



Conservation Defense Insurance
TERMS AND CONDITIONS
June 8, 2009 corrected and updated September 30, 2011

Conservation Permanence

All land trusts want their conservation work to be permanent. But eventually every land trust, even the very best managed, will discover a major violation of a conservation easement or will be the defendant in litigation seeking to unravel an easement. The Land Trust Alliance has heard concerns from land trust leaders that some land trusts might not have sufficient reserves to cover the costs of protecting their easement or fee-owned land portfolios in court from repeated, determined and well-financed challenges. The Alliance has also heard from land trusts about the need for a national source of tools, techniques and information to avoid unnecessary litigation and to promote cost-effective resolution of disputes while still upholding conservation permanence.

In addition to increases in frequency and severity of legal challenges by trespassers and some successor owners and developers, the IRS is increasing its scrutiny of the tax code requirement that land trusts have the resources to adequately monitor and defend their easements. Moreover, the IRS is considering additional inquiries into land trust financial resources to perpetually uphold conservation easements.

To respond to these challenges, many land trusts have asked the Land Trust Alliance to investigate the feasibility of insurance to cover dispute resolution and litigation costs. The Land Trust Alliance board will not approve this service unless two conditions are met: 1) the Alliance must have written commitments from eligible land trusts willing to insure at least 16,000 conservation easements or parcels of fee-owned land; and 2) the Alliance must raise \$4 million from funders to capitalize Terrafirma.

We are all in this together. Terrafirma, conservation defense insurance (“Terrafirma”) would unite the strength and expertise of land trusts throughout the country. Terrafirma is designed to be a safety net for land trusts and not a substitute for reserves and good practices. Terrafirma would be a backstop for conservation permanence by sharing information nationally to build strong legal precedents, and would be supported by the Alliance’s training and service programs. Terrafirma would provide free claims assistance to land trusts and early advice to assist dispute resolution and to avoid unnecessary litigation. It could also assist land trusts in gaining support from funders by demonstrating a collective commitment to permanence.

Terrafirma Philosophy

Our ultimate goal is to create favorable case law, avoid unfavorable case law, and protect the permanence of conserved land. Terrafirma is designed to provide a safety net for a land trust

from catastrophic legal expenses and provide the confidence and capability to uphold our conservation obligations forever.

The Alliance, in consultation with hundreds of land trusts around the country, designed Terrafirma to encourage practices that will help prevent violations and unnecessary litigation. Terrafirma complements *Land Trust Standards & Practices* and the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance. To that end, Terrafirma includes significant discounts for land trusts that implement good risk management practices.

Funding for Stewardship and Legal Defense

Every land trust will need sufficient funds to conduct day to day stewardship activities as well as legal defense, and the Land Trust Alliance recommends that land trusts have sufficient reserves or endowment funds to cover those costs in perpetuity. Conservation Defense Insurance is an important part of a comprehensive and effective legal defense strategy, but it is not a replacement for sufficient reserves and good risk management practices.

The IRS recently changed the Form 990 reporting requirements for land trusts and now asks for documentation of the amount of time and money a land trust spends in monitoring and defending its easements. In future versions of the Form 990, the IRS is considering a requirement that all land trusts document the financial resources available to monitor and defend easements. Every land trust that holds even one conservation easement has an obligation to be sufficiently prepared to uphold conservation permanence against any challenge.

Even if a land trust participates in Terrafirma, it is critical for the land trust to have reserves to fund the annual costs of deductibles, exclusions and any claims that exceed policy limits. Land trusts will still need to contribute to these funds as they increase the size of their portfolios. In order to support our collective conservation ethic, land trusts need to provide for the perpetual defense of their portfolios and not defer this responsibility to their successors to examine the true financial implications of perpetuity.

Conservation defense insurance is designed to help land trusts protect their reserves and their integrity from these challenges. One angry land owner or neighbor could drain reserves and threaten an organization's success—possibly even an organization's survival. Land trusts could think of Terrafirma as standing behind them to protect their resources.

Land trusts may also wish to consider partnerships with other land trusts in their area to collaborate on providing strong stewardship services. Land trusts can leverage the power of partnerships to address stewardship costs rather than trying to make a go of it alone.

Gaps in Other Insurance

Most land trusts have general liability insurance, and many land trusts also have directors and officers insurance or title insurance. The Alliance recommends that land trusts maintain such insurance. General liability insurance, which is required for eligibility for Terrafirma, covers lawsuits against the land trust for negligence. Directors and officers insurance and title insurance are not required for eligibility for Terrafirma, but are strongly recommended. Directors and officers insurance covers breaches of fiduciary obligations by the land trust board and staff.

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Unpaid directors of non-profits such as a land trust may have some coverage available under their individual homeowners or personal liability umbrella policies. If there is any coverage provided for unpaid directors under these policies. This coverage would be limited to the individual director and should not be considered as a substitute for general liability or directors and officers insurance in the name of the non-profit entity. Each board member should consult with their own insurance agent or insurance company regarding if there are situations in which their individual policies might provide coverage.

Title insurance generally excludes items on the ground, unless the survey exception is deleted, and usually excludes landowner compliance with the conservation easement. Title insurance does compensate the land trust if the actual title to (ownership of) the conservation easement is challenged, or if there is a dispute about the legal description of the property provided that it is not excluded by the survey exception. None of these insurance products will pay for a land trust to sue someone; traditional insurance only pays to defend the land trust if sued under certain circumstances.

Sometimes these other insurance policies might cover a portion of a legal challenge that is also covered by Terrafirma. For example, property owners insurance might cover the damage done but would not cover a suit against the trespasser to stop the activity. In these situations a land trust may want to use all the available insurance to cover the entire spectrum of risk. Terrafirma would fill gaps in coverage that these other insurance products do not cover and provide coverage for legal fees when a land trust must initiate a lawsuit. Terrafirma offers a significant layer of protection from risk exposure not covered by other insurance. To the extent that other insurance policies do provide coverage, those resources are to be used first to address claims. Conflicts among policies and legal representation would be addressed on a case-by-case basis by the national coordinating attorney.

Legal Structure

Terrafirma is limited liability company organized in April 2011 under the State of Vermont Limited Liability Company Law. It is domiciled in Vermont. Pursuant to its LLC Agreement it is an LLC in which the Members have designated an entity not a Member to be the Manager of the LLC, authorized to act in its name and manage the business of Terrafirma on behalf of the Members. Alliance Risk Management Services LLC (“ARMS”), a Vermont limited liability company of which the Alliance is the sole owner and member, will be the sole “Manager” of Terrafirma.

Instead of a Board of Managers, the Members in the LLC Operating Agreement (“LLC Agreement”) have established a Members Committee (the “Members Committee”) to represent their interests. In order to assure broad representation of the land trust community in America, the LLC Agreement provides for the election of the Members Committee by region, and also requires nominations on a basis reasonably designed to include on the Members Committee representatives of national, regional (State) and local land trusts, and also a mix of accredited and non-accredited land trusts. The regulators require that one of the nine members of the Members Committee be a Vermont resident.

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Terrafirma is expected to qualify as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code. To qualify as an organization described in Section 501(c)(3), an organization must (i) be organized and operated exclusively for certain exempt purposes set forth in Section 501(c)(3), including a “charitable purpose”, (ii) not have any of its earnings inure to any private shareholder or individual, (iii) not attempt to influence legislation as a substantial part of its activities, and (iv) not participate in any campaign activity for or against political candidates. There is, however, an exception for organizations meeting the definition of “charitable risk pool” under 501(n). Provided that the organization meets the requirements of that section, the organization will be deemed to have a “charitable purpose.” Terrafirma is expected to meet the requirements of Section 501(n), including the requirement that all of the organization’s members and insured parties are entities that have been determined by the Internal Revenue Service to be entities described in Section 501(c)(3) of the Internal Revenue Code, and will, therefore, be deemed to be organized and operated exclusively for a charitable purpose. Terrafirma is also expected to meet all other qualifying requirements.

Terrafirma Design

The following terms and conditions have been shaped by comments that the Alliance received from hundreds of land trusts, attorneys, insurance experts and business leaders. The following 19 sections outline coverage, limits, premium rates and other matters that a land trust may want to consider when evaluating Terrafirma. If Terrafirma proves feasible, it would be offered through a land trust-owned risk retention group, also known as “captive insurance” would be owned by the covered land trusts and managed by ARMS a subsidiary of the Land Trust Alliance.

These terms and conditions are general in nature. The coverage is subject to definitions and other restrictions that are beyond the scope of this document and which would be fully articulated in the Terrafirma policy. If the final policy delivered to land trusts materially deviates from these Terms and Conditions, then a land trust is not obligated to participate in Terrafirma. Terrafirma would be a tax exempt Risk Retention Group¹ that is owned by the covered land trust participants and managed by ARMS to support conservation permanence.

The overall philosophy is to provide the broadest possible coverage for the greatest number of private land trusts and quasi-governmental land trusts (a government entity operated by an independent board) consistent with prudent business principles. The estimated initial annual operating costs for Terrafirma would be approximately \$400,000, which includes prevention programs and risk management.

The purpose of Terrafirma is to defend and enforce conservation easements, to protect fee-owned land and to support activities that increase prevention, good practices and good precedents. The Alliance anticipates that most legal challenges on fee-owned land would involve some form of trespass. These challenges are usually not covered by general liability insurance, title insurance or directors and officers insurance. Terrafirma also offers coverage for litigation initiated by third

¹ A Risk Retention Group (RRG) is a *liability* insurance company that is *owned* by its members functioning as a captive insurance company and organized for the primary purpose of assuming and spreading the liability risk exposure of its group member owners. Once licensed by its state of domicile, an RRG can insure members in all states because RRGs operate under a federal law that preempts state regulation, making it easier for RRGs to operate nationally.

parties involved in a trespass on land owned by a land trust, as well as land trust initiated litigation against a trespasser on its fee-owned land.

Coverage

Coverage under Terrafirma is only for litigation, mediation, negotiation and other dispute resolution expenses, but not to pay for damages or to undertake corrective work on the ground.

Coverage includes:

1. Defense against litigation regarding conservation easements and fee-owned land
2. Enforcement of legal rights by conservation easement holders and fee-land owners when those respective rights are violated
3. Fees for alternative dispute resolution, such as mediation fees, court filing fees, negotiation fees and the like for both defense and enforcement coverage, as well as fees for outside experts and associated out of pocket expenses for these experts
4. Any appeals up to the policy limits.

An event is an occurrence that may or may not become a claim. A claim is a demand made by the covered land trust for payment of the benefits as provided by the policy. Therefore, a claim event would be one where the covered land trust reasonably anticipates that the event is likely to result in a claim or has already resulted in a claim. This includes a claim for payment of mediation, negotiation or other similar fees or other expert fees. The notice of a challenge or a complaint would initiate the claim without the need to have a lawsuit filed. A claim may stretch over more than one year, but it is covered under the policy in the policy year of first occurrence. This is a “claims made” policy so the claim would be docketed as occurring in the year the land trust makes the claim to Terrafirma.

Prior violations and pre-existing known issues are excluded from coverage. If a land trust has knowledge of a pre-existing dispute prior to inception of the original policy or in a policy lapse year, then the claim would not be covered. Pre-existing issues at policy inception would not be covered, but future ones would be if the land trust purchased coverage in the policy year that the claim occurs. Details on these points will be explicit in the final policy delivered to insured land trusts if the Alliance creates Terrafirma.

Service to land trusts is a central feature of Terrafirma. A land trust can call for help early before fully engaged in a dispute. Land trusts without litigator relationships are encouraged to call early for assistance to prevent problems from becoming disputes. More experienced land trusts with the capacity to resolve more complex problems would be asked to give Terrafirma reasonable notice of a problem that is likely to become a claim at the first indication that the problem is not likely to be resolved voluntarily or without assistance of experts.

A land trust may insure its entire conservation easement portfolio or its entire fee-owned land portfolio or both, but may not select individual properties or easements for coverage. Covenants contained in a deed conveying real estate that are vested in and enforceable by an insured, as well as trail easements, are eligible for coverage. A land trust may elect not to cover all trail easements or all deed covenants in its portfolio separately from its conservation easements and fee-owned land. A land trust may also elect to cover its entire portfolio of conservation interests.

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Exceptions would be available for land held for resale without retaining a conservation easement or restrictions (trade land), and for certain co-holder situations. Land conservation easements that have historic value and/or historic buildings are covered, but historic facade easements are not.

If a land trust recovers fees or other costs or is awarded any other monetary damages of any kind in a case covered by Terrafirma, then any such proceeds are divided between Terrafirma and the land trust based first on their actual costs. Typically the deductible is re-paid to the insured land trust first, and then anything above that (up to the amount of the claim paid out) is paid to Terrafirma. Then any remaining award would be paid to the land trust.

Commitment Letter

To determine the feasibility of Terrafirma, the Land Trust Alliance will ask land trusts to sign contingent commitments to participate in the first three years of Terrafirma and to pay a registration fee that is refundable if the Alliance does not start Terrafirma as outlined in these Terms and Conditions. Once the Alliance secured commitments to insure at least 16,000 easements (this number included some fee-owned land), the Alliance board approved raising the \$4 million required to capitalize Terrafirma. Given the state of the economy, it will take longer to raise the necessary capital. Also, land trusts may be reluctant to take on the cost of the new premium in the midst of a recession. For both of these reasons, the commitments will provide for Terrafirma to begin operations no earlier than January 31, 2011, and no later than December 31, 2013. If the Alliance determines that Terrafirma is not feasible or is unable to raise the necessary capital by December 31, 2013, the land trusts may elect to be released from their commitment and the Alliance will refund the registration fees. With the administrative difficulties of tracking hundreds of checks arriving at different times, the Alliance will not be able to provide interest on the registration fees in the event the fees are refunded. Land trusts are encouraged to commit to participation before Policy inception, as the registration fee will increase by at least 50%.

A land trust does not have to meet the eligibility requirements at the time of commitment, but it will be required to be eligible at the time of actual application for coverage. If a land trust signs a commitment letter and pays a registration fee but is not eligible when Terrafirma starts, then the land trust may elect to correct any deficiencies, or forfeit the registration fee.

In order to maintain stability of Terrafirma and have equitable prices for everyone, all land trust participants are asked to maintain their commitment to Terrafirma. If a land trust does not renew its participation in any year and then decides to renew participation later, the land trust would need to pay another registration fee at the higher price and for its full insured portfolio each time it reenters Terrafirma after a lapse of a year or more. A 50 percent co-payment of all claims in the first year of re-entry after a lapse would also be required.

Costs, Limits and Coverage Details

Premium, Limits and Coverage

Costs are based on data collected from a systematic random sampling and extensive telephone interviews of over 200 land trusts during the summer of 2008.

1. First year premium of \$60 per year per conservation easement or fee-owned land (with certain discounts, as detailed below in Underwriting and Discounts and also a volume discount for large portfolios as detailed in the Large Portfolio Additional Terms below).

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The premium is calculated on the number of conservation easements or deeds of fee land that a land trust holds regardless of the number of parcels that comprise any one conservation easement or deed of fee land. Certain exceptions to this general rule are explained below for divisions of conservation easements into separate ownership and for aggregation of fee preserves. If a land trust insures its trail easements or deed covenants, then those are also charged one premium per year per deed.

2. A maximum limit of \$500,000 per claim (which includes defense costs).
3. **And** a maximum aggregate limit of \$500,000 total for all claims in the policy year the claim occurred (the limit of the total amount of claims made by one organization in one policy year if more than one claim is made in the policy year).
4. Land trusts with insured portfolios of **250 or more** conservation easements and/or fee-owned land have a higher aggregate limit available as described below in Large Portfolio Additional Terms.
5. A \$5,000 deductible per claim regardless of policy limits. A pro bono attorney arrangement may be credited toward the deductible with approval of the claims committee. Certain fees may also be credited toward meeting the deductible. For example, if a land trust uses outside counsel or other experts in its efforts to voluntarily resolve a dispute, the claims committee may determine that those fees are deductible.
6. No coinsurance (co-payment).
7. Non-assessable (no obligation for required future capital contributions in the event of financial difficulties for Terrafirma).
8. Each **exercised** division right under an insured conservation easement, trail easement or deed covenant at the time of each annual application is counted as a separate conservation easement with an additional \$60 premium. If the divided parcel is not subject to an insured conservation easement, trail easement or deed covenant, then no additional premium is charged and no coverage provided.
9. Separate easements that are fully and legally merged in one ownership would be treated as one easement. (Please note that though a property may be described as containing several legal parcels, or taxable parcels, or assessed parcels if conserved under one easement then the property would be treated as one complete parcel.)
10. Fee-owned reserves comprised of multiple parcels may be treated as one insured unit with one annual premium payment rather than the multiple premiums for units acquired under separate deeds, but only if *both* of the following conditions are met without exception:
 - a. Each deeded parcel must be owned in its entirety and exclusively by the same entity.
 - b. The collection of parcels must form in the aggregate a contiguous, compact conservation reserve operated as a single unit.
11. Multiple conservation easements may be treated as one insured unit with one annual premium payment rather than the multiple premiums for multiple conservation easements, but only if all the following conditions are met without exception:
 - a. Each conservation easement is held by the same land trust or the same set of co-holders.
 - b. Each underlying parcel must be owned in its entirety and exclusively by the same landowner.
 - c. The land covered by the conservation easements must be contiguous.

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d. Each conservation easement is substantively identical in terms of restrictions and permitted uses. (Land trusts will be asked to provide copies of the conservation easements they wish to be treated as one unit.)

If the property and the easement have been subdivided but is in identical ownership it is still treated as one conservation easement.

12. Terrafirma shall have the option to permit land trusts to not insure conservation easements or fee-owned land of five or fewer acres based upon risk criteria that Terrafirma will develop if the Alliance creates Terrafirma.
13. Each land trust will pay a one-time modest registration fee on a sliding scale from \$250 to \$3000 depending on portfolio size in the first year of participation or upon commitment, whichever occurs first. The registration fee will be paid with the conditional commitment and is refundable if the Alliance does not create Terrafirma by December 31, 2013. The Alliance will have a reasonable grace period to correct problems prior to refunding the registration fees. If a land trust decides to enroll an additional category of conservation interests at Terrafirma inception over that indentified in its Commitment Agreement, then it will be asked to recalculate the registration fee and pay any additional increment due. If a land trust allows coverage to lapse, then it must pay another registration fee to reinstate coverage.

Sliding Scale Registration Fee Schedule

Based on a land trust's total portfolio, it will elect from the following coverage choices at the time it signs the commitment letter or in the first year of participation, whichever occurs first: 1) all holdings or 2) all conservation easements or 3) all trail easements or 4) all deed covenants or 5) all fee-owned land. Remember that a land trust may not select individual properties or easements for coverage, but is limited to choosing among the five options listed above. The registration fee schedule **until Terrafirma inception** is as follows:

Total Insured Portfolio	Registration Fee
1 to 24	\$375
25 to 49	\$750
50 to 99	\$1,125
100 to 299	\$1,500
300 to 499	\$1,875
500 to 999	\$2,250
1000 to 1999	\$2,625
2000 and up	\$3,000

The registration fee will increase upon Terrafirma inception. If a land trust obtains coverage after Terrafirma inception, then its registration fee is calculated on its insured portfolio at the time it first obtains coverage. Land trusts that committed to participate in writing by June 1, 2010, received a discounted registration fee. Increases in a land trust portfolio between its written commitment and inception of Terrafirma will not result in payment of an increased or additional registration fee. Reinstitution of insurance after a lapse of coverage would result in payment of higher re-registration fees calculated at the time of reinstatement.

Premium Stability

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The purpose of establishing Terrafirma, instead of using commercial insurance, is to give land trusts control over the product, premiums and claims management. Our desire is to keep premiums and terms stable over many years. Terrafirma would do this by building strong capitalization and retained earnings, investing in loss prevention, promoting good practices, providing pragmatic claims management, and controlling costs of service providers. To a large extent, our destiny is in our own hands. If all land trusts work diligently to have good practices and reduce unnecessary litigation, then Terrafirma is more likely to be able to keep premiums low. Of course, no one can guarantee that premiums would not change over time, but our consultants have designed the best available approach that protects land trusts from increases. Land trusts want protection from sudden increases in premiums before signing a commitment to participate in the first three years of Terrafirma. A land trust can be released from its commitment if claims exceed the insurance consultant estimates and premiums increase by more than 2.5 percent a year over the first three years. Prior to this election, Terrafirma would have a reasonable period of time to address any problems or cost increases.

Large Portfolio Additional Terms

Volume Discount

The unit cost to issue and administer a policy to a land trust with a portfolio of 250 or more insured units (conservation easements and/or fee-owned land) is substantially less than for land trusts with smaller portfolios. It is equitable and customary for insurance programs to share the benefits of these savings with those insureds with larger portfolios. Therefore, land trusts with a total insured portfolio of 250 conservation easements and/or fee-owned land parcels would receive a volume discount of \$3 per insured unit in addition to other discounts for which the land trust may qualify.

Aggregate Limits

As a matter of equity for the holders of large portfolios (250 or more insured units) who would be paying much more in total premiums, the aggregate limit would be increased for those large portfolio land trusts having the good management practices below. For these land trusts, the aggregate cap would increase from \$500,000 to \$750,000 for land trusts with 250-399 easements or fee-owned land parcels insured, and \$1 million for land trusts with 400 or more easements or fee-owned land insured. The per unit base premium (exclusive of potential discounts) charged would be the same as for all other insureds and the per claim limit remains at \$500,000 per claim.

To obtain this additional coverage, the underwriting standards would be higher for insureds that desire the higher aggregate limit. Accredited land trusts would automatically qualify for the higher aggregate provided they have the larger portfolios. Any other large portfolio land trust would have to attest that it has each of the following to qualify for the higher aggregate limit in addition to a large portfolio:

1. In-house legal counsel or retained outside counsel on call under a written agreement
2. A program to personally visit every successor landowner with a conservation easement
3. Database system for tracking records, visits, amendments, reserved rights, discretionary approvals and violations
4. Written policies for record keeping, amendments, violations, annual visits, landowner relationships and conflicts of interest

Contribution to Permanence Fund

Some land trusts may prefer to participate in the national collective defense and enforcement effort by contributing a large one-time or periodic gift or an annual gift to Terrafirma for use in addressing national precedent setting cases. This special fund would be administered by the Alliance. Terrafirma would use the Alliance policy on the Litigation and Conservation Defense Fund to determine which national precedent setting cases are funded. The Alliance invites any land trust that declines to participate in the insurance portion of Terrafirma to donate money to the national precedent setting case fund.

Exploration of Other Products

The Alliance will continue to explore other potential products for the largest portfolio land trusts that are equitable to all potential insureds, do not adversely affect the premium for other land trusts and are financially sound and sustainable for Terrafirma. The Alliance may elect to offer any such additional products before or after Terrafirma inception if the Alliance board votes to start Terrafirma.

Exclusions

The overall philosophy is to keep Terrafirma simple and focused exclusively on matters directly related to conservation easement and fee-owned land defense and enforcement. Therefore, the following matters are excluded from coverage as they are not directly related, although still very important:

1. Condemnation and actions arising out of condemnation (eminent domain)
2. Any government enforcement action against a land trust for an alleged violation of statute, regulations, common law (including if applicable any fiduciary or other obligations under state law, if any) or other codes (land trust defense or enforcement of a conservation easement on land owned by a government entity is covered)
3. Any and all IRS audits, investigations or other inquires of any type for both landowners and land trusts
4. All tax related matters (challenges to the validity of a conservation easement itself by the landowner are covered)
5. Criminal matters
6. Actual damages or corrective work undertaken on the ground
7. Business disputes not directly related to the defense or enforcement of a conservation easement or fee-owned land
8. Historic facade easements (land conservation easements that have historic value and/or historic buildings are covered)
9. Anything covered by general liability insurance (which is required for eligibility for Terrafirma; any conflicts would be managed on a case by case basis)
10. Any other claim covered by other commercial insurance such as directors and officers liability insurance provided that the land trust has such policies (any conflicts would be managed on a case by case basis)
11. Certain back up holder positions (see more extensive discussion below in the section on Back Up Holders and Third Party Enforcement)
12. Any services provided by government attorneys or other staff
13. Pending or prior litigation

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14. Pre-existing known violations, disputes or trespass
15. Acts, proposed acts or failure to act on land not protected by the insured easement or land not owned in fee by the insured (third party trespass on conserved or fee-owned land is covered)
16. Affirmative rights in a conservation easement, covenants or trail easement such as a right of first refusal, option to purchase, mowing rights or active land management except as undertaken in defense or enforcement of a conservation easement, deed covenant or trail easement (this exclusion does not apply to land owned in fee by a land trust or to the affirmative right of public access for recreation or education contained in a conservation easement, trail easement or deed covenant)
17. Trespass by the land trust or other willful or grossly negligent acts or omissions
18. Court costs and any other costs related to a court action by the insured seeking to extinguish or amend any insured conservation interests; and any third party challenges to the validity of any easement amendment, termination or partial termination, provided, however, that once an easement has been amended or partially terminated, the policy would cover challenges to the easement itself
19. Disputes between an insured and an uninsured private land trust not a government entity, disputes among trustees, or trustees and staff of an insured, among co-holders or a primary and a back up holder, or between an insured easement holder and insured fee-land owner whether under one or multiple policies
20. Staff costs and related expenses for staff or volunteers

The claims committee of Terrafirma would be the arbiter of any disputes regarding whether the facts and circumstances of a potential claim fall within any Exclusion.

Eligibility

The overall philosophy of Terrafirma is to maintain public confidence in conservation easements as a legal tool and in land trusts as effective conservation organizations. In addition, the Alliance believes that land trusts are dependent on each other for optimal defense and can present a formidable collective defense. Therefore the Alliance hopes that all land trusts will participate in Terrafirma. The Alliance is exploring Terrafirma for the benefit of members of the Land Trust Alliance only. Accredited land trusts must be Alliance members to be eligible.

For these reasons, the application form and the process will be as simple as possible, minimizing the burden on land trusts and administrative costs to Terrafirma. The Alliance endeavored to make Terrafirma eligibility standards accessible for most land trusts, although some will need to improve baseline documentation reports and monitoring before they are eligible. Some of the eligibility criteria are drawn from *Land Trust Standards & Practices* with consistent language so that we avoid confusion about multiple standards. If a land trust is accredited, then it is automatically eligible and will have a special short application form every year upon re-application for which it maintains accreditation and for the initial inception year.

All other land trusts and quasi-governmental organizations need to answer the following questions affirmatively for the initial inception year and every year upon re-application:

1. Is the land trust legally organized and in good standing in that state?

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2. Is the land trust tax exempt under IRC § 501(c)(3) or listed on Publication 78 (or a successor listing) with the IRS?
3. Does the land trust have a complete baseline documentation report for every conservation easement? Please see <http://www.landtrustaccreditation.org/pdf/11BGuidanceDocument.pdf> .
4. If the land trust is insuring its fee properties, does the land trust have a complete inventory for every parcel of fee-owned land?
5. Does the land trust implement a program for annual monitoring of its conservation easements? Please see <http://www.landtrustaccreditation.org/pdf/11CGuidanceDocument.pdf>.
6. If the land trust is insuring its fee properties, does the land trust regularly monitor its fee-owned land?
7. Is the land trust a member in good standing of the Land Trust Alliance?
8. Is the land trust free of any final judgment against it for fraud, misrepresentation, criminal charges, bad faith, misleading business practices or any other similar charges?
9. Is the land trust free from an on-going governmental investigation or inquiry, such as an attorney general investigation, legislative hearing and the like, the subject of which is land trust complicity in misleading business practices, fraud, gross negligence or criminal misconduct?
10. Is the land trust operating at breakeven (where income and expenses are equivalent) or does it have a plan to reach breakeven?
11. Does the land trust have general liability insurance? (no D&O requirement)
12. Does the land trust have and implement a written records policy and secure record keeping system that preserves irreplaceable documents essential to defense and enforcement? Please see <http://www.landtrustaccreditation.org/pdf/9GGuidanceDocument.pdf>.
13. Is the land trust actively building its legal defense and general stewardship reserves or other reserves that can be allocated for legal defense and stewardship, unless prohibited by state statute or regulation?

Government held conservation easements and land are not eligible for coverage. A private land trust or quasi-governmental conservation entity easement on government-owned land or fee-owned land encumbered by a government held easement are both able to be insured if the land trust or quasi-governmental conservation entity is otherwise eligible for coverage. Coverage is available for both land trusts where one land trust owns the fee and a second land trust holds the conservation easement on that parcel of fee-owned land, provided they are otherwise eligible.

Terrafirma would have the legal ability to refuse to insure a land trust and to verify land trust statements in each annual application, and to refuse to cover a land trust if it does not meet the eligibility requirements. The Members Committee of Terrafirma may refuse to insure a land trust if it deems that a land trust has flagrant deviations from *Land Trust Standards & Practices* or its participation would materially damage the viability of Terrafirma. The Members Committee would have the right to waive specific requirements in demonstrated exceptional cases as well.

In addition, if a land trust has not answered the eligibility or discount criteria questions with substantial accuracy and if the inaccuracy is material to the coverage (or to the adjudication of

the claim), then the claims committee can deny coverage for a claim. For example, if a land trust does not monitor its easements every year, then it runs the risk of being denied coverage for a claim if that failure to monitor is substantial and material to the coverage for the claim.

Back up Holder and Third Party Enforcer Coverage

Terrafirma would also offer coverage for back up holders and third party enforcers of conservation easements. Generally back up holders and third party enforcers are considered to be any other qualified holder with an expressly granted secondary, conditional or ancillary interest in a conservation easement. Any narrowness in this definition is not intended to exclude otherwise eligible land trusts with legally vested rights in conservation easements from applying for coverage. The following conditions apply:

1. The back up holder or third party enforcer has agreed in writing to serve in that role for the primary holder.
2. The back up holder or the third party enforcer is eligible for coverage.
3. If the primary holder has insured its portfolio, then the back up holder or the third party enforcer can obtain coverage; in that case the premium would be \$30 per conservation easement per year (half the base premium) for the back up holder or the third party enforcer (no discounts available for this coverage).
4. The back up holder or the third party enforcer would have to provide eligibility information for both itself and the primary holder if the primary holder were not already insured; in that case the premium would be \$60 per conservation easement per year (the full base premium) for the back up holder or the third party enforcer only if both the primary and the back up holder or the third party enforcer are eligible for coverage (discounts available for this coverage).
5. If the back up holder or the third party enforcer has no knowledge of and cannot provide Terrafirma with a list of the conservation easements in which it is named as a back up or enforcer, then no coverage is available.

Co-holder Coverage

Terrafirma would also offer coverage for co-holders of conservation easements or co-owners of fee-owned land on the following conditions:

1. Only one aggregate collective policy limit and claim limit.
2. Each co-holder seeking coverage would pay a full premium. (The reason for not reducing the premium for co-holders is that multiple holders would increase complexity of case management.)
3. Required to consent to joint representation by one attorney.
4. The primary holder would be the “first named insured” and would manage the Terrafirma relationship. If necessary the co-holders would need to designate a primary holder for insurance purposes and execute a written agreement about co-holding roles and responsibilities.
5. The primary holder would be delegated to act for all the other insured co-holders on any claims.
6. Suits between co-holders are excluded (this is called an ‘insured versus insured’ exclusion).

If the primary holder has coverage, then the other co-holders may choose not to insure only their co-held easements with that primary holder. The uninsured holders would be solely responsible for their legal costs. If the primary holder is not insured, then the co-holders may not exclude the easement from their insured portfolio.

Coverage for a Conservation Easement on Land Owned by Another Land Trust

Where one land trust holds a conservation easement on land owned exclusively by another land trust, Terrafirma offers two options.

1. The conservation easement holder may choose to not insure only those conservation easements on fee-owned land *if* the fee holder is eligible for Terrafirma.
2. If the conservation easement holder wishes to obtain coverage on land owned exclusively by another land trust, then *if* the fee holder is eligible for Terrafirma the conservation easement holder may insure its interest at half of the base premium (\$30 per conservation easement per year initially). No discounts are available for this coverage.
3. If the fee holder is *not* eligible for Terrafirma, then the full base premium would be charged and discounts would be available as a part of the conservation easement holder's portfolio.

All types of land trust versus land trust disputes are excluded from coverage. This half price coverage would be for third party disputes. If both the conservation easement holder and fee owner have coverage on the same land then they cannot combine their policy limits in the same case. If the two insureds have different policy limits, then the higher limit would apply. Both insureds must agree to joint representation and delegate one of the insureds to be the lead representative in the claim.

Statewide Coalition Coverage

Terrafirma may retain the right to participate in uninsured cases in the rare event where the Members Committee of Terrafirma decides that the matter is of extreme significance nationally. This would be an exceptional event and should be undertaken in collaboration with and subject to the Alliance policy on the Conservation Defense Fund. Part of the premium paid by insureds may potentially go to a discretionary fund over which the Members Committee has control and it may decide to pay for some uninsured claims in rare and extraordinary circumstances.

In addition, many programs are available from the Alliance to assist coalitions with cases arising from uninsured land trusts, such as the Conservation Defense Fund, the Conservation Defense Network, national pro bono attorneys, law school research assistance, and law clinic legal assistance and other general assistance.

Underwriting and Discounts

After extensive interviews with land trusts, the Alliance decided to keep Terrafirma simple. Terrafirma would not underwrite individual conservation easements, but would offer discounts based on the overall quality of a land trust's practices. The Alliance recognized that it would take land trusts too much time to fill out an application form with detailed questions about each conservation easement, and this would cost land trusts far more than the value of any premium discount.

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Rather than attempt to distinguish among various risks in existing easements, Terrafirma would focus on promoting good quality practices going forward both for conservation easements and for organizational management. The Alliance wants to keep the application form simple and avoid confusing land trusts with requirements similar to accreditation. At the same time, the Alliance wants to use discounts to encourage good practices and provide continuing education.

The Alliance believes that accredited land trusts as a group are a good risk and have had their practices scrutinized. While any land trust may be subject to legal challenges, including frivolous lawsuits, good practices are more likely to prevent unnecessary litigation.

Accredited land trusts would therefore receive an automatic \$11 per insured unit discount. For all other land trusts, each would have to attest to meeting all the following conditions to receive a \$4 discount per insured unit:

1. Currently every transaction is reviewed and approved by a qualified attorney prior to closing.
2. Has and follows a written policy on violation resolution.
3. Has and follows a written conflict of interest policy.
4. Has and follows written criteria for selecting land and easement projects consistent with its mission.
5. Evaluates its capacity to perform its perpetual stewardship responsibilities for each project.

Since the goals of Terrafirma exceed those of traditional insurance and include a strong commitment to education, prevention and good practices, Terrafirma would provide an additional discount of \$1 per insured unit to any land trust for attendance at an approved Risk Prevention seminar or other education program approved by the Alliance and held at Rally or at regional conferences in the year prior to the application period. Continuing conservation education would have to be obtained annually for a land trust to receive the discount in the following year.

Risk Management, Prevention and Good Practices

A central feature of Terrafirma would be to fund and provide integrated tools, techniques, tips and training on good risk management, prevention and conservation practices. Terrafirma would share knowledge and skills gained nationally and would promote education on conservation permanence. Terrafirma will favor alternative dispute resolution techniques to prevent unnecessary litigation. The claims committee and the national coordinating attorney would have a central role in sharing this information nationally. Terrafirma would also direct land trusts to existing Alliance resources for assistance, as well as suggest refinements to Alliance offerings or additional endeavors based on the claims experience of Terrafirma. The risk management and prevention strategies would be designed to compliment and coordinate *Land Trust Standards & Practices*, the accreditation process and emerging state certification processes for land trusts.

Random Verification of Records

Terrafirma would have the right to randomly visit the insured Terrafirma participants to confirm that they meet eligibility requirements and any claimed discounts. These visits would assist land trusts in understanding the eligibility and discount criteria and help Terrafirma better understand

the challenges facing land trusts. Since one of the purposes of Terrafirma is to assist all land trusts with continuous learning and improvement, this visit would be an opportunity to share techniques and trends on the latest systems and other ideas for good conservation practices. The policy would include a clause granting access to each insured land trust's records and personnel so that Terrafirma may review the land trust systems as it deems necessary, whether it is part of a random review or based on a reason to visit a land trust more frequently. If such a visit (or review upon a claim) reveals a substantial discrepancy that is material to the coverage (or to the adjudication of the claim), then Terrafirma would have the discretion to deny coverage for that claim, rescind the policy, request corrective action, recalculate the premium or another reasonable, appropriate and proportional response.

Evolution of Terrafirma and Pricing

Since this is a new program, all participants would be learning about risk management and costs as Terrafirma evolves and as it collects data. The pricing structure and eligibility, therefore, would be both reviewed and potentially modified annually.

Claims Management

The feasibility report anticipates a high degree of collaboration and collective decision making on counsel selection and case management with the land trust and the claims committee of Terrafirma. The claims committee would be appointed by the Members Committee. The process to select committee members would be equitable and address the need for litigation expertise.

Significant consideration for local issues and a preference for experienced local litigators would guide attorney selection. For land trusts without an experienced litigator, Terrafirma would want to be able to refer land trusts to competent attorneys and would develop a list of good defense attorneys in each state. Terrafirma would also work to obtain favorable rates for land trusts from this list of attorneys. For those land trusts with some size, experience and long-standing experienced litigator relationships, Terrafirma would defer to local counsel. The Alliance anticipates fair decisions about legal counsel and claims management since the land trusts are also the owners and operators of Terrafirma. The ultimate decision in the case of a dispute rests with the claims committee.

One of the initial tasks when a land trust makes a claim would be to assign roles and responsibilities between the land trust and Terrafirma and determine which attorney would have the lead role in managing the case. This would allow land trusts with experienced, qualified litigators to manage the litigation in consultation with the national coordinating attorney.

An efficient response, sound judgment and good management is critical to case oversight. The national coordinating attorney would triage cases, assist as needed with obtaining legal counsel and provide case oversight. Either the land trust attorney or an attorney provided by Terrafirma would actually manage the case so that the national coordinating attorney is free to provide overall timely direction, cost containment, share information and coordinate management with the land trust. The Alliance sees this as a collaborative partnership to uphold conservation permanence.

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In some situations, Terrafirma and the insured might disagree about how far to proceed with litigation or a settlement opportunity or the use of alternative dispute resolution. If the insured does not agree with the offered settlement but Terrafirma does, Terrafirma would have no responsibility for costs beyond that settlement. In that case the insured could take over the action, but would be responsible for those costs above the proposed settlement opportunity. Terrafirma would not settle without the approval of the land trust. Since Terrafirma would be owned and operated by land trusts, it should be much more responsive and fair than a commercial insurance product regarding pursuing litigation to achieve a desired result rather than settling too early.

In some cases, a land trust may have practices or documentation or a problematic amendment which would make it difficult to win a case. In that situation, the claims committee and the national coordinating attorney would work with the land trust to decide how best to defend that case using alternative methods; in any event, however, Terrafirma would pay for the defense or enforcement. Litigation is generally a last resort method and Terrafirma will encourage appropriate use of alternative dispute resolution to avoid unnecessary litigation. Terrafirma will use litigation where necessary.

In the case of appeals of lower court decisions, the process would be similar to the original claim evaluation process. All the parties—the land trust, the attorney, the claims committee and the national coordinating attorney—would collectively consider all the facts and circumstances. They would then arrive at a consensus approach on whether and how to appeal a court order.

Terrafirma would provide free claims assistance to land trusts and early advice to assist dispute prevention. Early and effective claims management may help avoid more costly disputes and promote more rapid resolution of a problem rather than delaying intervention. At the same time, land trusts with the capacity and capability to resolve more complex problems would want to use good faith efforts first to resolve the matter voluntarily using staff time while keeping Terrafirma appropriately advised of developments. All participating land trusts would be expected to give Terrafirma reasonable notice of a problem that is likely to become a claim at the first indication.

The claims committee of Terrafirma would be composed of attorneys and practitioners experienced with legal challenges and knowledgeable about operating a land trust. The claims committee would also be responsible for ensuring that costs are appropriately contained, while still achieving the purpose of upholding conservation permanence in service to all insured land trusts.

Reinsurance

Because of the lack of loss history, our insurance consultants do not believe that reinsurance would be available at reasonable premiums. After several years in operation, it may be possible to obtain reasonably priced reinsurance and Terrafirma would investigate it again then.

No Guaranty Fund

Terrafirma is not protected by a financial insolvency or guaranty fund. This means that all money paid into Terrafirma is at risk and that coverage will end if Terrafirma ceases operations. The loss to a land trust if Terrafirma ends is limited to the loss of premiums paid and potentially the loss of payment of a claim in full or in part. Additionally the opportunity to add the annual

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premium to a self-insurance reserve has been lost. But with robust capitalization, sufficient reserves and attention to loss trends, the Alliance believes that this risk is minimal.