# CHAPTER 59

# Utah

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## Introduction

Utah is one of approximately 22 states to adopt the Uniform Environmental Covenants Act (Uniform Act), which is generally administered by the Utah Department of Environmental Quality (UDEQ) through a series of remedial statutes. Like the EPA, Utah's legislature recognized the increasingly significant role that institutional controls can play to effectively and cost-efficiently remediate contaminated properties. By tailoring cleanups to anticipated future land uses rather than requiring cleanups to meet any unrestricted use, institutional controls serve to provide a more affordable and expeditious cleanup approach, while still protecting both the public health and the environment. This revised approach is often referred to as a risk-based cleanup. Through the use of environmental covenants, controls are implemented that curtail the likelihood of exposure to remaining contaminants following cleanup. This chapter provides an overview of Utah's Uniform Environmental Covenants Act (UECA)[1] and how each of the environmental and remediation programs administered by the UDEQ allows for the use of these controls. This chapter also discusses the Utah Environmental Institutional Control Act,[2] which preceded UECA, and its application to contaminated properties.

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*Editor's note:* The terminology for these restrictions varies from program to program and jurisdiction to jurisdiction. The most commonly used terminology includes "institutional controls," "land use controls," "environmental covenants," and "activity and use limitations." The program discussed in this chapter uses the terminology "institutional controls," "environmental institutional controls," "environmental use restrictions," and "environmental covenants." It is important to understand how this terminology may differ from that used in other programs or jurisdictions. *See* chapter 1.

## Utah Environmental Institutional Control Act

The Utah legislature enacted the Utah Environmental Institutional Control Act (UEICA) in 2003. This statute, which provides for the use of environmental institutional controls in connection with cleanup or risk assessment activities overseen by the UDEQ, applies only to institutional controls that were created *before* May 1, 2006. UEICA defines environmental institutional controls to include various types of institutional controls, whether they are couched as a restrictive covenant, an easement, a reservation, an environmental notice, an engineering control, or another type of restriction or obligation.[3] Importantly, UEICA only applies to, or attempts to validate institutional controls used in, remediation projects reviewed, overseen, conducted, or administered by the UDEQ.[4] Thus, landowners who wish to impose institutional controls on property outside of a governmentally approved cleanup cannot rely on the protections afforded under the statute. UEICA provides that landowners may, with the approval of the executive director of the UDEQ, restrict the use of real property by imposing on the real property appropriate environmental institutional controls to mitigate the risk posed to the public health and the environment.[5] Without expressly validating the effect of an institutional control, UEICA further provides that an environmental institutional control should state that the environmental institutional control runs with the land and binds subsequent landowners.[6] Unlike some of the early environmental use restriction statutes in several western states, UEICA grants landowners the power to enforce environmental institutional controls on property by a temporary restraining order or injunction[7] and the right to consent to a modification or termination of the restriction.[8] Specifically, enforcement of an environmental institutional control falls to the UDEQ and "other affected parties."[9] However, an affected party may only pursue equitable remedies to enforce an environmental institutional control, including a temporary restraining order or an injunction.[10] The UDEQ, however, may seek to recover its costs in enforcing or protecting an environmental institutional control.[11] The statute also expressly provides how to terminate an environmental institutional control. The landowner may request, in writing, that the executive director of the UDEQ approve a request to terminate or modify an environmental institutional control.[12] The executive director may also, on his or her own accord, determine that an environmental institutional control is no longer necessary because any unacceptable risk to human health or the environment has been abated.[13]

UEICA also provides specific requirements for drafting and implementing an environmental institutional control. For example, an environmental institutional control must be in writing and must be recorded by the owner of the real property in the county recorder's office where the property is located.[14] The written instrument must include a legal description of the property subject to the environmental use restriction as well as a description of the environmental institutional control itself and the reason why the environmental institutional control must remain in place.[15] The written instrument must also include a statement that the environmental institutional

control runs with the land and is binding on its successors unless and until the control is terminated as authorized under U.C.A. § 19-10-105.[16]

For the most part, UEICA is far less comprehensive than the Uniform Act. Most importantly, the statute does not expressly purport to validate a private institutional control as a covenant running with the land.[17] In addition, UEICA does not include a retroactive provision purporting to validate environmental use restrictions imposed prior to the effective date of the statute. The statute also does not contain a provision stating that the statute is not to be interpreted as indicating that other types of covenants and easements are unenforceable. These omissions are significant. It can be argued that a statute drafted to ensure that certain environmental use restrictions run with the land reflects the legislature's belief that, absent such a statute, such restrictions would not do so. Such negative implication makes it more difficult to argue that other types of environmental use restrictions are binding on subsequent purchasers.

UEICA has other deficiencies. For example, the statute does not explicitly address procedures for subordinating prior interests in the land to the environmental institutional control. The statute also does not expressly protect environmental use restrictions from being extinguished by common law real property doctrines or statutory devices. While UEICA was likely intended to make environmental institutional controls binding on subsequent purchasers,[18] the statute does not expressly state that they are. In sum, UEICA does not address those issues related to the question of enforceability of environmental use restrictions as comprehensively as does the Uniform Act.

In response to these deficiencies and to eliminate concerns regarding the enforceability of certain environmental use restrictions, the Utah legislature enacted the Uniform Environmental Covenants Act (UECA).

## Utah's Uniform Environmental Covenants Act

Enacted in 2006, UECA is based on the model Uniform Act and applies to environmental covenants adopted *after* May 1, 2006. As mentioned above, environmental covenants may be used in a host of environmental remediation programs administered by the UDEQ.

Prior to enactment of UECA, various types of institutional controls, including informational, governmental, and proprietary controls, were potentially available under Utah law. Examples of informational controls include deed restrictions and state registries. Zoning ordinances, groundwater use ordinances and restrictions, and site-specific restrictions on access or use are examples of governmental controls. Proprietary controls include restrictive covenants running with the land or equitable servitudes. Due to common law limitations, these controls have been the most problematic to enforce.[19] For example, common law property rules require covenants to "run with the land" or "touch and concern" the encumbered property. However, certain restrictive covenants may not satisfy these common law

principles, thereby undermining their enforceability against subsequent landowners.

Now, however, with the advent of UECA, environmental covenants run with the land and bind subsequent purchasers of property even though the covenant may (1) not be appurtenant to the property; (2) impose a negative burden; (3) impose an affirmative obligation on the owner of the burdened property; (4) not touch and concern the property; or (5) lack privity.[20] Importantly, for those parties that attempt to implement activity and use limitations prior to the date of the 2006 statute, UECA validates these pre-existing restrictions or servitudes.[21]

A cardinal but limiting feature of UECA is that it only applies to environmental covenants that are imposed as part of an "environmental response project." An "environmental response project" is specifically defined to include "a plan, risk assessment, or work performed for environmental remediation of real property or surface and groundwater on or beneath the real property and conducted: (a) under a federal or state program governing environmental remediation of real property, including under Title 19, Environmental Quality Code; (b) incident to closure of a solid and hazardous waste management unit, if the closure is conducted with approval of an agency; or (c) under the state voluntary clean-up program. . . ."[22] Thus, an environmental covenant may only be implemented in the context of a remedial action, which by definition is limited to federal or state programs under the UDEQ's authority or other state or federal agency that determines or approves an environmental response project. Consequently, reclamation programs such as mine closure activities that are overseen by Utah's Division of Oil, Gas and Mining are not specifically, and may not be, included within the purview of UECA and may not benefit from its provisions.

UECA authorizes a variety of persons to enforce an environmental covenant by injunctive or equitable relief, including a party to the covenant, a "holder," the agency involved, any person to whom the covenant expressly grants power to enforce, a person whose interest in the property or whose collateral or liability may be affected by an alleged violation of the covenant, or local governments.[23] A "holder" of an environmental covenant can be any person, including the landowner, local governments, and the agency in charge of the remediation, and there can be more than one holder.[24] Thus, VECA gives responsible parties authority to enforce environmental covenants to prevent breaches of the covenant that may increase liability.

UECA specifies the nature of the rights of the various parties to an environmental covenant. The right of an agency[25] under an environmental covenant, other than a right as a holder, is not an interest in real property.[26] An agency is bound by any obligation it affirmatively assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant.[27] In addition, any other person that signs an environmental covenant is bound by the obligations that person assumes in the environmental covenant, but by signing the covenant, it does not change the obligations, rights, or protections granted or imposed under other laws,

except as provided in the covenant.[28] Unlike the Uniform Act, which specifies that as a condition to signing the environmental covenant the relevant agency may require the owner to obtain subordination agreements from any person with an interest in the property, subjecting that interest to the covenant, UECA does not impose such a requirement on interests in real property in existence at the time an environmental covenant is created or amended.[29] Further to the point, UECA does not require a person that owns a prior interest in real property to subordinate that interest to the environmental covenant or to agree to be bound by the covenant.[30] An interest that has priority under other law is not affected by an environmental covenant unless the person that owns that interest subordinates it to the covenant.[31] In addition, while a person who agrees to subordinate a property interest to an environmental covenant affects the priority of that person's interest, it does not by itself impose any affirmative obligation on the person regarding the environmental covenant.[32]

An important aspect of UECA is the set of provisions intended to ensure that environmental covenants will be perpetual.[33] Under UECA, an environmental covenant is not subject to being extinguished by any of the common law real property or statutory termination devices. In addition, an environmental covenant cannot be terminated in an eminent domain proceeding unless the UDEQ consents, and a covenant cannot be terminated under the doctrine of changed circumstances unless the UDEQ consents and all parties to the covenant have been made parties to the judicial proceeding.[34] However, an environmental covenant may be terminated by foreclosure of an interest that has priority over the environmental covenant.[35] The parties may amend or terminate an environmental covenant only with the consent of the UDEQ, the current owner, the holder, and any other party who may have signed the covenant.[36] Because responsible parties who are not holders of an environmental covenant may nevertheless sign the document and become parties to the covenant, they can assure themselves that they will be apprised of, and allowed to participate in, any termination or modification proceeding.[37]

An environmental covenant may be enforced through a civil action for injunctive or other equitable relief for violation of an environmental covenant by a party to the covenant, the agency involved, any person to whom the covenant expressly grants power to enforce, or a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant.[38] Like environmental institutional controls under UEICA, the UDEQ may seek to recover its costs in enforcing or protecting an environmental covenant under UECA.[39]

Like UEICA, UECA provides specific requirements for drafting and implementing an environmental covenant.[40] Specifically, an environmental covenant must state that the instrument is an environmental covenant executed under the statute; contain a legally sufficient description of the real property; describe the activity and use limitations on the real property; identify every holder; be signed by the agency involved, every holder, and, unless

waived by the agency, every owner of the fee simple of the real property subject to the covenant; and identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.[41] In addition, an environmental covenant may contain other information, restrictions, and requirements agreed to by the parties signing it, including requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, the property subject to the covenant; periodic reporting that describes compliance with the covenant; rights of access; description of the environmental contamination; and additional limitations on amendment or termination of the covenant.[42]

In sum, due to the statutory provisions of the UECA and the clarity of its requirements, the common law issues that once plagued the use of institutional controls, such as the requirement that a covenant "touch and concern" the property, are no longer a hindrance to the perpetual effect of these tools. Accordingly, because environmental covenants may last in perpetuity for subsequent landowners, utilizing an environmental covenant under UECA has become an increasingly popular strategy for cleaning up contaminated sites.

## The Interplay Between UECA and UEICA

Landowners seeking to use environmental covenants or environmental institutional controls in environmental response projects in Utah must be mindful of both UECA and UEICA. For environmental response projects ongoing after May 1, 2006, landowners need only follow the requirements of UECA to utilize an environmental covenant for a project. For sites where environmental response projects began prior to May 1, 2006, but that have been extended beyond or have been reopened after that date, landowners may create an environmental covenant under UECA that incorporates existing environmental institutional controls or land use restrictions to overcome the common law issues that otherwise plague the use of environmental institutional controls. For sites where the environmental response project concluded prior to May 1, 2006 and that do not qualify for either UECA or UEICA, there can be no assurance that an environmental institutional control or environmental use restriction will be enforceable against subsequent landowners. However, other mechanisms are available to approximate that result, including careful drafting of restrictive covenants, which may increase the odds of environmental use restrictions being enforceable over time. Most of these tools cannot be used in the context of imposing institutional controls in a regulated cleanup, but could be used in a subsequent transfer of a remediated site to ensure compliance with the previously imposed institutional controls. Such tools might include the use of reversionary interests or self-replicating covenants.[43]

### Reversionary Interests

Although traditional covenant and easement doctrines are not well suited for enforcement of environmental use restrictions, reversionary interests can pro-

vide additional protection for those landowners of contaminated sites that are considering a transfer of their property. Under the common law, a landowner can convey real property with a provision that, if a specified event occurs or does not occur, the property will either automatically revert to the grantor or the grantor can choose to take back the property. Unlike covenants and negative easements that may be enforceable by injunctive relief, a reversionary interest does not allow the transferor to preclude the activity before it occurs. The transferor's remedy is to take the property back if the prohibited activity takes place. Thus, reversionary interests are best suited for restrictions, like nonresidential use restrictions, where the damage caused by the violation of the restriction is not immediate. Even as to other use restrictions, there is value in a reversionary interest because it can act as a strong deterrent. Landowners that know that engaging in a prohibited behavior will result in the loss of their land typically do not engage in the behavior.

### Use of Self-Replicating Covenants

In addition to carefully drafted restrictive covenants that bind subsequent landowners and the use of reversionary interests, a self-replicating covenant, although it will not make a covenant run with the land, may offer some protections for a landowner. For example, after setting out the various land use restrictions to be imposed, the following clause can be inserted in an attempt to ensure that subsequent transferees are personally obligated by the covenants:

> *Subsequent Transfers.* Grantee shall include in any deed or other instrument conveying or transferring an interest in the Property provisions substantially similar to those contained in paragraphs x-x of this Deed (including this Paragraph x), such that the transferee under such deed or instrument shall be bound by those provisions to the same extent as Grantee.

Because the original landowner will not be in privity of contract with a remote grantee of the property, the original landowner may not be able to sue the grantee for not including the clause in a transfer of the property. However, there will be a party that could do so—the remote grantee's immediate grantor. In addition, the repetition of the covenant in each transfer ensures against a purchaser taking the property without actual notice of the use restrictions, increasing the odds that the restriction will be honored. Finally, in states with marketable record title acts, like Utah,[44] the repetition of the restriction during successive transfers will protect the restriction from being extinguished under those acts.

## Utah's Remediation Programs Where Environmental Institutional Controls May Be Used

Because environmental covenants and environmental institutional controls may only be implemented in a remediation context, UECA's provisions are

limited to programs established under Utah's Environmental Quality Code.[45] As stated above, the UDEQ, through three of its six divisions, implements these programs in Utah. Risk-based solutions for cleanups under each of these programs can often be facilitated with environmental covenants governed by the UECA.

## The Division of Environmental Response and Remediation

The Division of Environmental Response and Remediation (DEER) administers three environmental remediation programs where environmental covenants may be used: (1) the Hazardous Substances Mitigation Act; (2) the Underground Storage Tank Act; and (3) the Voluntary Cleanup Program.

### *Hazardous Substance Mitigation Act (U.C.A. § 19-6-301)*

The Hazardous Substance Mitigation Act (HSMA) was established in 1989[46] and is Utah's counterpart to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). HSMA provides for management and corrective action plans for hazardous substances. The statute delegates authority to the executive director of the UDEQ to oversee cleanup and enforcement actions at potentially hazardous sites in Utah. As part of its statutory authority, the executive director has authority to establish and maintain a hazardous substances priority list of sites that pose a significant risk to public health or the environment.[47] In addition, the executive director is responsible for coordinating remedial investigations of contaminated properties and ordering remedial action plans. The executive director must follow the federal National Contingency Plan to ensure agreement between the state and federal CERCLA programs.

### *Underground Storage Tank Act (U.C.A. § 19-6-401)*

The Underground Storage Tank Act (USTA) was enacted in 1989 and establishes the Underground Storage Tank (UST) program for Utah. The DERR regulates this program under the direction of the Solid and Hazardous Waste Control Board.[48] The UST program addresses hazardous substances stored in underground tanks and includes specific provisions for the cleanup of leaking tanks. If a release occurs, the statute and implementing rules[49] provide the minimum standards that must be met in any remediation activity. The Leaking Underground Storage Tank (LUST) program, within the DERR, oversees the actual remediation activities at contaminated sites.

### *Utah's Voluntary Cleanup Program (U.C.A. § 19-8-101)*

Utah's Voluntary Cleanup Program (VCP) became effective in May 1997 and provides for the voluntary cleanup of contaminated sites by approved applicants. Because the program is intended to be completely voluntary, either the

applicant or the UDEQ may terminate a Voluntary Cleanup Agreement at any time and for any reason. Perhaps the most significant provision within Utah's VCP program is the certificate of completion, which is issued after the site is successfully cleaned up. This certificate of completion provides a liability release to participants. However, parties who are originally responsible for a release under the HSMA, USTA, Solid and Hazardous Waste Act, or Water Quality Act are not eligible for a liability release even if they participate in the program and receive a certificate of completion. Certificates of completion are recorded in the county recorder's office where the site is located and are transferable to subsequent owners.

### The Division of Solid and Hazardous Waste

The Division of Solid and Hazardous Waste (DSHW) oversees the Utah Solid and Hazardous Waste Act.[50] The act establishes Utah's solid and hazardous waste program, which includes a permitting, management, and remediation program for solid and hazardous wastes in Utah. This is an EPA-delegated program whereby Utah administers federal regulations under the Resource Conservation and Recovery Act (RCRA) and the Solid Waste Amendments of 1984. Because this is a federally delegated program, Utah must continually amend its regulations to conform to its federal counterpart. The Board of Solid and Hazardous Waste adopted risk-based cleanup standards in 1994, allowing a party to remediate a site to levels other than the background standards.

### The Division of Water Quality

The Division of Water Quality (DWQ) is responsible for implementing Utah's Water Quality Act,[51] which includes pollution control programs for surface and ground water sources throughout the state. Notably, the DWQ shares responsibility for implementing the underground injection control program with the Division of Oil, Gas and Mining, an agency that is part of the Utah Department of Natural Resources. Utah's Water Quality Act was enacted in 1981[52] and governs surface and groundwater quality in Utah. Pursuant to its implementing rules, the DWQ requires a corrective action plan for any adverse impacts to groundwater.[53] As part of a corrective action plan, the rules recommend implementing measures such as providing hazard notices, capping contaminated soil to prevent groundwater contamination, and other long-term measures to avoid further contamination and infiltration. These remedial actions fall squarely within the UECA.

## Conclusion

Utah's Uniform Environmental Covenant Act has provided for a more affordable yet effective remediation program to clean up contaminated sites in Utah according to appropriate risk-based standards. Because it is driven

by a risk-based assessment standard rather than the more stringent traditional protocols for cleanup activities to meet background or unrestricted use standards, environmental covenants are becoming increasingly common in Utah's remediation programs. While the use of environmental institutional controls under UEICA was initially fraught with limitations largely due to common law principles governing restrictions on real property interests, the adoption of UECA has helped to overcome those hurdles. Now, environmental covenants not only serve to limit further contamination and human and ecological exposure to contamination, but they can be implemented in such a way as to bind subsequent landowners in perpetuity. For now, environmental covenants are clearly applicable in the remediation context, although there are legal arguments that support a broader application of these measures. It would be worth expanding the use of environmental covenants, for example, to reclamation and mine closure programs in the future.

## Notes

1. U.C.A. § 57-25-101 *et seq.*
2. *Id.* §§ 19-10-101 *et seq.*
3. *Id.* § 19-10-102(1).
4. *Id.* § 19-10-102(1)(a).
5. *Id.* § 19-10-103.
6. *Id.* § 19-10-104(4).
7. *Id.* § 19-10-106.
8. *Id.* § 19-10-105.
9. *Id.* § 19-10-106(1).
10. *Id.*
11. *Id.* § 19-10-106(2).
12. *Id.* § 19-10-105(1).
13. *Id.* § 19-10-105(2).
14. *Id.* § 19-10-104 (1).
15. *Id.* § 19-10-104(2)-(3).
16. *Id.* § 19-10-104(4).
17. In contrast, see U.C.A. § 57-25-105 (Validity-Effect on other instruments).
18. U.C.A. § 19-10-104(4).
19. For a more detailed discussion about the legal aspects of institutional controls generally, see Patricia J. Winmill, Hal J. Pos, and Elizabeth A. Schulte, *Use of Institutional Controls in Mine Closures*, 47 ROCKY MTN. MIN. L. INST., JOURNAL 77 (2010); and Patricia J. Winmill and Hal J. Pos, *Use and Enforceability of Institutional Controls in Risk-Based Environmental Cleanups: They're Cheap and Good Looking, But Will They Last?*, 49 ROCKY MTN. MIN. L. INST. 23 (2003) [hereinafter *Use and Enforceability of Institutional Controls*].
20. *See* UNIF. ENVTL. COVENANTS ACT § 5(a) and (b); *see also* U.C.A. § 19-10-104.
21. U.C.A. § 57-25-105(3)(a).
22. *Id.* § 57-25-102(5).
23. *Id.* § 57-25-111(1).
24. *Id.* § 57-25-102(6), -103(1).
25. UECA defines "agency" to mean the UDEQ or other state or federal agency that determines or approves the environmental response project under which an environmental covenant is created. U.C.A. § 57-25-102(2).

26. *Id.* § 57-25-103(2).
27. *Id.* § 57-25-103(3)(a).
28. *Id.* § 57-25-103(3)(b).
29. *Id.* § 57-25-103(4).
30. *Id.* § 57-25-103(4)(b).
31. *Id.* § 57-25-103(4)(a).
32. *Id.* § 57-25-103(4)(d).
33. *Id.* § 57-25-(109)(1).
34. *Id.* § 57-25-(109)(2).
35. *Id.* § 57-25-(109)(1)(d).
36. *Id.* § 57-25-110.
37. *Id.*
38. *Id.* § 57-25-111(1).
39. *Id.* § 57-25-111(4).
40. *Id.* § 57-25-104(10).
41. The UDEQ DERR website provides a sample draft of an environmental covenant. *See* http://www.undergroundtanks.utah.gov/remediation.htm.
42. U.C.A. § 57-25-104(2).
43. *Use and Enforceability of Institutional Controls,* at 38–41.
44. U.C.A. §§ 57-9-1 *et seq.*
45. U.C.A. TITLE 19.
46. The HSMA originally numbered U.C.A. § 26-14d-101 was renumbered in 1991.
47. U.C.A. § 19-6-310.
48. *See* U.C.A. § 19-1-105(1)(c). Notably, there are two separate divisions within the UDEQ that are governed by one Board. The Board of Solid and Hazardous Waste supervises the activities of the Division of Solid and Hazardous Waste and the Division of Environmental Response and Remediation.
49. *See* R311-204-1 *et seq.*
50. *See* U.C.A. §§ 19-6-101 *et seq.*
51. *See* U.C.A. §§ 19-5-101 *et seq.*
52. Originally enacted under U.C.A. § 26-11-1 (1981) and renumbered in 1991. More recent amendments to the Code will become effective July 1, 2012.
53. *See* UTAH ADMIN. CODE R317-6.15.