



We are at a pivotal moment in the history of land conservation. Conservation easements and conserved lands across America are under attack from many sources – developers and some landowners who purchase land under easement but are not conservation-minded. A land trust should not have to stand alone in funding legal challenges against a well-financed adversary. Land trusts asked the Land Trust Alliance to investigate the feasibility of low-cost litigation insurance.

In November, Rand Wentworth wrote to every Alliance member and asked for comments on a report looking at the feasibility of creating a conservation defense insurance program. More than 200 land trusts responded positively to that request.

Your comments and those we sought from attorneys, business leaders and insurance experts have been valuable in revising the draft feasibility report with substantive improvements. If you wish to read the original report or the explanatory material, please visit the [Alliance CD Insurance web page](#).

**We now need your advice on the details of this program to make sure it works for you.** Please comment on the new proposed business terms for the insurance program. I encourage you to review and discuss the revised plan and its details with your board, your land trust attorney and insurance agent, as well as your key staff or volunteers. **The *draft Business Terms and draft Conditional Commitment Agreement* are now available online for your review.**

Please send me your comments and suggestions by March 25, 2009, so that I have your advice in time for the Alliance board vote on the Business Terms at its April 9, 2009 meeting. Starting in May we plan to ask your land trust for a formal commitment to the insurance program.

I look forward to hearing from you.

Sincerely,

*Leslie*

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## **Exploring Conservation Defense Insurance Draft Business Terms**

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. Most land trusts do not have endowments sufficient to cover the cost of defending an easement or fee-owned land. IRS scrutiny of the financial resources to monitor and defend easements is also increasing. Many land conservation leaders are concerned about the increase both in the cost of and the number of legal challenges to conservation easements and have asked the Land Trust Alliance to investigate the feasibility of insurance to cover these litigation costs. The Alliance is exploring the feasibility of such a program, but it will only proceed if there is wide support from land trusts.

Most land trusts do not have endowments sufficient to cover the cost of defending an easement or fee-owned land. Federal law requires land trusts to have the resources to adequately monitor and defend their easements, and the IRS is increasing its scrutiny of this requirement. 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 resources available to monitor and defend easements. Given the small number of land trusts with large endowments, many land trusts would have difficulty answering such a question satisfactorily.

The purpose of this document is to brief our members on the details of such an insurance program. Later this year, the Alliance will ask each land trust board to vote on whether the land trust will participate in the program and commit to insuring its portfolio. The Board of the Land Trust Alliance will not approve this service unless two conditions are met: 1) the Alliance must have written commitments from land trusts willing to insure at least 12,000 conservation easements or parcels of fee-owned land; and 2) the Alliance must raise \$4 million to capitalize the program.

Conservation defense insurance is just one part of the stewardship of easements, and land trusts will still need to raise endowment funds to cover perpetual monitoring and stewardship costs, the annual costs of insurance deductibles and exclusions and any claims that exceed policy limits. Insurance is an important part of a comprehensive and effective legal defense strategy, but it is not a replacement for good risk management practices and good business practices. Some land trusts are considering keeping their segregated legal defense funds intact and using the income from the fund to pay the insurance premiums and using the

principal to pay deductibles, exclusions and claims in excess of the policy limit. Land trusts will still need to contribute to these funds as they increase the size of their portfolios.

We have designed the insurance program to encourage practices that will help to prevent violations and litigation, so there are significant discounts for land trusts that implement good risk management practices. We designed the insurance program so that it complements *Land Trust Standards & Practices* and the land trust accreditation program. Our ultimate goal is to create favorable case law, avoid unfavorable case law, and protect the permanence of conserved land.

The following business terms have been shaped by comments the Alliance received from hundreds of land trusts, attorneys, insurance experts and business leaders. Before we finalize the terms, we want to ask you if this service meets your needs. Please send your comments by March 25, 2009 to Leslie Ratley-Beach, Conservation Defense Director, at [lrbeach@lta.org](mailto:lrbeach@lta.org) or 44 Deerfield Drive, Montpelier, VT 05602. Thank you.

The following 19 sections outline coverage, limits, premium rates and other matters that a land trust may want to consider when evaluating conservation defense insurance. If this program proves feasible, it would be offered through a land trust owned captive insurance program which would be owned and managed by the insured land trusts and the Land Trust Alliance. These terms are general in nature and may change somewhat as the Land Trust Alliance refines the program. The coverage is subject to definitions and other restrictions that are beyond the scope of this document and which will be fully articulated in the insurance policy.

We all want to increase good risk management, prevent unnecessary litigation, create conservation favorable case law, avoid unfavorable case law and assist member land trusts to promote high quality conservation practices and ensure conservation permanence. We believe that it is very important to design any insurance program to complement *Land Trust Standards & Practices*, the accreditation process and emerging state certification processes for land trusts.

### **Coverage**

The proposed insurance program would be a Reciprocal Risk Retention Group<sup>1</sup> that is owned and operated by the insured land trust participants and the Land Trust Alliance for their collective benefit 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 annual operating costs will be \$300,000

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<sup>1</sup> 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. A Reciprocal Risk Retention Group is an RRG structured for tax purposes to pass through the tax treatment of excess revenues to its members so that RRG taxes are assessed based on the members' tax status.

which includes prevention programs and risk management. The purpose of the program is to defend and enforce conservation easements and to protect fee-owned land and to support activities that increase prevention, good practices and good precedents.

Coverage under the conservation defense insurance program includes:

1. Defense against litigation regarding conservation easements and fee-owned land, and
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 are included in both defense and enforcement coverage.

An event is an occurrence that may or may not become a claim. A claim is a demand made by the insured for payment of the benefits as provided by the policy. Therefore a claim event would be one where the insured 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 less than litigation fees. The notice of a challenge or a complaint will 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 year of first occurrence. Details on these points will be explicit in the final insurance policy delivered to insured land trusts.

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 also eligible for coverage. 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 covered.

The policy form will contain the standard insurance clause that allows the program to identify and decline to cover specific easements or covenants that excessively exceed the scope and purpose of the insurance coverage. Any such denial shall be accompanied by a detailed explanation and assistance to possibly address the concerns so as to obtain coverage. Most land trusts have general liability insurance, and many land trusts also have directors and officers insurance or title insurance. Sometimes these other insurance policies might cover a portion of a legal challenge. 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 will be addressed on a case-by-case basis. The insurance program will also retain the right to decline to insure any land trust as discussed in Eligibility below.

### **Commitment Letter**

To determine the feasibility of this program, the Land Trust Alliance will ask land trusts to sign contingent commitments to participate in the first three years of the program and to make a refundable registration payment. Once the Alliance has secured commitments to insure at least 12,000 easements (this number might include some fee-owned land), with Alliance board approval we will begin meeting with foundations and individual donors to raise the \$4

million required to capitalize the insurance program. Given the state of the economy, it is likely that it will take longer than originally expected 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 the insurance program to begin operations no earlier than January 31, 2011, and no later than December 31, 2013. If the Alliance determines that the program 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 interest. . A land trust does not have to meet the eligibility requirements at the time of commitment, but it will be required to meet the insurance eligibility criteria at the time of actual application for insurance. If a land trust signs a commitment letter and pays a registration fee but is not eligible if the insurance program starts, then the land trust may elect to correct any deficiencies, or forfeit the registration fee.

### **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).
2. A maximum limit of \$500,000 per claim (which includes defense costs).
3. **And** a maximum 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 year).
4. Land trusts with insured portfolios of 100 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.
6. No coinsurance (co-payment).
7. Non-assessable (no obligation for required future capital contributions in the event of financial difficulties for the insurance program).
8. Each **exercised** division right under an insured conservation easement, trail easement or deed covenants at the time of each annual insurance 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 covenants, then no additional premium is charged and no coverage provided. See the Large Portfolio Additional Terms below for volume discount information for large portfolios.
9. Separate easements that are fully and legally merged will be treated as one easement.
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.
  - 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.)
- 12. The insurance program 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 the insurance program will develop.
- 13. Each land trust will pay a one-time modest registration fee on a sliding scale from \$250 to \$2500 depending on portfolio size in the first year of participation. The registration fee will be paid with the conditional commitment and is refundable with interest if the Alliance does not create the insurance program by December 31, 2013. The Alliance will have a reasonable grace period to correct problems prior to refunding the registration fees. To provide an incentive for early enrollment, the registration fee will increase by 50 percent after June 1, 2010.

*Sliding Scale Registration Fee Schedule*

Based on the total portfolio that a land trust insures (that is: 1. all holdings or 2. all conservation easements including trail easements and deed covenants or 3. all fee-owned land), the registration fee is as follows:

Total Insured Portfolio	Registration
1 to 24	\$250
25 to 49	\$500
50 to 99	\$750
100 to 299	\$1,000
300 to 499	\$1,500
500 to 999	\$2,000
1000 and up	\$2,500

**Premium Stability**

The purpose of establishing a captive insurance program, instead of using commercial insurance, is to give land trusts control over the insurance product, premiums and claims management. Our desire is to keep premiums and the insurance terms stable over many years. The insurance program will 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 the program is more likely to be able to keep premiums low. Of course, no one can guarantee that premiums will not change over time, but our consultants have designed the best available approach that protects land trusts from increases. We understand that a land trust will want protection from sudden increases in premiums before it will sign a commitment to participate in the first three years of the program. A land trust can be released from its commitment if claims exceed our estimates and premiums increase by more than 2.5 percent a year over the first three years. Prior to this election, the insurance program will have a reasonable period of time to address any problems or costs increases.

### **Large Portfolio Additional Terms**

#### *Volume Discount*

The unit cost to issue and administer a policy to a land trust with a portfolio of 300 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 300 conservation easements and/or fee-owned land will receive a volume discount of \$3 per insured unit.

#### *Aggregate Limits*

As a matter of equity for the holders of large portfolios who will be paying much more in total premiums, the aggregate limit will be increased for those large portfolio land trusts having the good management practices below. For these land trusts, the aggregate cap will increase from \$500,000 to \$750,000 for land trusts with 100-399 easements or fee-owned land insured, and \$1 million for land trusts with 400 or more easements or fee-owned land insured. The per unit base premium charged would be the same as for all other insureds.

For those land trusts with portfolios of 1000 or more easements or fee-owned land insured, we are endeavoring to obtain regulator approval for a higher aggregate limit as well as a determination regarding the financial sustainability and risks of an additional higher aggregate. If we are successful, the per unit base premium charged would still be the same as for all other insureds.

To obtain this additional coverage, the underwriting standards will 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. 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

## **Exclusions**

The overall philosophy is to keep the insurance program 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 (this does not include land trust defense or enforcement of a conservation easement on land owned by a government entity)
3. IRS audits, investigations or other inquires
4. All tax related matters (challenges to the validity of a conservation easement itself by the landowner are covered)
5. Criminal matters
6. The actual costs for damages or for on the ground repairs or corrections (as opposed to an action that was seeking specific performance or remediation, which would be covered)
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 conservation defense insurance; any conflicts will 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 will 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. Staff costs including any services provided by government attorneys or other staff
13. Pending or prior litigation
14. Pre-existing known violations 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)
17. Payment of the adverse party's legal fees if awarded by the court
18. Trespass by the land trust or other willful or grossly negligent acts
19. 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 will cover challenges to the easement itself

20. 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

### **Eligibility**

The overall philosophy of the proposed insurance program is to maintain public confidence in conservation easements as a legal tool and in land trusts as effective conservation organizations. In addition, we believe that land trusts are dependent on each other for optimal defense – we are all in this together – and can present a formidable collective defense. Therefore we want virtually all land trusts to participate in the insurance and risk prevention programs. For these reasons, we will keep the application form and the process as simple as possible, minimizing the burden on land trusts and administrative costs to the insurance program. We have tried to make the program eligibility standards accessible for most land trusts, although we recognize that 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.

All other land trusts and quasi-governmental organizations need to answer the following questions affirmatively:

1. Is the land trust legally organized and in good standing in that state?
2. Is the land trust tax exempt under I.R.C § 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 annually monitor 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 or has 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. For quasi-governmental organizations only—the organization must meet the following three standards from the *Interpretation and Application of Land Trust Standards and Practices* in lieu of numbers 1 and 2 above:
  - a. Is established and exists as a legal entity according to state or local law requirements and operates under bylaws or equivalent rules and regulations based on its charter or statutory requirements.
  - b. Is qualified for federal tax-exempt status under Section 170(c)(1) of the IRC and ensures that all contributions or gifts are used exclusively for public purposes and meets the IRC requirements for a qualified holder of a qualified conservation easement.
  - c. Attaches annual report provided to oversight agency or council or other outside entity.

Government held conservation easements and land are not eligible for insurance 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 insurance. 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.

The insurance program will have the legal ability to refuse to insure a land trust and to verify land trust statements in each application for insurance, and to refuse to insure a land trust if it does not meet the eligibility requirements. Also, the board of the insurance program 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 the insurance program. The board of the insurance program will have the right to waive specific requirements in demonstrated exceptional cases as well.

### **Back up Holder and Third Party Enforcer Coverage**

The program will also offer coverage for back up holders and third party enforcers of conservation easements on the following conditions:

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 insurance.
3. If the primary holder has insured its portfolio, then the back up holder or the third party enforcer can obtain insurance, and in that case the premium would be \$30 per conservation easement per year 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, and in that case the premium would be \$60 per conservation easement per year 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 the insurance program 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**

The program will 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 insurance would pay a full premium. (The reason for not reducing the premium for co-holders is that multiple holders will increase complexity of case management.)
3. Required to consent to joint representation by one attorney.
4. The primary holder will be the “first named insured” and would manage the insurance program relationship.
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 the insurance, then the other co-holders may chose 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.

### **Statewide Coalition Coverage**

The insurance program may retain the right to participate in uninsured cases in the rare cases where the board of the program decides that the matter is of extreme significance nationally. Part of the premium paid by insureds may potentially go to a discretionary fund over which the board of the insurance program has control. The board 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.

The insurance program will continue to evaluate whether it could offer coverage for statewide and multi-state land trust coalitions with conditions.

### **Underwriting and Discounts**

After extensive interviews with land trusts, we have decided to keep the program simple. We will not underwrite individual conservation easements, but will offer discounts based on the

overall quality of a land trust's practices. We 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.

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

We believe 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 will 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 this program exceed those of traditional insurance and include a strong commitment to education, prevention and good practices, the program will 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 the insurance program will be to fund and provide integrated tools, techniques, tips and training on good risk management, prevention and conservation practices. The program will share knowledge and skills gained nationally and will promote education on conservation permanence. The claims committee and the national coordinating attorney will have a central role in sharing this information nationally. The insurance program will 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 the insurance program. The risk management and prevention strategies will 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**

The insurance program will have the right to randomly visit the insured program participants to confirm that they meet eligibility requirements and any claimed discounts. These visits will assist land trusts in understanding the eligibility and discount criteria and help the insurance program better understand the challenges facing land trusts. Since one of the purposes of the insurance program is to assist all land trusts with continuous learning and improvement, this visit would be an opportunity to share national ideas and trends on the latest systems and other ideas for good conservation practices. The policy will include a clause granting access to each insured land trust's records and personnel so that the insurance program may review the land trust program 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 the insurance program 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 the Program and Pricing**

Since this is a new program, all participants will be learning about risk management and costs as the program evolves and as we collect data. The pricing structure and eligibility, therefore, will 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 the insurance program. The claims committee would be appointed by and operate under the direction of the board of the insurance program. We have not yet determined how committee members will be selected, but the process will be representative, fair and inclusive.

Significant consideration for local issues and a preference for experienced local counsel will guide counsel selection. We anticipate fair decisions about legal counsel and claims management since the land trusts are also the owners and operators of the insurance program, even though the ultimate decision in the case of a dispute rests with the insurance program board.

The claims committee of the insurance program would be composed of land trust practitioners experienced with legal challenges and knowledgeable about operating a land trust. The claims committee will also be responsible for ensuring that the insurance program is well managed and costs are appropriately contained, while still achieving the program purpose of upholding conservation permanence in service to all insured land trusts. In some cases a land trust may have practices or documentation or a problematic amendment which would make it difficult to win a case. There 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 but in any event the insurance program would pay for the defense.

The insurance program will not settle without the approval of the insured. In some situations, the insurance program and the insured might disagree about how far to proceed with litigation or a settlement opportunity. An insurance program that is owned and operated by land trusts should be much more responsive and fair than a commercial insurance product. If the insured does not agree with the settlement, the insurance program would have no responsibility for costs beyond that settlement. In that case the insured would take over the action but would be responsible for those costs above the proposed settlement opportunity.

### **Reinsurance**

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

### **No Guaranty Fund**

The insurance program is not protected by a financial insolvency or guaranty fund. This means that all money paid into the program is at risk and that insurance coverage will end if the program ceases operations. Unlike life insurance, however, the risk would be limited to the loss of premiums paid for a single year and potentially the loss of payment of a claim in full or in part. But with robust capitalization, sufficient reserves and attention to loss trends, we believe that this risk is minimal.

### **Legal Structure**

Once we have determined if the insurance program is feasible, the Land Trust Alliance will evaluate alternative legal structures and make a recommendation to the Alliance board for approval. Typically, the participants serve as owners and managers of a Reciprocal Risk Retention Group with one vote for each land trust participant.

We have not yet determined the role of the Land Trust Alliance in the entity. We also have not determined how the board and committee members will be selected and we will need to address appropriate representation geographically, by size, and by conservation focus as well as needed expertise. If the board votes to proceed with the insurance program, we will work closely with our counsel Tom Jones of McDermott, Will and Emery to address all these issues equitably and appropriately.