

Institutional Control Establishment

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Categories of Institutional Controls

- Proprietary controls
- Government controls
- Informational devices
- Enforceable controls

Proprietary Controls

Deed restrictions -- Private contractual mechanisms that are contained in a deed or other instrument used to transfer title to property.

Conservation servitudes

Conservation servitudes are typically “negative” interests, meaning they limit the rights of other parties, preventing the landowner from altering the natural state and ecological integrity of the parcel in question.

Types of Conservation Servitudes

- Easements
- Real covenants
- Equitable servitudes

General Rule of Common Law

Common law has a traditional bias toward unrestrained use of the land, and against adopting rules governing land that are enforceable by and against parties other than those who made the original agreement.

Enforceability of Conservation Servitudes

- Unclear whether regulator can enforce:
 - common law easement against subsequent owners because of bias against negative easements in gross
 - Common law covenant against subsequent owner because of requirement for privity of estate

Governmental Controls

- State and local governments limit the use of property through planning and zoning maps, subdivision plats, building permits, siting restrictions and groundwater use restrictions in the form of well drilling prohibitions or well use permits.



Informational Controls

Purpose of information controls is to advise future owners and users of hazards existing at the property.

State Mechanisms for Implementing ICs

- Informational ICs
 1. Notice in the state agency's contaminated sites database (GIS)
 2. Notice of environmental contamination/deed notice
 3. Statutory transfer provisions

Problems with Informational ICs

- Not enforceable by regulators or RPs
- Don't run with the land
- May not provide adequate notice to subsequent purchasers or lessees

Enforceable Controls

- More traditional enforcement actions may be used to create institutional controls

Enforceable Institutional Controls

1. Uniform Conservation Easement Act
2. Permits
3. Compliance Orders by Consent
4. Compliance Orders
5. Land Management Plans

Problems with these “enforceable” State IC tools

- Some don't run with the land
- Can be out of regulator control
- Transfers of property interest can't be used against the DoD
 - UCEA – DoD won't transfer interest in property until property is transferred out of federal ownership

Potential State Changes to UECA

Potential state issues with UECA

- Environmental cleanup decision maker approves the covenant.
- → State solution – change “agency” to “department” so the state is always the primary regulatory actor in establishing environmental covenants (Kentucky, Alabama and Delaware)

Potential state issues with UECA

- No requirement to subordinate prior interests.
- → State solution – Require the owner to obtain subordination from all prior interests unless waived by the department

Potential state issues with UECA

- Covenant as an interest in property
- → State solution – secondary mechanism for use when there are legal impediments to entering into an environmental covenant (Colorado)

Potential state issues with UECA

- Amendment/termination of environmental covenant only through consent of all signatories or by department going to court
- → State solution – Add an administrative route with right of appeal

Potential state issues with UECA

- UECA has no trigger
- → State solution – Add a trigger

Question is...

How much can you change before they will declare you “not uniform” anymore.