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Attorneys at Law
Institutional Controls, Deed Restrictions, Restrictive Covenants and The Uniform Environmental Covenants Act
R&H
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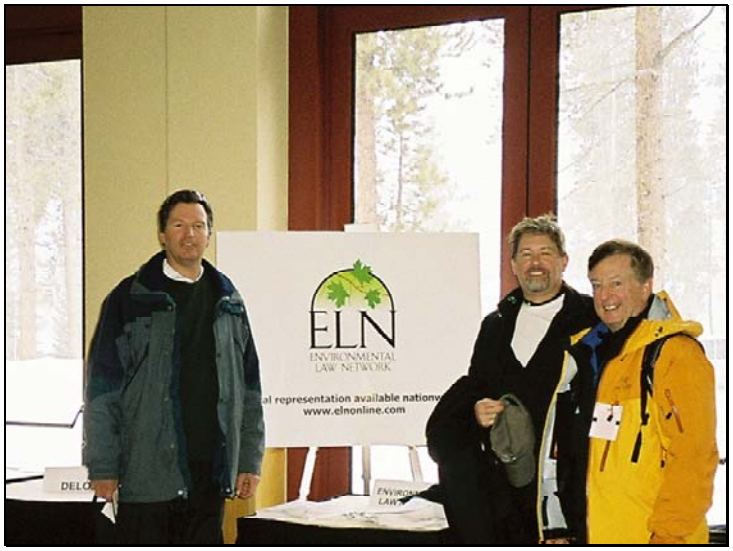

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An introduction to
Institutional Controls

- *Institutional Controls* - The shorthand phrase to describe the restrictions on use and development imposed in lieu of requiring complete cleanup of contaminated soil or groundwater by RCRA, Superfund or their state counterparts. Also, describes limits on destruction of natural resources, i.e. forests or wetlands.

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An introduction to
Institutional Controls

- For contaminated sites imposed as part of risk-based cleanup to prevent disturbance or exposure , e.g.:
  - Prohibit of groundwater wells for potable water due to contaminants exceeding drinking water standards,
  - Impose construction techniques for buildings to prevent vapor intrusion, or exposure to construction workers, or
  - Limit construction in, under or over remedial caps.

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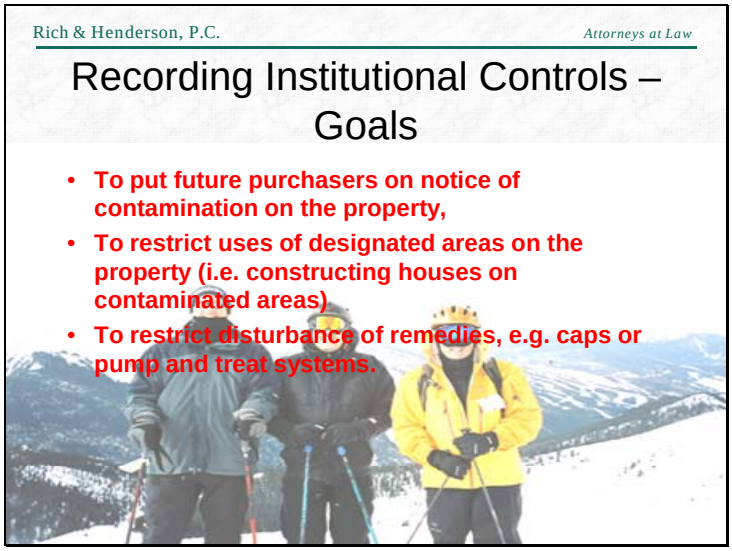
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Recording Institutional Controls – Goals
• To put future purchasers on notice of contamination on the property,
• To restrict uses of designated areas on the property (i.e. constructing houses on contaminated areas),
• To restrict disturbance of remedies, e.g. caps or pump and treat systems.

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Recording
Institutional Controls
• Supplementing Institutional controls through property records is done in variety of ways:
• Recording of orders to provide notice.
• Deed restrictions
• Environmental easements
• Environmental covenants.

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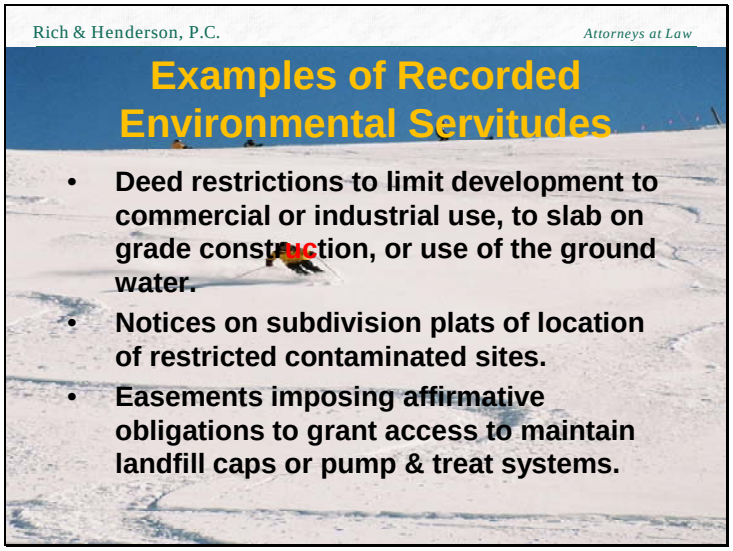
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Examples of Recorded Environmental Servitudes
• Deed restrictions to limit development to commercial or industrial use, to slab on grade construction, or use of the ground water.
• Notices on subdivision plats of location of restricted contaminated sites.
• Easements imposing affirmative obligations to grant access to maintain landfill caps or pump & treat systems.

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Limitations of Traditional Environmental Servitudes or Covenants

- Enforcement hindered by traditional common law doctrines:
  - Waiver, abandonment, acquiescence
  - Adverse possession or foreclosure
  - Limited to persons with a real property interest
- Subject to limits by prior easements, liens or notes
- Subject to amendment or termination of a covenant by future owners, which discourages cleanup and redevelopment – encourages holding onto and not developing the property.

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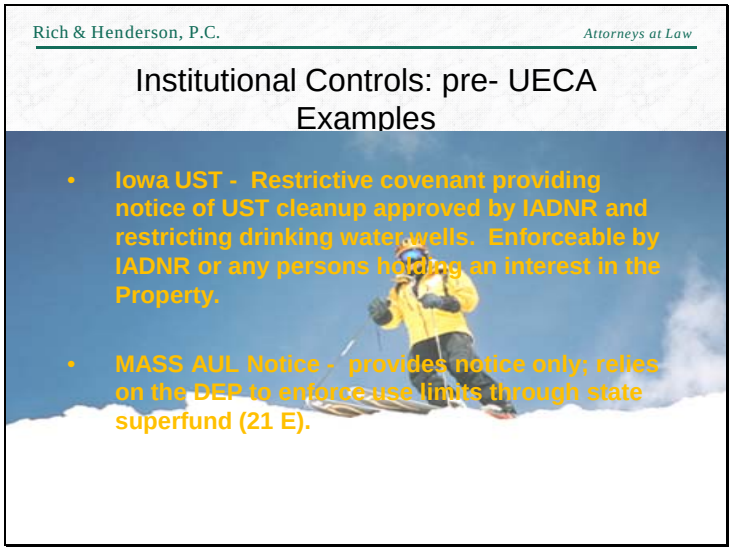
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Institutional Controls: pre- UECA Examples
• Iowa UST - Restrictive covenant providing notice of UST cleanup approved by IADNR and restricting drinking water wells. Enforceable by IADNR or any persons holding an interest in the Property.
• MASS AUL Notice - provides notice only; relies on the DEP to enforce use limits through state superfund (21 E).

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Institutional Controls: pre- UECA Examples, Cont.

- **MD Superfund Easement/ Restrictive Covenant- required by EPA as a condition of a Consent Decree with all PRPs. Provides access and enforcement rights to PRPS & EPA.**
- **MD Voluntary Cleanup Program – records the 'no further requirements determination' by MDE for release of solvent by drycleaner tenant of shopping center. Provides notice of contamination, limits on groundwater use, and maintenance requirements. Relies on threat of loss of NFA status for compliance.**

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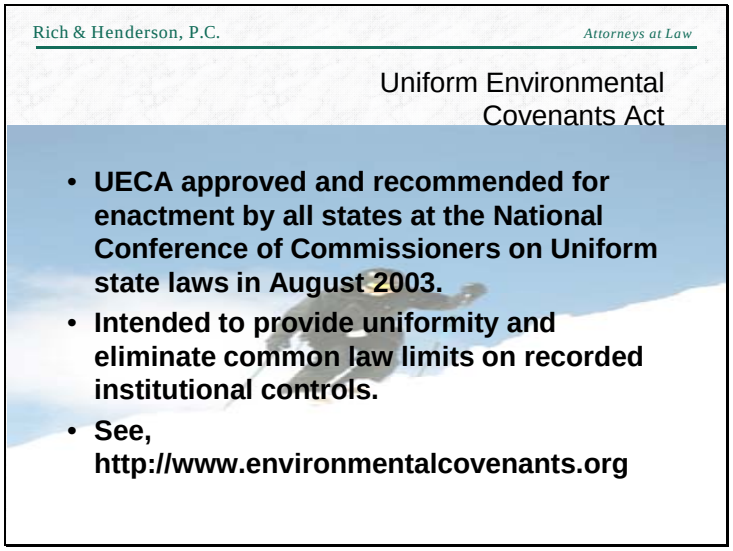
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Uniform Environmental Covenants Act
• UECA approved and recommended for enactment by all states at the National Conference of Commissioners on Uniform state laws in August 2003.
• Intended to provide uniformity and eliminate common law limits on recorded institutional controls.
• See, http://www.environmentalcovenants.org

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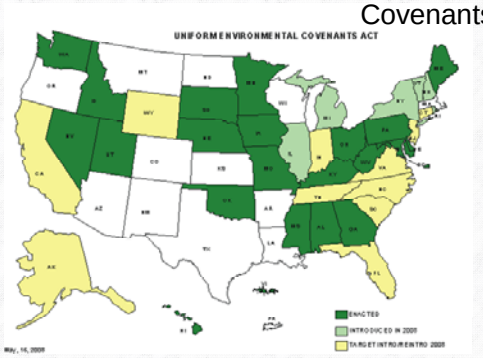
Uniform Environmental Covenants Act



Colorado *25 C.R.S.A § 15-318* - Separate environmental covenants statute enacted in 2001 as part of the state hazardous waste management program

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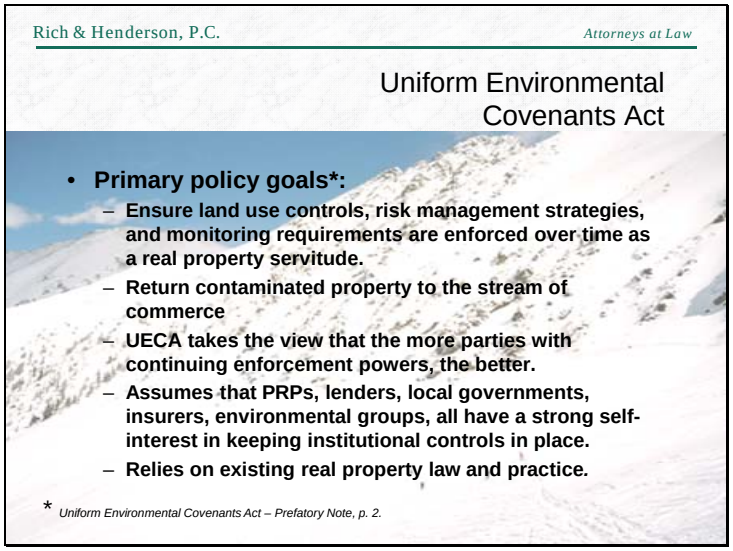
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Uniform Environmental Covenants Act
• Primary policy goals*:
– Ensure land use controls, risk management strategies, and monitoring requirements are enforced over time as a real property servitude.
– Return contaminated property to the stream of commerce
– UECA takes the view that the more parties with continuing enforcement powers, the better.
– Assumes that PRPs, lenders, local governments, insurers, environmental groups, all have a strong self-interest in keeping institutional controls in place.
– Relies on existing real property law and practice.
* Uniform Environmental Covenants Act – Prefatory Note, p. 2.

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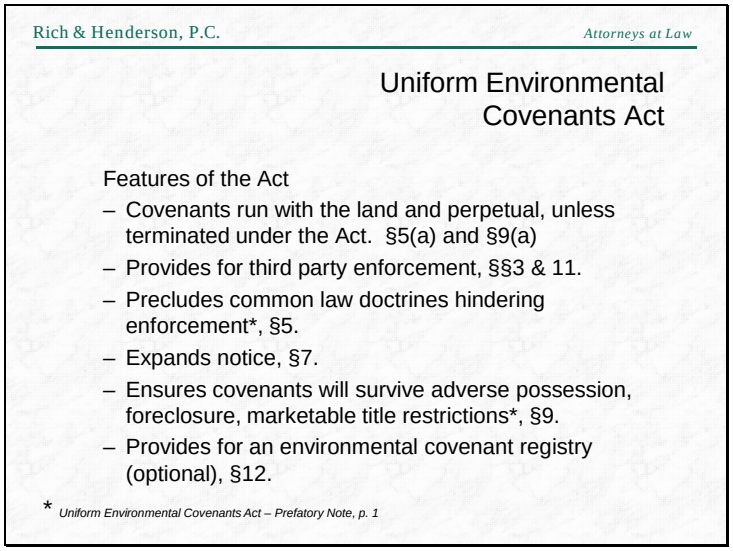
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Uniform Environmental Covenants Act
Features of the Act
– Covenants run with the land and perpetual, unless terminated under the Act. §5(a) and §9(a)
– Provides for third party enforcement, §§3 & 11.
– Precludes common law doctrines hindering enforcement*, §5.
– Expands notice, §7.
– Ensures covenants will survive adverse possession, foreclosure, marketable title restrictions*, §9.
– Provides for an environmental covenant registry (optional), §12.
* Uniform Environmental Covenants Act – Prefatory Note, p. 1

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Uniform Environmental Covenants Act - Key Provisions

- Section 4(a) – Required Contents of an Environmental Covenant
  - Reference to UECA
  - A legally sufficient description of the real property
  - activity and use limitations on the property
  - Identify every agency, land owner and any other holder
  - Be signed by every agency (unless waived), owner and holder
  - Identify administrative record location for any environmental response project (optional Statewide Registry - § 12)
  - Recorded per § 8

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Uniform Environmental Covenants Act - Key Provisions

- Section 4(b) – Optional Contents of an Environmental Covenant
- Additional Parties
- Notice of change of ownership or land use
- Periodic reporting on the land use
- Access rights for various parties
- Description of the location and details of remaining contaminants, pathways of exposure, exposure limits
- Other rights or duties of the holder

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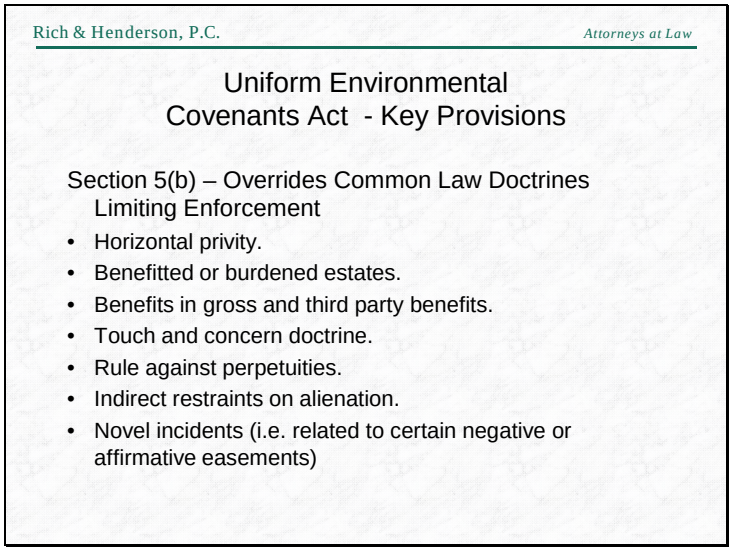
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Uniform Environmental
Covenants Act - Key Provisions
Section 5(b) – Overrides Common Law Doctrines Limiting Enforcement
• Horizontal privity.
• Benefitted or burdened estates.
• Benefits in gross and third party benefits.
• Touch and concern doctrine.
• Rule against perpetuities.
• Indirect restraints on alienation.
• Novel incidents (i.e. related to certain negative or affirmative easements)

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Uniform Environmental Covenants Act - Key Provisions

- Section 7 – Notice
- Copy of the environmental covenant must be provided to:
  - Each person who signed the covenant
  - Each person holding a recorded interest in the real property
  - Each person in possession of the real property
  - **Each municipality or local government where the real property is located**
  - **Any other person the agency requires**

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Uniform Environmental Covenants Act - Key Provisions

Section 9 – Duration and Amendment

- Perpetual unless terminated by one of limited circumstances listed in §9(a): i) existing mortgages not overridden: e.g. old lenders' mortgages; or ii) eminent domain and the "doctrine of changed circumstances" can override in specified circumstances. §9(a)(5).
- State tax liens and foreclosures, adverse possession, and similar doctrines do not override §9(c)
- Marketable Title Act or Dormant Mineral Interests Acts superseded §9(d)

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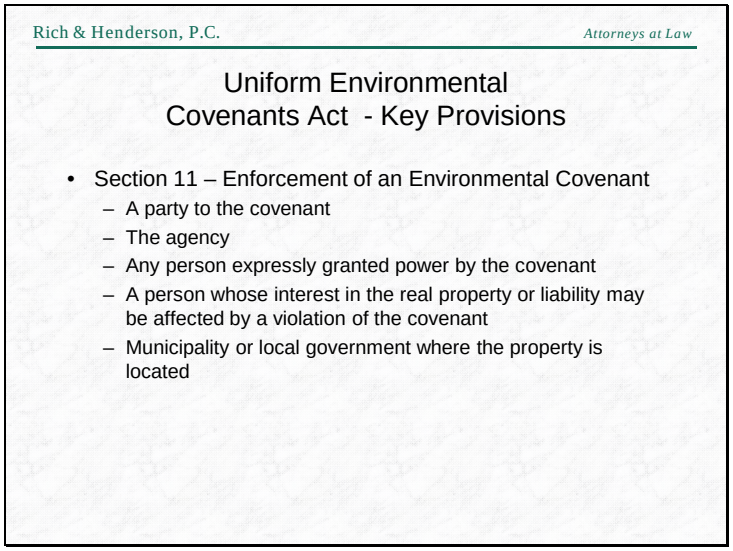
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Uniform Environmental
Covenants Act - Key Provisions
• Section 11 – Enforcement of an Environmental Covenant
– A party to the covenant
– The agency
– Any person expressly granted power by the covenant
– A person whose interest in the real property or liability may be affected by a violation of the covenant
– Municipality or local government where the property is located

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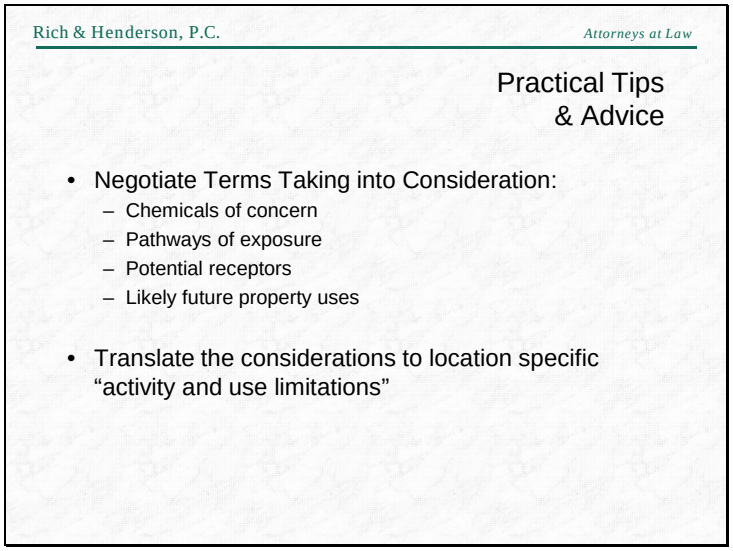
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Practical Tips
& Advice
• Negotiate Terms Taking into Consideration:
– Chemicals of concern
– Pathways of exposure
– Potential receptors
– Likely future property uses
• Translate the considerations to location specific "activity and use limitations"

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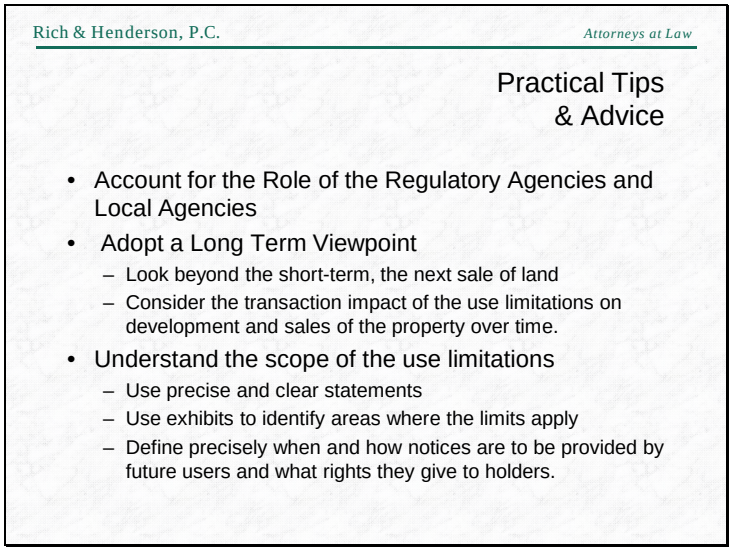
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Practical Tips
& Advice
• Account for the Role of the Regulatory Agencies and Local Agencies
• Adopt a Long Term Viewpoint
– Look beyond the short-term, the next sale of land
– Consider the transaction impact of the use limitations on development and sales of the property over time.
• Understand the scope of the use limitations
– Use precise and clear statements
– Use exhibits to identify areas where the limits apply
– Define precisely when and how notices are to be provided by future users and what rights they give to holders.

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UECA - Maryland Mine Reclamation Example

Pertinent Facts:

- Two sand and gravel mines on roughly 200 acres.
- From 1995 to 2007 reclaimed with over 4.5 million tons of coal ash in discrete areas of both mines.
- In 2007 MD MDE brought an enforcement action for contamination of groundwater.
- Oct. 2007 Consent decree required a restrictive covenant on future uses of the land to protect the remedy (a cap and pump & treat system) and prevent exposure.
- My client and the utility drafted a restrictive covenant in accordance with UECA; MDE has not yet approved.

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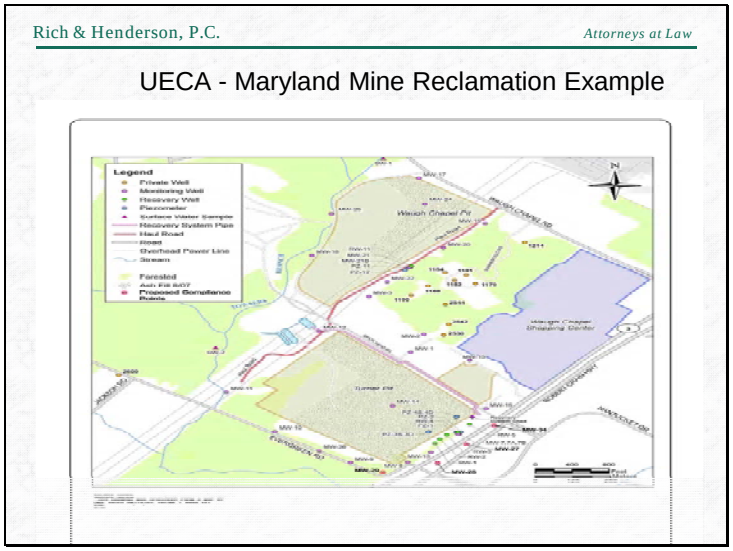
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UECA - Maryland Mine Reclamation Example
Legend
Private Well
Monitoring Well
Recovery Well
Piezometer
Surface Water Sample
Recovery System Pipe
Haul Road
Road
Overhead Power Line
Stream
Forested
Proposed Surveillance Points
Welsh Gravel Pit
Welsh Quarry Rd
Welsh Quarry
Hancock Rd
Hancock Rd
Fredericktown Rd
N

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UECA - Maryland Mine Reclamation Example

Key Features of the Restrictive Covenant:

- Holders are limited to property owner, utility and MDE.
- Will be recorded for the 6 parcels on which the two mines are located.
- Distinguishes among the property, the encumbered property (the 4 mined parcels reclaimed with ash), and the Capped Areas (those containing ash, covered by the required cap and adjacent drainage structures).
- Requires owners to maintain the Encumbered Property to prevent water intrusion; and to ensure the integrity of the cap and comply with 'Construction Guidelines' on the Capped Areas.

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UECA - Maryland Mine Reclamation Example

Enforcement Provision:

- Authorizes the Holders entry to enforce the terms with limitation: "only to the extent such entry does not unreasonably interfere with any tenant's or owner's use, development or occupancy of the Encumbered Property."
- Consistent with the law, authorizes the Holders or any party who owns all or any portion of the Encumbered Property to respond to non-compliance with "any and all remedies" provided by the MD UECA.

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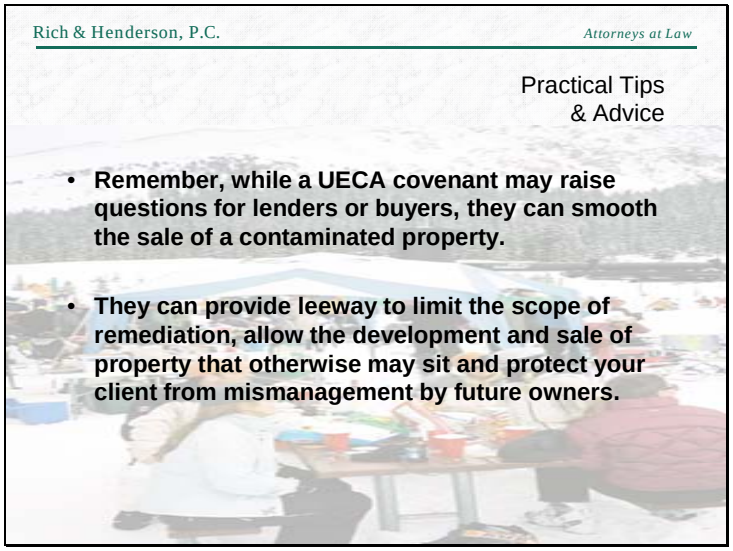
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Practical Tips
& Advice
• Remember, while a UECA covenant may raise questions for lenders or buyers, they can smooth the sale of a contaminated property.
• They can provide leeway to limit the scope of remediation, allow the development and sale of property that otherwise may sit and protect your client from mismanagement by future owners.