



## NATIONAL TRENDS AND OBSERVATIONS ON STEWARDSHIP CHALLENGES

Terra Firma is a full-service conservation defense liability insurance company that helps its member owners uphold lasting conservation of preserves, easements, deed restrictions and trails.

### *Trends*

1. **Public access** and trail disputes are increasing nationally with the increased use during the pandemic. Dogs and horses are friction points with landowners and neighbors, followed by noise and loud music. Terra Firma is handling claims on this issue from Hawaii to Maine. You may wish to consider tighter public access language, increased monitoring, communication with neighbors and more detailed management planning to attempt to head off disputes.
2. **Land division** disputes also are increasing in more rural areas as we start to see the first of the natural disaster migration out of cities. We expect this trend to increase so you may wish to evaluate your risks and adapt stewardship administration to address increased human pressure on conserved land. Adding stewardship monitoring online and by title search for prohibited divisions is worth considering. Please also examine your easement template to ensure that you have modern division prohibition language.
3. **Title disputes**, boundary disputes, access disputes and **extinguishment** challenges are increasing nationally as neighbors and successor owners attempt to maximize the financial value of their land and any adjoining land that they perceive as not used for development. The challenges that Terra Firma sees are with opponents that are determined and usually well-funded. This requires land trusts to have precise and complete records that you check annually at a minimum.
4. **Water rights** cases are increasing and span the country from the arid west to the wet southeast. If you do not address uses of ground and riparian water, you may wish to consider it. Accretion issues also are increasing on oceanfront conservation land. This area is complex and requires expert legal counsel in the water law of your state. It is worth an investment of legal time to understand how these laws affect conservation in your area.
5. **Technical errors** can damage or end the defense of a conservation right.
  - a) The land trust name on a 30-year-old CR was missing one word of which opposing counsel emphasized at great expense to the land trust
  - b) Landowner name in 10-year-old easement was an individual instead of an LLC
  - c) Multiyear protracted failure to check boundaries
  - d) Failure to obtain survey promptly upon persistent uncorrected trespass
  - e) Inconsistent legal description omitted a parcel, but a restriction included the parcel
  - f) Inconsistent baseline documentation undermined the correct CE interpretation

### ***Collective Defense is Stronger than Ever***

545 land trust member owner insureds	\$12 +/- million total market value all assets
48 U.S. states have member land trusts	\$4.6+ million paid to help land trusts
10.2 + million acres covered in the U.S.	\$1 million +/- total subrogation returned
\$3.5 + million actuary certified reserves	\$4 + million in capital

## **Risk Management**

1. Please be sure to have a full insurance portfolio including Terrafirma, general liability, directors & officers, volunteer and title coverage.
2. Please stay in touch with Alliance Risk Management Services staff when you have a covered claim. Staff can help you coordinate, move decisions quickly and avoid delays in waiting for Terrafirma approval of case management.
3. Call Terrafirma early! Waiting until after the trial to claim reimbursement of legal fees may lead to loss of coverage.

## **PLEASE FILE CLAIMS ON TIME**

Filing a notice of a possible problem is quick and easy.

- Does not hinder voluntary resolution!
- Preserves timeliness of claim
- 61-day “grace period”
- Has no adverse impact to land trusts and no effect on premiums or coverage continuation
- Simple single sentence quarterly update
- Everything is online and simple

Even as you are working to resolve the problem voluntarily, please file a placeholder claim before the grace period passes for the policy year in which *the potential problem first started*. This example of a land trust letting that deadline pass resulted in a denial of coverage:

Land Trust reported the Claim to Terrafirma by electronic submission on February 25, 2020 but noted that *it first learned of the problem on June 1, 2018*. Land trust filed the Claim in the 2019 policy year (March 1, 2019 to March 1, 2020). The problem first started in the 2018 policy year (March 1, 2018 to March 1, 2019).

At least three distinct ‘red flag’ events occurred in 2018 and 2019 before the grace period for the 2018 policy year ran out on April 30, 2019. These events included annual monitoring revealing several violations or possible violations which were confirmed by photographs, land trust receiving a letter from a backup holder noting violations and holding a meeting with all parties to prepare a remediation plan. Even one of these events is sufficient to warrant filing a placeholder claim. Failing to do so resulted in a coverage denial for this land trust.

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## TWO POINTS ON NATIONAL DEDUCTIBLE EASEMENT LEGAL CHALLENGES

### **Reserved Rights**

The Land Trust Alliance conservation defense staff is tracking a new line of IRS challenge in Tax Court in the cases *Georgia Crushed Stone*, *Malibu Valley*, *Hickory Equestrian*, and *Piedmont Breeze*. The IRS is now scrutinizing clauses addressing reserved rights in the context of compliance with the regulations for baselines, monitoring, inspections, and approvals, in addition to proceeds clauses. For example, the IRS is expanding its reserved rights argument to insist on written notice for even minor structures such as picnic shelters, hunting stands, viewing platforms, and fences. The Tax Court is allowing some of these issues to go to trial.

### **New Legal Tactics**

IRS announced it will be expanding its toolbox to challenge syndicated conservation easement transactions. The IRS announced hiring 200 additional attorneys. It also stated it will invoke the arguments it has employed against conventional tax shelters such as inflated values, economic substance, non-independence of the appraiser, that the partnership was invalid, substance over form, and step transaction. It plans to show the full scope of the promoter's activities and the relationship between the promoter, the appraiser, and other key parties using pattern evidence.

For more information on tax issues write to Diana Norris, Conservation Defense Network and Tax Manager at [dnorris@lta.org](mailto:dnorris@lta.org)

For additional Stewardship and Drafting assistance, please see the *Practical Pointers series of single topic common sense information and action steps* at [tlc.lta.org](http://tlc.lta.org) / Conservation Defense / Practical Pointers. For court opinions and case law summaries see the Law Library also at [tlc.lta.org](http://tlc.lta.org).

For more information on conservation defense, stewardship and legal actions, write to Ailla Wasstrom-Evans, Conservation Defense Fund & Education Manager at [awasstrom-evans@lta.org](mailto:awasstrom-evans@lta.org)

### Commonly Purchased Insurance Compared

There is no formula for the amount of insurance coverage for a land trust or for appropriate limits of liability and deductibles. Land trusts frequently purchase these coverages. *This is not legal, risk, insurance or any other advice.* The following is a general summary only.

COVERAGE TYPE	COVERAGE PROVIDED	NO COVERAGE
<ul style="list-style-type: none"> <li>• General liability</li> </ul>	bodily injury or property damage	embezzlement, fraud or dishonesty; all of D&O coverage; Emotional distress, unless arising from bodily injury; financial loss, unless arising from bodily injury or property damage, property damage to intangible property (such as information stored on a computer network)
<ul style="list-style-type: none"> <li>• CGL</li> </ul>	adds personal, advertising injury liability and medical to GL cover	employment practices, social media, smart phones
<ul style="list-style-type: none"> <li>• Directors and officers (D&amp;O)</li> </ul>	wrongful management decisions by board, volunteers and staff, allegations of neglect, breach of duty, misstatements, and errors by the board, employees, volunteers, and/or the entity itself. allegations of harassment,	embezzlement, fraud or dishonesty; all of GL coverage
<ul style="list-style-type: none"> <li>• Employment practices liability</li> </ul>	discrimination, retaliation and wrongful termination	stand-alone policy may not provide depth of coverage, nonprofit D&O policy with EPL coverage may have more; check that the organization, all employees and volunteers are insureds, definition of covered employment actions may be narrow
<ul style="list-style-type: none"> <li>• Professional liability</li> </ul>	higher standards required of professionals providing services w/in expertise	may not cover all your land trust's professional exposures
<ul style="list-style-type: none"> <li>• Non-owned automobile liability</li> </ul>	accidents caused by an employee or volunteer driving a personal vehicle for a nonprofit	covers only the organization not the individual

COVERAGE TYPE	COVERAGE PROVIDED	NO COVERAGE
<ul style="list-style-type: none"> <li>• Business Continuity</li> </ul>	costs of business disruptions from specific causes	may exclude cyber risk
<ul style="list-style-type: none"> <li>• Property coverage</li> </ul>	property must be damaged by certain causes of loss	significant catastrophes that affect a wide geographical area, such as floods or earthquakes, nuclear war
<ul style="list-style-type: none"> <li>• Excess and umbrella liability</li> </ul>	when primary policy limits are exhausted, the excess policy provides additional coverage for defense, judgments and settlement expenses	does not cover claims excluded by the primary policy
<ul style="list-style-type: none"> <li>• Volunteer accident coverage</li> </ul>	payment of medical costs associated with work-related injuries or illnesses	does not cover the organization itself, may dissuade an injured volunteer from suing the land trust
<ul style="list-style-type: none"> <li>• Workers' compensation</li> </ul>	medical reimbursement up to a defined limit but not income replacement	reduces but does not eliminate the risk that the employer will face a liability claim from an injured worker; laws vary widely
<ul style="list-style-type: none"> <li>• Fidelity or dishonesty coverage</li> </ul>	employee theft, forgery, fund transfer fraud, computer fraud, money order and counterfeit currency fraud and credit card fraud, as well as costs to investigate a loss.	Only covers employee dishonesty
<ul style="list-style-type: none"> <li>• Title insurance</li> </ul>	compensates the land trust if actual title to (ownership of) the conservation easement is challenged or if the legal description is disputed, subject to the survey exception	issues on the ground, specific preexisting title exclusions
<ul style="list-style-type: none"> <li>• Cyber insurance</li> </ul>	Most cyber insurance has the option to include six key coverage areas data loss as opposed to hardware loss, business interruption, notice, content, regulatory, perception, extortion	This coverage is now expensive and coverage has narrowed; be sure to have expert help reading the quotes
<ul style="list-style-type: none"> <li>• Terrafirma</li> </ul>	significant protection from risk not covered by other insurance specifically for your conservation portfolio; provides coverage when a land trust must sue or is sued regarding <i>only</i> conservation rights	38 specific exclusions in Section 3 of the policy form

***Similarities in Commercial General Liability and D&O Policies***

<b>Commercial General Liability</b>	<b>Directors &amp; Officers Liability</b>
Covers liabilities common to all nonprofits, including land trusts.	Covers claims alleging wrongful management acts that are common to all nonprofits.
Provides broad catch-all or basic liability coverage. Other liability coverages are more specific and narrower in scope.	Provides broad coverage for wrongful management acts.
Includes all board members, employees and volunteers as insureds.	Includes all board members, employees and volunteers as insureds.

***Key Differences between Commercial General Liability and D&O Policies***

<b>Commercial General Liability</b>	<b>Directors &amp; Officers Liability</b>
Covers bodily injury, property damage and personal and advertising injury.	Always excludes bodily injury and property damage.
Covers accidents only. Claims usually arise directly from operations rather than governance (management decisions).	Covers wrongful acts. Claims usually arise from governance or management decisions. Board members, management and the organization itself are often defendants and are listed under a broad definition of <i>insured</i> in the policy.
Most often sold to nonprofits as an “occurrence” policy. The coverage trigger in this policy form is the date of the event, accident or occurrence.	Most often sold to nonprofits as a “claims-made” policy. In a claims-made policy, the coverage trigger is the date the claim was made against the organization. A lawsuit is likely to be filed or “made” many months after the events occurred.
Standard policy wording. Most insurance carriers use one of the forms issued by the Insurance Services Offices (ISO). The form number and ISO reference appear at the bottom of each page of the policy.	Nonstandard policy wording. Each insurer drafts or “manuscripts” its own D&O policy forms. Differences in wording and policy structure make it difficult to undertake a side-by-side comparison of coverage, a key to determining which provides better or preferable protection for the insured.

Adapted from [\*\*\*A Guide to Risk Management for Land Trusts\*\*\*](#), The Land Trust Alliance 2014. See the helpful Annual Insurance Analysis Grid on the next page for you to complete with your agent and board.

**DISCLAIMER**

The Land Trust Alliance designed this material to provide accurate, authoritative information about the subject matter covered with the understanding that the Land Trust Alliance is not engaged in rendering legal, accounting or other professional advice. If a land trust or individual requires legal advice or other expert assistance, they should seek the services of competent professionals. The Land Trust Alliance is solely responsible for the content of this series.

	Insert ins policy here	Insert ins policy here	Insert ins policy here	Insert ins policy here
Coverage type				
Premium annual				
Deductible				
Claim limit				
Policy aggregate				
Who covered?				
Who not?				
Other gaps				
Any riders				
Any endorsements				
Umbrella				
Notice requirement				
Potential overlaps				

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## FOUR STORIES OF DILIGENCE AND SUCCESS

### **San Juan Preservation Trust prevails with Terrafirma's help**

The San Juan Preservation Trust (WA), with Terrafirma's backing, obtained payment of a \$100,000 settlement from a neighboring landowner who cut a wide swath of conserved trees to get water views for a bed and breakfast. The payment will help replant the trees on a waterfront nature preserve on Fidalgo Island in the San Juan Islands of Washington State.

The nature preserve owned by the San Juan Preservation Trust, a private land trust that protects open space throughout the San Juan Islands, includes a steep slope between the bed & breakfast and the shoreline. The tree cutting removed materially all trees from a one-quarter acre area extending from the top of the bank down to the beach enhancing water views from the establishment. The cuttings damaged important shoreline wildlife habit, destabilized the steep bank by eliminating native vegetation and undermined its natural water drainage patterns. The bed and breakfast advertised to the public substantial water views of Burrows Bay and Puget Sound as part of the accommodations and surroundings available at the Ship House Inn.

The clear-cut property is part of the Preservation Trust's 1.25-mile long "John H. Geary Shoreline Preserve," a 38-acre collection of 22 contiguous parcels along the west side of Fidalgo Island that was permanently conserved in 1992 by a coalition of neighbors concerned about a proposed development along this steep hillside. The preserve follows Fidalgo's western shoreline beginning north of Sunset Lane, around Edith Point, and then south toward Biz Point. The Geary Preserve is managed as an undeveloped wildlife habitat and scenic view-shed. The SJPT's property runs along the shoreline, and encompasses a steep bank declining to the water.

"No one likes to embark on litigation, but this community worked very hard to protect this shoreline," said Keith Gerrard, president of the San Juan Preservation Trust's Board of Trustees. "We have a responsibility to defend all of our nature preserves in perpetuity, and we won't shy away from that commitment." We were pleased that our insurer, Terrafirma RRG worked with us, and selected our preferred counsel to prosecute an injunctive relief and damage civil action.

According to Mr. Gerrard, "we were happy to report that the settlement was also able to reimburse Terrafirma's litigation costs, as well. By the terms of Terrafirma's insurance policy, the member-based insurer funded the litigation and was entitled to recover those costs. Funds recovered will be used to help fund future legal challenges to land and conservation easements for Terrafirma's member organizations. The Preservation Trust, which has agreed to drop the pending lawsuit, intends to use the remaining recovery (approximately 87.5% of the settlement) to restore lost vegetation, re-stabilize the steep bank, educate upland neighbors about the nature preserve, and implement new strategies to avoid future violations.

There are over three dozen homes adjacent to the Geary Preserve. While some of the neighbors that fought to establish this preserve in 1992 still remain, many of these homes have changed hands. The Trust used some of the settlement funds to increase neighborhood outreach.





***Bear Yuba Land Trust vs. Michael Nudelman et al***, Case No. CU15-081153, Nevada County Superior Court of California.

A Grant Deed (donation) from Saving Special Places, LLC to BYLT dated December 20, 1999 conveyed 28.23 acres total to BYLT that constitutes the Woodpecker Wildlife Preserve. A portion of Woodpecker Wildlife Preserve is a high elevation and steep sloped forest heavily used by the residents of the neighboring developments for pedestrian recreation. The Preserve is of a mixed forest largely dominated by Ponderosa Pine, incense cedar, Douglas Fir, maple and black oak. Dogwood and a few isolated madrone are also found on the Preserve.

Above and to the south of the Cascade Canal on the Preserve, there are many five to 12 foot high Douglas Fir that will eventually transition the current mixed forest ecology into a Douglas Fir late succession forest. The Preserve provides essential habitat to Pileated Woodpeckers and many other species and is within the winter range for the Nevada City deer herd. Steep erosion cuts are a continual challenge with the site. The slipping land and erosion require continued monitoring and some investment to repair and stabilize.

One of the neighboring house owners, Michael Nudelman, appears to have authorized the cutting of a swath of trees from his house down a steep slope to the seasonal creek gully. The area cut was about .25 acres. The BYLT stewardship team visited the Woodpecker Wildlife Preserve on July 29, 2014 for annual monitoring and discovered several large trees cut down. The fallen trees, left lying in the ravine and clogging the natural stream runoff route, may also be jeopardizing slope stability.

BYLT staff by an exchange of emails dating from July 22, 2013 through December 12, 2013 had previously denied permission to Michael Nudelman to cut down these same trees. These emails are now part of the pleadings. BYLT investigation to date shows that Mr. Nudelman contracted a local tree removal company to fell trees to create a better view for his home. He appears to have cut four large trees (one Douglas Fir and three incense cedar) and knocked down another during the apparent trespass. The trees ranged in age from 110 to 159 years and in diameter at breast height from 14 to 46 inches. The largest was a Douglas Fir that measured 140 feet high with a stump diameter of 50 inches and 13 feet in circumference weighing an estimated three to four tons. All the trees will have to be removed to stabilize the vertical and near-vertical slope. BYLT filed a report with the County Sheriff's office on advice of counsel. The land trust filed a Complaint, answers and cross motions ensued. Mediation was attempted and failed before the first meeting. Discovery ensued and finally after three years of court room drama and trespasser obfuscation, the land trust achieved a settlement and payment of \$37,000.



**Solano Land Trust (SLT - CA)** (Preserve trespass.) Staff members found excavation equipment and at least four very large open trenches and one trench partially filled in on SLT's King Ranch Property in 2015. SLT was not contacted by anyone to allow any equipment or personnel to be onsite. The trespasser was aware that this was California red-legged frog habitat. SLT also noted that endangered butterflies are on site to the trespasser staff. They needed to get the ground fixed before the rainy season so all agreed to an interim step of restoration by SLT despite the deliberate trespass. The land trust did finally obtain a detailed restoration agreement and a substantial payment.



### **Middle of the country regional land trust with a wildlife preserve trespass.**

A local business hosted a motor cross Fest. Neighbors to the preserve contacted the land trust about hearing heavy equipment and trees toppling on the preserve. Staff visited the site immediately to document and assess the situation. Staff found road bulldozing in process for the Fest. They met with the event organizer on site, who appeared apologetic, cooperative, and asked how to correct their damage. The full extent of the violation took time and outside experts to assess, and the damage to the steep site is extensive. The event organizer stated that they would not use the road for the Fest. Terrafirma suggested that all parties notify all insurers.

A land trust member had heard large equipment running. She had also been walking near the preserve in the last few days and noticed a bulldozer and road constructed to the south that went down into the woods. They had concerns that this new road was for the upcoming Fest. After walking part of the newly bulldozed road, it was apparent that the road went well onto the preserve.

After sending the letter mentioned above on 5/3/18, the land trust met resistance from the organizer on paying anything to remediate the severe damage. They wanted to do a fast job with volunteers. The organizer started trying to blame the land trust. Trial counsel engaged and agreed to the Terrafirma rates and guidelines. The land trust obtained an initial site overview and some basic stabilization recommendations from a site expert. A board attorney who is a mediator and litigator is serving as liaison with counsel and Terrafirma. They will meet to negotiate restoration with the organizer. Counsel prepared a formal demand letter with chronology and details plus a draft complaint to inspire better cooperation by the trespasser.

More erosion occurred while the land trust engaged in documentation and negotiation. Eventually, the bulldozer operator insurer appeared ready to cover the damage. The issue was how much. Getting to this point took one year. The land trust had to restore the property before the settlement to prevent erosion and more damage. It took another year to obtain payment of \$100,000 and an acceptable release and settlement agreement with the bulldozer operator's insurer. The land trust restoration, expert and attorney fees and costs were fully paid from settlement. Terrafirma was reimbursed in full for what it paid as required in the policy subrogation clause.

