because the easement agreement's fee-shifting clause addressed only the fees of an enforcing grantee and not a third-party enforcer.[272] Allowing successful third-party plaintiffs to collect attorney's fees will

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271. Melissa K. Thompson & Jessica Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373, 410 (2001).

272. Bjork v. Draper, 886 N.E.2d 563, 575-76 (Ill. App. Ct. 2008).

encourage third-party lawsuits for easement enforcement. Encouraging third-party litigation will ensure that the public good is protected in the long-term, even if the grantee organization is unwilling or unable to sue for easement enforcement.

Grantee organizations should also consider including a clause in the contract that would allow a lien to be placed on the property or proceeds that result from the diversion of resources, such as timber or soils, from an area protected by conservation easement. Because conservation easements are recorded, the clause would provide notice to a third party who participated in the removal or destruction of protected resources.

B. Influencing a Balancing Test

Land trusts and their attorneys must prepare to influence an equity-balancing test when litigating conservation easement violations in court. Courts use balancing tests both when deciding whether to issue injunctions and when determining what remedy to award when they find a violation has occurred.[273] *Fox Chapel v. Walters*[274] is an important warning to conservation easement litigators that they cannot assume courts will understand the natural value of a property or how a violation can damage that value. It is not enough to claim that an easement violation causes harm to wildlife or historic structures. Litigators must be prepared to prove both the natural value of the site and the harms that a violation will cause or already has caused.

Studying case law from around the country can help conservationists learn different approaches that judges take to this area of law and develop litigation strategies that will appeal to those approaches.

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273. *See, e.g.*, Feduniak v. Cal. Coastal Comm'n, 56 Cal. Rptr. 3d 591, 616 (Ct. App. 2007) (applying a balancing test to determine what remedy to award after an easement violation); Windham Land Trust v. Jeffords, No. RE-07-077, 2007 Me. Super. LEXIS 140, at *14-15 (Super. Ct., June 29, 2007), *aff'd*, 2009 ME 29, 67 A.2d 690 (using a balancing test to determine whether to award an injunction).

274. Fox Chapel v. Walters, No. CV 07-8008-PCT-JAT, 2007 WL 2265684 (D. Ariz. Aug. 6, 2007).

1. Expert Witnesses

One such strategy is to employ the use of experts. As the *Fox Chapel* court demonstrated, some courts do not have an inherent appreciation for the value of nature.[275] Land trusts should prove the value of natural lands by expert testimony. Expert witnesses should be familiar with the property and prepared to discuss endangered, rare, and threatened flora and fauna, along with any important historical or geological features of the property.

If the defense attempts to mitigate damages by showing that these flora, fauna, or geological features exist elsewhere, the expert could testify to the importance of creating redundancy in conservation work.[276] When focusing on a particular species or habitat type, many conservation groups try to protect it in multiple places so that there is a "back-up" in case a catastrophic event (such as disease, tornado, or fire) destroys one area.[277] Some conservation groups are even using redundancy as a strategy to prepare for global climate change.[278]

Those involved with the *Cullen* case believe that expert testimony was crucial to their case.[279] The land trust hired an independent engineering firm to prepare a damage report and testify at trial.[280] Those engineers were able to explain the impact of the loss of eighty-year growth.[281] Land trust representatives believe that the engineers' testimony, along with the testimony of the biologist who did the baseline easement documentation, were crucial to winning the case.[282]

In their 2001 article, Thompson and Jay illustrate the potential power of expert witnesses through their analysis of the *Redwood Construction v. Doornbosch* case.[283] They emphasize the court's justification of its decision to grant the developer's motion for summary judgment—the developer had presented an unrebutted

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275. *Id.* at *2.

276. Craig R. Groves et al., *Planning for Biodiversity Conservation: Putting Conservation Science into Practice*, 52 BIOSCIENCE 499, 506 (2002).

277. *Id.* at 509.

278. *Id.* at 510.

279. McGrory-Klyza, *supra* note 221, at 25-26.

280. *Id.* at 26.

281. *Id.*

282. *Id.*

283. Thompson & Jay, *supra* note 271, at 397 (citing Redwood Constr. v. Doornbosch, 670 N.Y.S.2d 560 (App. Div. 1998)).

prima facie case that its access easement would not violate the conservation easement on the property.[284] Thompson and Jay speculate that the developer presented a credible expert witness, and the land trust did not, helping the court justify its granting the motion for summary judgment.[285]

2. Visual Aids

Land trusts should take advantage of the power of pictures in the courtroom. The judge's visit to the property in question in *Bjork v. Draper*[286] demonstrates how important it can be to a court to be able to visualize a property and any potential problems associated with it. The *Peterson* court notes that the map and photographic evidence produced by the government to show the location of the protected areas provided "more than adequate" support for the magistrate's ruling for the government.[287] Because property encumbered by conservation easement is often scenic, photographs could help courts understand the importance of what the conservation easement protects. Visual aids are a powerful weapon to bring life to dry expert scientific testimony.

VIII. CONCLUSION

Easements are powerful tools for conservation. Americans lose more natural lands, agricultural lands, and historically important buildings to development every day. Conservation easements provide a cost-effective, private-sector mechanism for curbing that loss. As conservation easements continue to grow in popularity, land trusts, government conservation agencies, legislatures, and the courts must work together to ensure that conservation easements are upheld forever. This cooperative effort toward maintaining the public good inherent in easements will assure that future generations will enjoy the same abundance of scenic beauty and natural resources that Americans enjoy today.

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284. *Id.*
285. *Id.*
286. Bjork v. Draper, 886 N.E.2d 563, 570 (Ill. App. Ct. 2008).
287. United States v. Peterson, 178 F.App'x 615, 617 (8th Cir. 2006).