



TERRAFIRMA TIPS: WHAT WE LEARNED

Terrafirma is a full-service conservation defense liability insurance company that helps its member owners uphold lasting conservation. Terrafirma shares experiences from the disputes with the land trusts it assists. These are some of the tips from things we learned:

1. Records are critical – have complete and careful records for all conservation rights; this can help avert a dispute from escalating.
2. Preserve your records. Start a file on the case and designate *one* file manager once you are in a dispute. The file should include all documents related to the lawsuit, including materials from the opposing party, documents from your attorney and documents from your insurance company.
3. Designate a backup manager to ensure a seamless transition in an emergency.
4. Keep the file in a secure location, such as a locked cabinet, allowing access only to those who need to review the materials. If you are using fully electronic materials, store them on a separate external hard drive that can be removed and secured physically every night.
5. Do not alter or dispose of any documents, even if you think they may be harmful, because doing so may be illegal. Destruction of such documents can result in fines, imprisonment or loss of rights in the action.
6. 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. Opposing counsel much made of that at much expense
 - b) In landowner name in 10 year old CR: individual should have been LLC
 - c) Multiyear protracted failure to check boundaries
 - d) Failure to obtain survey promptly upon persistent uncorrected trespass
7. 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.
8. Involve your attorney early for advice and for retaining any needed experts.
 - a) Order expert reports so that the poorly done report can be protected – work product protection
 - b) Insufficient expert documentation
 - c) Some land trust volunteers forget that inter-office and private emails are all discoverable
 - d) Full independent analysis
9. Damages theories are critical. Make sure your attorney explores everything. This is another reason to stay in touch with so staff can share what Terrafirma has learned across the country.
 - a) Ecosystem service value of damage to land, vegetation and creatures
 - b) Use criminal proceedings appropriately
 - c) Leverage any state statutes
 - d) Early involvement of landowner insurance coverage and leverage
10. Communicate in a balanced, measured, neutral and well-informed manner to avoid inflaming an otherwise manageable problem that can affect all proceedings thereafter.
11. Avoid uninformed demands or agreements that are not supported by the facts or law as these are very difficult to retract later.

12. Have full, complete and accurate transaction, baseline, approval or violation and trespass documentation. This establishes your credibility, refutes contrary claims and can shorten the time to resolution.
 - a) Avoid ambiguous approval or interpretation letters. A clever opposing attorney uses ambiguity to make a case that innocent successor developer gets to put that road in, or a house or whatever other development use someone might want.
 - b) Errors, inconsistencies, gaps in baseline documentation and monitoring all contribute to reduced ability to defend conservation.
13. Promptly demand cease and desist of prohibited activities and followup to insure stoppage.
14. Enhance the understanding of attorneys about vigorous defense and that conservation is not business matter; it is a charitable matter.
15. Call Terrafirma early! Waiting until after the trial to claim reimbursement of legal fees may lead to loss of coverage.
16. Please be sure to have a full insurance including Terrafirma, general liability, directors & officers, volunteer and title coverage.
17. Some claim trends:
 - a) Public access and trail disputes 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. Terrafirma 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.
 - b) 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.
 - c) 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 being used for development. The challenges that Terrafirma sees are with opponents that are very determined and usually well funded.
 - d) Water rights cases are increasing dramatically and span the country from the arid west to the wet southeast. If you don't regulate 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.

PLEASE FILE CLAIMS ON TIME!

Filing a notice of a possible problem is quick and easy. It does not hinder voluntary resolution!

- Preserves timeliness of claim
- 60-day "grace period"
- Has no adverse impact to land trusts
- Simple single sentence quarterly update
- Everything is online and simple

ALLIANCE RISK MANAGEMENT SERVICES LLC (ARMS)

1250 H STREET NW, SUITE 600, WASHINGTON, DC 20005

HANNAH FLAKE

Conservation Defense Coordinator

202-800-2248 | hflake@lta.org

help@terrafirma.org

LESLIE RATLEY-BEACH

Conservation Defense Director

ARMS Vice President and Secretary

802-262-6051 | lrbeach@lta.org