Session Outline
Intro to Title Review for Conservation Easement Transactions

Saturday, September 9 | 10:30 a.m. - noon

Session Description:
This session will provide some basics about reviewing a preliminary title insurance commitment and related documents during a conservation easement transaction. It will focus on a number of real-life title issues the presenter has experienced, and will include some pointers on how to identify and resolve such title issues.

Outline

I. Introduction

II. Title products
   A. What is a title commitment?
   B. What is a title insurance policy and what protection does it offer?
   C. Why should land trusts obtain title insurance?
      1. A railroad runs through it: Quick example of issue that might be resolved in reviewing a title product
      2. Recommendation to resolve the issue

III. The different parts of a title commitment
   A. Schedule A
   B. Legal Description
   C. Schedule B-1 (Requirements)
   D. Schedule B-2 (General and special exceptions)
   E. Sample title review memorandum

IV. Case studies of real-life title issues and their resolutions
   A. The phantom fractional interest
      1. Issue: An unexpected fractional owner of a property, who died decades ago, and the heirs needed to be tracked down
      2. Resolution: Research; quit claim deed(s)
   B. George and his siblings
      1. Issue: Apparent property owner was actually one of several property owners, all of the others long-since dead
      2. Resolution: Multiple probates
   C. The pushy mineral company
      1. Issue: Mineral rights company that held mineral rights to a property, and wanted to explore those rights (and was skeptical of Conservation Easements)
2. Resolution: Mineral Ownership Report; Mineral Remoteness Test; Negotiated surface use agreements

D. Access across the railroad
   1. Issue: Road access across a railroad track, and potential appraisal issues
   2. Resolution: Negotiation of a new permit with the railroad

E. Whistling past the graveyard
   1. Issue: A property that included a cemetery plot, and potential access by extended family members
   2. Resolution: Understand scope of family members’ access—who, when, etc.

F. The cell tower speculator
   1. Issue: A cell tower site the lease for which included a concerning right of first refusal
   2. Resolution: Need to negotiate a subordination with cell tower company

G. The illusory patent
   1. Issue: A property some of which was wrongly patented because it lay inside the boundaries of a federal Indian reservation
   2. Resolution: Long, drawn-out process involving survey and quit claim deed

Document List:

1. Sample title insurance commitment from Montana
2. Sample title insurance commitment from Washington
3. Sample title insurance policy from Montana
4. Sample title memorandum from attorney to land trust client
5. LTA article “Closing the Transaction”
6. LTA article “Title Investigation”
7. LTA Practice document 9F “Title Investigation and Recording”
8. LTA Practical Pointer “Lien and Mortgage Subordination”
COMMITMENT FOR TITLE INSURANCE

SCHEDULE A

1. Effective Date: October 18, 2021 at 08:00 AM

2. Policy or Policies to be issued:
   (a) (X) ALTA Own. Policy (08/01/16)
       Proposed Insured:
       Inc., a Montana non-profit corporation
       Amount
       $000.00
   (b) ( ) ALTA Loan Policy (08/01/16)
       Proposed Insured:

3. The estate or interest in the land described or referred to in this Commitment and covered herein is CONSERVATION EASEMENT and is at the effective date hereof vested in:
   Inc., a Montana corporation, as to Parcel 1

   And

   LLC, as to Parcel 2

4. The land referred to in this Commitment is situated in the County of , State of Montana, and is described as follows:
   Parcel 1:
   Township North, Range East, P.M.M., County, Montana.
   Section Certificate of Survey recorded in Book ; LESS Bargain and Sale Deed Number
   Section 4:
   Parcel 2:
   Tract A of Certificate of Survey No. recorded in situated in part of Section and the W½ of the NW¼ of Section all being in Township North, Range East, P.M.M., County, Montana.

   AND

   Tract C of Certificate of Survey No. recorded in situated in part of the S½ of Section , Township North, Range East, P.M.M., County, Montana.

Countersigned: Title Guaranty, LLC
Authorized Officer of Agent
400 Avenue
, MT 59

VALID ONLY IF SCHEDULE B AND COVER ARE ATTACHED.
SCHEDULE B - SECTION 1
REQUIREMENTS

Order No: [Redacted]

The following requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.

2. Pay the agreed amount for the estate or interest to be insured.

3. Pay the premiums, fees, and charges for the Policy to the Company.

4. Documents satisfactory to the Company that convey Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

5. Release(s) or Reconveyance(s) of item(s) deemed necessary.

6. You must give us the following information:
   1. Any off-record leases, surveys, etc.
   2. Statement(s) of identity, all parties.

7. This order is subject to High Liability Underwriter Approval. Terms and conditions subject to change once approval has been received.
SCHEDULE B - SECTION 2
EXCEPTIONS

Schedule B of the Policy or Policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records.

2. Any facts, rights, interest, or claims which are not shown by the public records but which could be ascertained by an inspection of said Land or by making inquiry of persons in possession thereof.

3. Easements, claims of easement or encumbrances which are not shown by the Public Records.

4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title including discrepancies, conflicts in boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, ditch or ditch right, whether or not the matters excepted under (a), (b), or (c) are shown by the Public Records.

6. Any liens, or rights to a lien, for services, labor or materials theretofore or hereafter furnished, imposed by law and not shown by the Public Records.

7. Any right, title or interest in any minerals, mineral rights, or related matters, including but not limited to oil, gas, coal, and other hydrocarbons, sand, gravel or other common variety materials, whether or not shown by the Public Records.

8. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B - Section 1 Requirements are met.

9. General County Taxes for the year 2020
   First Half: [paid]
   Second Half: [paid]
   Total for year: [redacted]
   Geo Code: [redacted]
   Taxpayer No.: [redacted]
   Prior Years Delinquent Taxes: NONE
   PLEASE NOTE: DELINQUENT TAX AMOUNTS ABOVE, IF ANY DO NOT INCLUDE PENALTY AND INTEREST.

10. General County Taxes for the year 2020
    First Half: [paid]
    Second Half: [paid]
    Total for year: [redacted]
    Geo Code: [redacted]
    Taxpayer No.: [redacted]
    Prior Years Delinquent Taxes: NONE
    PLEASE NOTE: DELINQUENT TAX AMOUNTS ABOVE, IF ANY DO NOT INCLUDE PENALTY AND INTEREST.
11. General County Taxes for the year 2020
   First Half: [Redacted] PAID
   Second Half: [Redacted] PAID
   Total for year: [Redacted]
   Geo Code: [Redacted]
   Taxpayer No.: [Redacted]
   Prior Years Delinquent Taxes: NONE
   PLEASE NOTE: DELINQUENT TAX AMOUNTS ABOVE, IF ANY DO NOT INCLUDE PENALTY AND INTEREST.

12. INTENTIONALLY DELETED

13. INTENTIONALLY DELETED

14. No liability is assumed for errors, omissions or changes in assessed evaluations or amount of taxes assessed by any state, county, city or federal taxing or assessing authority.

15. Reservations or exceptions in patents or in Acts authorizing the issuance thereof all claims to water and water rights.

16. County road right-of-way the existence of which is dependent in whole or in part upon writings which have not been recorded and indexed as conveyances in the office of the Clerk and Recorder pursuant to Title 70, Chapter 21 MCA.


18. INTENTIONALLY DELETED

19. INTENTIONALLY DELETED


22. All matters, covenants, conditions, restrictions, ensemes and any rights, interests or claims which may exist by reason thereof, disclosed by the recorded plat of said subdivision, recorded in Book [Redacted] of Plats, page [Redacted] but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c).


25. Grant of Easement to [Redacted], recorded 11/20/2002 as Document Number [Redacted], records of [Redacted] County, Montana.

26. All matters, covenants, conditions, restrictions, easements and any rights, interests or claims which may exist by reason thereof, disclosed by the recorded plat of said subdivision, recorded as Book [Redacted] of Plats, page [Redacted] but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c).

27. All matters, covenants, conditions, restrictions, easements and any rights, interests or claims which may exist by reason thereof, disclosed by the recorded plat of said subdivision, recorded as Certificate of Survey in Book [Redacted] of Plats, page [Redacted] but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c).

28. Reservations, Exceptions and Easements described in Document Number [Redacted], records of [Redacted] County, Montana.

29. Access may be by way of un-recorded Railroad Crossing Permit.

30. Any claim or loss based on the assertion that the [Redacted] River has moved its boundaries.

31. Right, title and interest of the State of Montana within the natural bed of the [Redacted] River below the ordinary low water line, and also excepting any artificial accretions waterward of said ordinary low water line.

32. Public right and easements for commerce, recreation, navigation and fishery.


36. INTENTIONALLY DELETED


39. INTENTIONALLY DELETED

SCHEDULE B - SECTION 2
EXCEPTIONS
(Continued)

Order No: 


42. Terms and conditions of Pipeline Easement recorded in Book of Micro, page, records of County, Montana.


44. Terms and Provisions of Bargain and Sale Deed recorded 7/20/2010, as Document Number, records of County, Montana.

45. Easement Deed by Court Order in Settlement of Landowner Action recorded 5/14/2012, as Document Number, records of County, Montana.

46. INTENTIONALLY DELETED

47. INTENTIONALLY DELETED

48. MORTGAGE and related matters dated 6/1/2015, executed by to Electric Cooperative, Inc., to secure payment of $ plus interest, recorded 6/10/2015, as Document Number, records of County, Montana.

NOTE: This Order does not include a search for financing statements filed in the office of the Secretary of State and the Clerk and Recorder and no liability is assumed. Please contact this office if a search is requested.

NOTE: As an accommodation and not part of this commitment, no liability is assumed by noting the following conveyances describing all or part of the subject property, which have been recorded within the past 24 months: NONE

NOTE: Other than as shown in Schedule B, we find no Judgment Liens, Federal Tax Liens or Child Support Liens of record which attach to the name(s) or interest of the vested owner and/or proposed insured owner/borrower.

NOTE: Any Deed Restrictions, Covenant, By-Law, Declaration of Condominium and/or any amendments thereto and/or otherwise as shown herein as an exception which may contain a clause indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent that such reference violates 42 USC 3604 (c), is hereby deleted as to said reference; no other deletion is hereby intended or implied.

END OF SCHEDULE B
ALTA COMMITMENT FOR TITLE INSURANCE

Issued By agent:
EXAMPLE TITLE COMPANY
Of Washington

Commitment Number:
12345678
Revision 2

NOTICE

IMPORTANT - READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.

THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACONTRACTUAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.

THE COMPANY’S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

COMMITMENT TO ISSUE POLICY

Subject to the Notice; Schedule B, Part I-Requirements; Schedule B, Part II-Exceptions; and the Commitment Conditions, Chicago Title Insurance Company, a Florida corporation (the "Company"), commits to issue the Policy according to the terms and provisions of this Commitment. This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A, only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Policy Amount and the name of the Proposed Insured.

If all of the Schedule B, Part I-Requirements have not been met within one hundred eighty (180) days after the Commitment Date, this Commitment terminates and the Company’s liability and obligation end.

Example Title Insurance Company
By:

Mad Hatter

Countersigned By:
Queen Ofhearts
Authorized Officer or Agent
Queen Ofhearts

Attest:
Mad Hatter, President
Cat Cheshire, Secretary

This page is only a part of a 2016 ALTA® Commitment for Title Insurance issued by Chicago Title Insurance Company. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I-Requirements; Schedule B, Part II-Exceptions; and a counter-signature by the Company or its issuing agent that may be in electronic form.

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Order Number: 12345678

SCHEDULE A

1. Commitment Date: January 1, 2022 at 08:00 AM

2. Policy to be issued:
   (a) ALTA Owner's Policy 2006
       Proposed Insured: Wonderland Land Trust, a Washington non-profit corporation
       Proposed Policy Amount: $100,000.00
       Premium: $ 459.00
       Tax: $ 39.02
       Total: $ 498.02

3. The estate or interest in the Land described or referred to in this Commitment is:
   Easement

4. The Title is, at the Commitment Date, vested in:
   Lewis and Alice Carroll, husband and wife
5. The Land is described as follows:

**PARCEL A:**

A tract of land located in Government Lot 1 and the E1/2SE1/4NW1/4 and the S1/2NE1/4 in Section 5, Township 13 North, Range 19 West, P.M.M., England County, Washington, lying and being easterly of the east right of way of Grant Creek Road, and being more particularly described as Tract 2 of Certificate of Survey No. 5867.


**PARCEL B:**

A tract of land located in and being a portion of the Southwest One-Quarter (SW1/4) of Section 10, Township 12 north, Range 19 West, W.M., England County, Washington and being more particularly described as follows:

Beginning at the South One-Quarter (S1/4) corner of said Section 10; thence S.88°21’06”W., along the South line of said Section 10 a distance of 1009.50 feet to the true point of beginning; thence continuing S.88°21’06”W. along the South line of said Section 10 a distance of 575.00 feet to a point in the centerline of an existing road; thence the following three (3) courses along the centerline of said road: N.15°46’58”W., 92.11 feet; thence N.13°38’11”E., 268.23 feet; thence N.03°14’36”E., 145.00 feet; thence leaving the centerline of said road and running N.39°07’13”E., 976.92 feet to a point on a tangent curve, said point being in the centerline of an existing road; thence Southeasterly along said centerline and along said tangent curve being concave to the Northeast and having a radius of 157.44 feet a distance of 169.90 feet; thence leaving the centerline of said road and running S.06°46’14”W., 599.27 feet; thence S.15°29’00”W., 572.88 feet to the true point of beginning.

**END OF SCHEDULE A**

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SCHEDULE B, PART I
REQUIREMENTS

All of the following Requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.

2. Pay the agreed amount for the estate or interest to be insured.

3. Pay the premiums, fees, and charges for the Policy to the Company.

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.

5. Additional requirements and/or exceptions may be added as details of the transaction are disclosed to, or become known by the Company.

6. If the Seller or Borrower intends to sign documents required to insure the transaction utilizing a remote online notary, please notify the Company immediately as additional underwriting requirements will need to be satisfied.

7. The application for title insurance was placed by reference to only a street address or tax identification number. The proposed Insured must confirm that the legal description in this report covers the parcel(s) of Land requested to be insured. If the legal description is incorrect, the proposed Insured must notify the Company and/or the settlement company in order to prevent errors and to be certain that the legal description for the intended parcel(s) of Land will appear on any documents to be recorded in connection with this transaction and on the policy of title insurance.

8. Furnish for recordation a document creating the easement described below:

   Grantor(s): Lewis Carroll and Alice Carroll
   Grantee(s): Wonderland Land Trust
   Purpose: Supply the purpose of the easement and the legal description of the easement to the Company, for approval, prior to the close of this transaction

The easement to be created is subject to the review and approval of the Company’s Underwriting Department.

The Company reserves the right to make additional requirements and/or charge additional fees for an easement search after such review.

END OF REQUIREMENTS

NOTES

The following matters will not be listed as Special Exceptions in Schedule B of the policy. There will be no coverage for loss arising by reason of the matters listed below because these matters are either excepted or excluded from coverage or are not matters covered under the insuring provisions of the policy.

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SCHEDULE B, PART I
REQUIREMENTS
(continued)

Note A: Notice: Please be aware that due to the conflict between federal and state laws concerning the cultivation, distribution, manufacture or sale of marijuana, the Company is not able to close or insure any transaction involving Land that is associated with these activities.

Note B: RECORDING PACKAGES SHOULD BE SENT TO:
EXAMPLE TITLE COMPANY
123 MAIN STREET/PO BOX 567
SEATTLE, WA 98125

Note C: Note: The Public Records indicate that the address of the improvement located on said Land is as follows:
3144 Looking Glass Rd.
Mirror Island, WA 98123

Note D: Note: FOR INFORMATIONAL PURPOSES ONLY:
The following may be used as an abbreviated legal description on the documents to be recorded, per Amended RCW 65.04.045. Said abbreviated legal description is not a substitute for a complete legal description within the body of the document:
Ptn Gov Lot 9, 12-34-5 & Gov Lot 7 & SW-NW, 67-89-1
Tax Account No.: 12341001000, 56782001000

Note E: Note: There are NO conveyances affecting said Land recorded within 36 months of the date of this report.

END OF NOTES
END OF SCHEDULE B, PART I
SCHEDULE B, PART II
EXCEPTIONS

THIS COMMITMENT DOES NOT REPUBLISH ANY COVENANT, CONDITION, RESTRICTION, OR LIMITATION CONTAINED IN ANY DOCUMENT REFERRED TO IN THIS COMMITMENT TO THE EXTENT THAT THE SPECIFIC COVENANT, CONDITION, RESTRICTION, OR LIMITATION VIOLATES STATE OR FEDERAL LAW BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, HANDICAP, FAMILIAL STATUS, OR NATIONAL ORIGIN.

The Policy will not insure against loss or damage resulting from the terms and provisions of any lease or easement identified in Schedule A, and will include the following Exceptions unless cleared to the satisfaction of the Company:

GENERAL EXCEPTIONS

A. Rights or claims of parties in possession, or claiming possession, not shown by the Public Records.

B. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.

C. Easements, prescriptive rights, rights-of-way, liens or encumbrances, or claims thereof, not shown by the Public Records.

D. Any lien, or right to a lien, for contributions to employee benefit funds, or for state workers' compensation, or for services, labor, or material heretofore or hereafter furnished, all as imposed by law, and not shown by the Public Records.

E. Taxes or special assessments which are not yet payable or which are not shown as existing liens by the Public Records.

F. Any lien for service, installation, connection, maintenance, tap, capacity, or construction or similar charges for sewer, water, electricity, natural gas or other utilities, or for garbage collection and disposal not shown by the Public Records.

G. Unpatented mining claims, and all rights relating thereto.

H. Reservations and exceptions in United States Patents or in Acts authorizing the issuance thereof.

I. Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes.

J. Water rights, claims or title to water.

K. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B, Part I—Requirements are met.
SCHEDULE B, PART II
EXCEPTIONS
(continued)

SPECIAL EXCEPTIONS

1. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Purpose: Ingress, egress and utilities
   Recording Date: January 20, 1967
   Affects: Westerly 40 feet of Parcel A
   Recording Ref: 123456

2. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Granted to: Tweedldee Power and Light Company
   Purpose: Electric transmission and/or distribution line, together with necessary appurtenances
   Recording Date: June 20, 1977
   Affects: Easterly portion of Government Lot 3
   Recording Ref: 987456

3. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Purpose: Conservation purposes
   Recording Date: December 28, 1980
   Affects: The West Half of Government Lot 9
   Recording Ref: 357789

4. Easement(s) for the purpose(s) shown below and rights incidental thereto, as granted in a document:

   Purpose: Conservation purposes
   Recording Date: December 11, 1999
   Affects: The East Half of Government Lot 2
   Recording Ref: 245698

5. Application Owner-Builder Permit, and the terms and conditions thereof:

   Recording Date: February 25, 1981
   Recording Ref: 1234556

6. Resolution No. 172-1990

   Recording Date: January 11, 2009
   Providing: Public benefit rating for open space
   Affects: Parcel A and Parcel B

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SCHEDULE B, PART II
EXCEPTIONS
(continued)

7. As to any portion of said land now, formerly or in the future covered by water: Questions or adverse claims related
to (1) lateral boundaries of any tidelands or shorelands; (2) shifting in course, boundary or location of the body of
water; (3) rights of the State of Washington if the body of water is or was navigable; and (4) public regulatory and
recreational rights (including powers of the USA) or private riparian rights which limit or prohibit use of the land or
water.

8. Payment of the real estate excise tax, if required.

The Land is situated within the boundaries of local taxing authority of England County.

CAUTION: Washington has a graduated excise tax rate for sales occurring on or after 1/1/2020 for most
properties, although a flat rate applies to properties formally classified and specially valued as timberland or
agricultural land on the day of closing.

The rate of real estate excise tax to a sale on or after 1/1/2020 for properties which are not formally classified and
specially valued as timberland or agricultural land is:

State portion: 1.10% on any portion of the sales price of $500,000 or less;
1.28% on any portion of the sales price above $500,000, up to $1,500,000;
2.75% on any portion of the sales price above $1,500,000, up to $3,000,000;
3.00% on any portion of the sales price above $3,000,000;

Local portion: 2.00% on the entire sales price

An additional $5.00 State Technology Fee must be included in all excise tax payments.

If the transaction is exempt, an additional $5.00 Affidavit Processing Fee is required.

Any conveyance document must be accompanied by the official Washington State Excise Tax Affidavit. The
applicable excise tax must be paid and the affidavit approved at the time of the recording of the conveyance
documents. (NOTE: Real Estate Excise Tax Affidavits must be printed as legal size forms).
SCHEDULE B, PART II  
EXCEPTIONS  
(continued)

9. General and special taxes and charges, payable February 15; delinquent if first half unpaid on May 1 or if second half unpaid on November 1 of the tax year (amounts do not include interest and penalties):

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>General and Special Taxes</td>
<td>Billed: $417.74, Full Year</td>
</tr>
<tr>
<td></td>
<td>Paid: $0.00</td>
</tr>
<tr>
<td></td>
<td>Unpaid: $417.74</td>
</tr>
</tbody>
</table>

Affects:

Parcel A

Prior to close of escrow, please contact the Tax Collector's Office to confirm all amounts owing, including current fiscal year taxes, supplemental taxes, escaped assessments and any delinquencies.

SCHEDULE B, PART II  
EXCEPTIONS  
(continued)

10. General and special taxes and charges, payable February 15; delinquent if first half unpaid on May 1 or if second half unpaid on November 1 of the tax year (amounts do not include interest and penalties):

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>General and Special Taxes</td>
<td>Billed: $11,323.77, Full Year</td>
</tr>
<tr>
<td></td>
<td>Paid: $0.00</td>
</tr>
<tr>
<td></td>
<td>Unpaid: $11,323.77</td>
</tr>
</tbody>
</table>

Affects:

Parcel B

Prior to close of escrow, please contact the Tax Collector's Office to confirm all amounts owing, including current fiscal year taxes, supplemental taxes, escaped assessments and any delinquencies.
11. A mortgage to secure an indebtedness as shown below

- **Amount:** $50,000.00
- **Dated:** December 10, 2006
- **Mortgagor:** Lewis Carroll and Alice Carroll
- **Mortgagee:** White Rabbit Bank
- **Recording Date:** December 11, 2006
- **Recording No.:** 123456
- **Affects:** Parcel A and Parcel B

**END OF SCHEDULE B, PART II**
COMMITMENT CONDITIONS

1. DEFINITIONS
   (a) "Knowledge" or "Known": Actual or imputed knowledge, but not constructive notice imparted by the Public Records.
   (b) "Land": The land described in Schedule A and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is to be insured by the Policy.
   (c) "Mortgage": A mortgage, deed of trust, or other security instrument, including one evidenced by electronic means authorized by law.
   (d) "Policy": Each contract of title insurance, in a form adopted by the American Land Title Association, issued or to be issued by the Company pursuant to this Commitment.
   (e) "Proposed Insured": Each person identified in Schedule A as the Proposed Insured of each Policy to be issued pursuant to this Commitment.
   (f) "Proposed Policy Amount": Each dollar amount specified in Schedule A as the Proposed Policy Amount of each Policy to be issued pursuant to this Commitment.
   (g) "Public Records": Records established under state statutes at the Commitment Date for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.
   (h) "Title": The estate or interest described in Schedule A.

2. If all of the Schedule B, Part I-Requirements have not been met within the time period specified in the Commitment to Issue Policy, this Commitment terminates and the Company's liability and obligation end.

3. The Company's liability and obligation is limited by and this Commitment is not valid without:
   (a) the Notice;
   (b) the Commitment to Issue Policy;
   (c) the Commitment Conditions;
   (d) Schedule A;
   (e) Schedule B, Part I-Requirements;
   (f) Schedule B, Part II-Exceptions; and
   (g) a counter-signature by the Company or its issuing agent that may be in electronic form.

4. COMPANY’S RIGHT TO AMEND
   The Company may amend this Commitment at any time. If the Company amends this Commitment to add a defect, lien, encumbrance, adverse claim, or other matter recorded in the Public Records prior to the Commitment Date, any liability of the Company is limited by Commitment Condition 5. The Company shall not be liable for any other amendment to this Commitment.

5. LIMITATIONS OF LIABILITY
   (a) The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:
      (i) comply with the Schedule B, Part I-Requirements;
      (ii) eliminate, with the Company's written consent, any Schedule B, Part II-Exceptions; or
      (iii) acquire the Title or create the Mortgage covered by this Commitment.
   (b) The Company shall not be liable under Commitment Condition 5(a) if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.
   (c) The Company will only have liability under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.
   (d) The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a)(i) through 5(a)(iii) or the Proposed Policy Amount.
   (e) The Company shall not be liable for the content of the Transaction Identification Data, if any.
   (f) In no event shall the Company be obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I-Requirements have been met to the satisfaction of the Company.
   (g) In any event, the Company's liability is limited by the terms and provisions of the Policy.
6. LIABILITY OF THE COMPANY MUST BE BASED ON THIS COMMITMENT
   (a) Only a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment.
   (b) Any claim must be based in contract and must be restricted solely to the terms and provisions of this Commitment.
   (c) Until the Policy is issued, this Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of this Commitment.
   (d) The deletion or modification of any Schedule B, Part II-Exception does not constitute an agreement or obligation to provide coverage beyond the terms and provisions of this Commitment or the Policy.
   (e) Any amendment or endorsement to this Commitment must be in writing and authenticated by a person authorized by the Company.
   (f) When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.

7. IF THIS COMMITMENT HAS BEEN ISSUED BY AN ISSUING AGENT
   The issuing agent is the Company's agent only for the limited purpose of issuing title insurance commitments and policies. The issuing agent is not the Company's agent for the purpose of providing closing or settlement services.

8. PRO-FORMA POLICY
   The Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure.

END OF CONDITIONS
Effective January 1, 1997, document format and content requirements have been imposed by Washington Law. Failure to comply with the following requirements may result in rejection of the document by the county recorder or imposition of a $50.00 surcharge.

**First page or cover sheet:**
3" top margin containing nothing except the return address.
1" side and bottom margins containing no markings or seals.

**Title(s) of documents.**
Recording no. of any assigned, released or referenced document(s).

**Grantors names (and page no. where additional names can be found).**

**Grantees names (and page no. where additional names can be found).**

**Abbreviated legal description (Lot, Block, Plat Name or Section, Township, Range and Quarter, Quarter Section for unplatted). Said abbreviated legal description is not a substitute for a complete legal description which must also appear in the body of the document.**

**Assessor’s tax parcel number(s).**
Return address (in top 3" margin).

**A cover sheet can be attached containing the above format and data if the first page does not contain all required data.**

**Additional Pages:**
1" top, side and bottom margins containing no markings or seals.

**All Pages:**
No stapled or taped attachments. Each attachment must be a separate page. All notary and other pressure seals must be smudged for visibility. Font size of 8 points or larger.
WIRE FRAUD ALERT

This Notice is not intended to provide legal or professional advice. If you have any questions, please consult with a lawyer.

All parties to a real estate transaction are targets for wire fraud and many have lost hundreds of thousands of dollars because they simply relied on the wire instructions received via email, without further verification. **If funds are to be wired in conjunction with this real estate transaction, we strongly recommend verbal verification of wire instructions through a known, trusted phone number prior to sending funds.**

In addition, the following non-exclusive self-protection strategies are recommended to minimize exposure to possible wire fraud.

- **NEVER RELY** on emails purporting to change wire instructions. Parties to a transaction rarely change wire instructions in the course of a transaction.

- **ALWAYS VERIFY** wire instructions, specifically the ABA routing number and account number, by calling the party who sent the instructions to you. DO NOT use the phone number provided in the email containing the instructions, use phone numbers you have called before or can otherwise verify. **Obtain the number of relevant parties to the transaction as soon as an escrow account is opened.** DO NOT send an email to verify as the email address may be incorrect or the email may be intercepted by the fraudster.

- **USE COMPLEX EMAIL PASSWORDS** that employ a combination of mixed case, numbers, and symbols. Make your passwords greater than eight (8) characters. Also, change your password often and do NOT reuse the same password for other online accounts.

- **USE MULTI-FACTOR AUTHENTICATION** for email accounts. Your email provider or IT staff may have specific instructions on how to implement this feature.

For more information on wire-fraud scams or to report an incident, please refer to the following links:

- **Federal Bureau of Investigation:**
  - [http://www.fbi.gov](http://www.fbi.gov)

- **Internet Crime Complaint Center:**
FIDELITY NATIONAL FINANCIAL
PRIVACY NOTICE

Effective January 1, 2021

Fidelity National Financial, Inc. and its majority-owned subsidiary companies (collectively, "FNF," "our," or "we") respect and are committed to protecting your privacy. This Privacy Notice explains how we collect, use, and protect personal information, when and to whom we disclose such information, and the choices you have about the use and disclosure of that information.

A limited number of FNF subsidiaries have their own privacy notices. If a subsidiary has its own privacy notice, the privacy notice will be available on the subsidiary's website and this Privacy Notice does not apply.

Collection of Personal Information
FNF may collect the following categories of Personal Information:
• contact information (e.g., name, address, phone number, email address);
• demographic information (e.g., date of birth, gender, marital status);
• identity information (e.g., Social Security Number, driver's license, passport, or other government ID number);
• financial account information (e.g, loan or bank account information); and
• other personal information necessary to provide products or services to you.

We may collect Personal Information about you from:
• information we receive from you or your agent;
• information about your transactions with FNF, our affiliates, or others; and
• information we receive from consumer reporting agencies and/or governmental entities, either directly from these entities or through others.

Collection of Browsing Information
FNF automatically collects the following types of Browsing Information when you access an FNF website, online service, or application (each an "FNF Website") from your Internet browser, computer, and/or device:
• Internet Protocol (IP) address and operating system;
• browser version, language, and type;
• domain name system requests; and
• browsing history on the FNF Website, such as date and time of your visit to the FNF Website and visits to the pages within the FNF Website.

Like most websites, our servers automatically log each visitor to the FNF Website and may collect the Browsing Information described above. We use Browsing Information for system administration, troubleshooting, fraud investigation, and to improve our websites. Browsing Information generally does not reveal anything personal about you, though if you have created a user account for an FNF Website and are logged into that account, the FNF Website may be able to link certain browsing activity to your user account.

Other Online Specifics
Cookies. When you visit an FNF Website, a "cookie" may be sent to your computer. A cookie is a small piece of data that is sent to your Internet browser from a web server and stored on your computer's hard drive. Information gathered using cookies helps us improve your user experience. For example, a cookie can help the website load properly or can customize the display page based on your browser type and user preferences. You can choose whether or not to accept cookies by changing your Internet browser settings. Be aware that doing so may impair or limit some functionality of the FNF Website.

Web Beacons. We use web beacons to determine when and how many times a page has been viewed. This information is used to improve our websites.

Do Not Track. Currently our FNF Websites do not respond to "Do Not Track" features enabled through your browser.
Links to Other Sites. FNF Websites may contain links to unaffiliated third-party websites. FNF is not responsible for the privacy practices or content of those websites. We recommend that you read the privacy policy of every website you visit.

Use of Personal Information
FNF uses Personal Information for three main purposes:
• To provide products and services to you or in connection with a transaction involving you.
• To improve our products and services.
• To communicate with you about our, our affiliates’, and others' products and services, jointly or independently.

When Information Is Disclosed
We may disclose your Personal Information and Browsing Information in the following circumstances:
• to enable us to detect or prevent criminal activity, fraud, material misrepresentation, or nondisclosure;
• to nonaffiliated service providers who provide or perform services or functions on our behalf and who agree to use the information only to provide such services or functions;
• to nonaffiliated third party service providers with whom we perform joint marketing, pursuant to an agreement with them to jointly market financial products or services to you;
• to law enforcement or authorities in connection with an investigation, or in response to a subpoena or court order; or
• in the good-faith belief that such disclosure is necessary to comply with legal process or applicable laws, or to protect the rights, property, or safety of FNF, its customers, or the public.

The law does not require your prior authorization and does not allow you to restrict the disclosures described above. Additionally, we may disclose your information to third parties for whom you have given us authorization or consent to make such disclosure. We do not otherwise share your Personal Information or Browsing Information with nonaffiliated third parties, except as required or permitted by law. We may share your Personal Information with affiliates (other companies owned by FNF) to directly market to you. Please see "Choices with Your Information" to learn how to restrict that sharing.

We reserve the right to transfer your Personal Information, Browsing Information, and any other information, in connection with the sale or other disposition of all or part of the FNF business and/or assets, or in the event of bankruptcy, reorganization, insolvency, receivership, or an assignment for the benefit of creditors. By submitting Personal Information and/or Browsing Information to FNF, you expressly agree and consent to the use and/or transfer of the foregoing information in connection with any of the above described proceedings.

Security of Your Information
We maintain physical, electronic, and procedural safeguards to protect your Personal Information.

Choices With Your Information
If you do not want FNF to share your information among our affiliates to directly market to you, you may send an "opt out" request as directed at the end of this Privacy Notice. We do not share your Personal Information with nonaffiliates for their use to direct market to you without your consent.

Whether you submit Personal Information or Browsing Information to FNF is entirely up to you. If you decide not to submit Personal Information or Browsing Information, FNF may not be able to provide certain services or products to you.

For California Residents: We will not share your Personal Information or Browsing Information with nonaffiliated third parties, except as permitted by California law. For additional information about your California privacy rights, please visit the “California Privacy" link on our website (https://fnf.com/pages/californiaprivacy.aspx) or call (888) 413-1748.
For Nevada Residents: You may be placed on our internal Do Not Call List by calling (888) 934-3354 or by contacting us via the information set forth at the end of this Privacy Notice. Nevada law requires that we also provide you with the following contact information: Bureau of Consumer Protection, Office of the Nevada Attorney General, 555 E. Washington St., Suite 3900, Las Vegas, NV 89101; Phone number: (702) 486-3132; email: BCPINFO@ag.state.nv.us.

For Oregon Residents: We will not share your Personal Information or Browsing Information with nonaffiliated third parties for marketing purposes, except after you have been informed by us of such sharing and had an opportunity to indicate that you do not want a disclosure made for marketing purposes.

For Vermont Residents: We will not disclose information about your creditworthiness to our affiliates and will not disclose your personal information, financial information, credit report, or health information to nonaffiliated third parties to market to you, other than as permitted by Vermont law, unless you authorize us to make those disclosures.

Information From Children
The FNF Websites are not intended or designed to attract persons under the age of eighteen (18). We do not collect Personal Information from any person that we know to be under the age of thirteen (13) without permission from a parent or guardian.

International Users
FNF's headquarters is located within the United States. If you reside outside the United States and choose to provide Personal Information or Browsing Information to us, please note that we may transfer that information outside of your country of residence. By providing FNF with your Personal Information and/or Browsing Information, you consent to our collection, transfer, and use of such information in accordance with this Privacy Notice.

FNF Website Services for Mortgage Loans
Certain FNF companies provide services to mortgage loan servicers, including hosting websites that collect customer information on behalf of mortgage loan servicers (the "Service Websites"). The Service Websites may contain links to both this Privacy Notice and the mortgage loan servicer or lender's privacy notice. The sections of this Privacy Notice titled When Information is Disclosed, Choices with Your Information, and Accessing and Correcting Information do not apply to the Service Websites. The mortgage loan servicer or lender's privacy notice governs use, disclosure, and access to your Personal Information. FNF does not share Personal Information collected through the Service Websites, except as required or authorized by contract with the mortgage loan servicer or lender, or as required by law or in the good-faith belief that such disclosure is necessary: to comply with a legal process or applicable law, to enforce this Privacy Notice, or to protect the rights, property, or safety of FNF or the public.

Your Consent To This Privacy Notice; Notice Changes; Use of Comments or Feedback
By submitting Personal Information and/or Browsing Information to FNF, you consent to the collection and use of the information in accordance with this Privacy Notice. We may change this Privacy Notice at any time. The Privacy Notice's effective date will show the last date changes were made. If you provide information to us following any change of the Privacy Notice, that signifies your assent to and acceptance of the changes to the Privacy Notice.

Accessing and Correcting Information; Contact Us
If you have questions, would like to correct your Personal Information, or want to opt-out of information sharing for affiliate marketing, visit FNF's Opt Out Page or contact us by phone at (888) 934-3354 or by mail to:

Fidelity National Financial, Inc.
601 Riverside Avenue,
Jacksonville, Florida 32204
Attn: Chief Privacy Officer
OWNER'S POLICY OF TITLE INSURANCE
ISSUED BY

stewart
Title Guaranty Company

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, STEWART TITLE GUARANTY COMPANY, a Texas corporation, (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured be reason of:

1. Title being voided other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to Insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney
      (vi) a document not properly filed, recorded, or Indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding,
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid,
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any Improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection
   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

Counterpart:

Authorized Counterpart:

Lake County Abstract & Title Co.

Company Name: Polson, MT

City, State

Policy: O-9301-000531707

Senior Chairman of the Board

Chairman of the Board

President

ALTA Owners Policy (6-17-00)
Agency ID: 260023
File Number: 2010087
SCHEDULE A

Name and Address of Title Insurance Company: Stewart Title Guaranty Company
P.O. Box 2029
Houston, TX 77252

File Number: [redacted]
Address Reference: [redacted]

Policy Number: O-9301-000 [redacted]

Amount of Insurance: $ [redacted]
Date of Policy: December 3, 2010 at 03:01 PM
Premium: $ [redacted]

1. Name of Insured:
   THE MONTANA DEPARTMENT OF FISH, WILDLIFE, AND PARKS, AND THE UNITED STATES OF AMERICA.

2. The estate or interest in the Land that is Insured by this policy is:
   A CONSERVATION EASEMENT AS ESTABLISHED BY INSTRUMENT RECORDED UNDER MICROFILE NO. [redacted] RECORDS OF LAKE COUNTY, MONTANA

3. Title is vested in:

4. The Land referred to in this policy is described as follows:
   See Exhibit "A" attached hereto and made a part hereof as if fully set forth at this place.
SCHEDULE B

EXCEPTIONS

THIS POLICY DOES NOT INSURE AGAINST LOSS OR DAMAGE (AND THE COMPANY WILL NOT PAY COSTS, ATTORNEYS' FEES, OR EXPENSES) THAT ARISE BY REASON OF:

1. Intentionally Deleted.

2. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records. Proceedings by a public agency, which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by Public Record. No liability is assumed for errors, omissions or changes of assessed valuations or amount of taxes assessed by any state, county, city or federal taxing or assessing authority.

3. Any facts, rights, interests, or claims which are not shown by the Public Records but which could be ascertained by an inspection of the Land or by making inquiry of persons in possession thereof.

4. Easements, liens or encumbrances, or claims thereof, which are not shown by the Public Records.

5. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land and not shown by the Public Records.

6. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water; ditch rights (d) any right, title, or interest in any sand, gravel and/or minerals including access to and from to extract minerals, mineral rights, or related matters, including but not limited to oil, gas, coal and other hydrocarbons, whether or not the matters excepted under (a), (b), (c) or (d) are shown by the public records.

NOTE: Various instruments appear of record affecting the interests of the parties to mineral rights, but neither this commitment nor the forthcoming policy covers an examination of or insurance as to the effect thereof, or the present ownership or condition of said minerals:
(a) Reservation of oil, gas, hydrocarbons and minerals as contained in Deed, executed by PCTC, Inc., a Delaware corporation, to Plum Creek Timber Company, L.P., a Delaware limited partnership; recorded July 6, 1989 under Microfile No. 2355, records of Lake County, Montana.


(c) Conveyance of Oil and Gas Reserved under Deed to Plum Creek Timber Company, L.P., executed by PCTC, Inc., a Delaware corporation, to Meridian Oil Inc, by instrument dated June 21, 1989; recorded July 6, 1989 under Microfile No. 2355, records of Lake County, Montana.

(d) Agreement between PCTC, Inc., Plum Creek Timber Company, L.P., Meridian Mineral Co., and Meridian Oil, Inc., recorded under Microfile No. 2355, records of Lake County, Montana.

(e) Correction Deed executed by PCTC, Inc., a Delaware corporation to Plum Creek Timber Company, L.P., a Delaware limited partnership; recorded January 15, 1993 under Microfile No. 2355, records of Lake County, Montana, (corrects Deed recorded under Microfile No. 2355, records of Lake County, Montana)

(f) Quit Claim Deed dated December 21, 1992, executed by Meridian Mineral Company to Plum Creek Timber Company, L.P., a Delaware limited partnership, recorded January 15, 1993 under Microfile No. 2355, records of Lake County, Montana.

7. Any lien or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the Public Records.

8. Any service, installation or connection charge for any and all utilities, including, but not limited to sewer, gas, water or electricity.

9. County road rights-of-way, not recorded and indexed as a conveyance of record in the office of the Clerk and Recorder pursuant to Title 70, Chapter 21, M.C.A., including, but not limited to any right of the Public and the County of Lake to use and occupy those certain roads and trails.
10. Certain rights as reserved and modified by the following:

(a) Reservation of oil, gas, hydrocarbons and minerals as contained in deed, executed by PCTC, Inc., a Delaware corporation, to Plum Creek Timber Company, L.P., a Delaware limited partnership, recorded July 6, 1989 under Microfile No. [redacted], records of Lake County, Montana;

(b) Conveyance of Oil and Gas reserved under deed to Plum Creek Timber Company, L.P., executed by PCTC, Inc., a Delaware corporation, to Meridian Oil Inc., by instrument dated June 21, 1989, recorded July 6, 1989 under Microfile No. [redacted], records of Lake County, Montana;

(c) Agreement between PCTC, Inc., Plum Creek Timber Company, L.P., Meridian Mineral Co., and Meridian Oil, Inc., recorded under Microfile No. [redacted], records of Lake County, Montana;

(d) Correction Deed executed by PCTC, Inc., a Delaware corporation, to Plum Creek Timber Company, L.P., a Delaware limited liability partnership, recorded January 15, 1993 under Microfile No. [redacted], records of Lake County, Montana (corrects deed recorded under Microfile No. [redacted], records of Lake County, Montana.

Affects: Parcels 644, 661-666

11.-39. Intentionally Deleted.

40. Perpetual, non-exclusive easement for a road, purposes and rights incidental thereto, from Burlington Northern Railroad Company to State of Montana, by instrument dated October 14, 1981; recorded November 18, 1981 under Microfile No. [redacted], records of Lake County, Montana and Amended and Restated Easement dated January 24, 2007, executed by Plum Creek Timberlands, L P. to the State of Montana Department of Natural Resources and Conservation; recorded August 9, 2007 under Microfile No. [redacted], records of said County.

Affects: Parcel 644: B1/2NB1/4, NW1/4NE1/4

41. Intentionally Deleted.

42. Intentionally Deleted.

43. Intentionally Deleted.

44. General County taxes for the year 2010, which are now a lien but not yet computed or payable.
45. An easement and right of way for ingress, egress and utilities from Plum Creek Timberlands, L.P., a Delaware limited partnership contained in deed Dated March 3, 2010, recorded March 10, 2010, under Microfile No. records of Lake County, Montana. Said deed is a correction to Grant deed recorded February 17, 2009 under Microfile No. records of Lake County, Montana.
   Affects: Parcel 662: SW1/4, E1/2NW1/4

46. Intentionally Deleted.

47. Easement granted by Plum Creek Timberlands, L.P. to the State of Montana Department of Natural Resources and Conservation dated October 12, 2010, recorded November 17, 2010 under Microfile No. records of Lake County, Montana.
   Affects: Parcel 644: Gov’t Lots 1, 2, SE1/4NE1/4

48. Easement for the construction, reconstruction, use and maintenance of a road, granted by Plum Creek Timberlands, L.P. to the State of Montana Department of Natural Resources and Conservation dated March 12, 1997; recorded April 10, 1997 under Microfile No. records of said County; and Amended and Restated Easement recorded December 20, 2004 under Microfile No. and Amendment No. 1 to Amended and Restated Easement dated May 24, 2007, recorded June 22, 2007 under Microfile No. records of Lake County, Montana.
   Affects: Parcel 661: NW1/4, SW1/4, NW1/4SE1/4
   Parcel 662: NW1/4, W1/2SW1/4, NE1/4SW1/4
   Parcel 663: E1/2SE1/4, NW1/4SE1/4, N1/2SW1/4
   Parcel 664: E1/2NE1/4, NW1/4NE1/4, E1/2NW1/4, SW1/4NW1/4, NE1/4SE1/4, E1/2SW1/4, NW1/4SW1/4
   Parcel 666: E1/2NE1/4

END OF EXCEPTIONS
COVERED RISKS (Continued)

9. Title being vested other than as stated in Schedule A or being defective
   (a) as a result of the existence in whole or in part, or from a court order
      providing an alternative remedy, of a transfer of all or any part of the
      title to or any interest in the Land occurring prior to the transaction
      vesting Title as shown in Schedule A because that prior transfer
      constituted a fraudulent or preferential transfer under federal
      bankruptcy, state insolvency, or similar creditors’ rights laws; or
   (b) because the instrument of transfer vesting Title as shown
      in Schedule A constitutes a preferential transfer under federal
      bankruptcy, state insolvency, or similar creditors’ rights laws
      by reason of the failure of its recording in the Public Records

   (c) to be timely, or
   (d) to impair notice of its existence to a purchaser for value or to a
      judgment or lien creditor.

10. Any defect in or lien on the Title or matter included in
    Covered Risks 1 through 8 that has been created or attached or has
    been filed or recorded in the Public Records subsequent to Date of
    Policy and prior to the recording of the deed or other instrument of transfer in
    the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys’ fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys’ fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including
      those relating to building and zoning) restricting, regulating, prohibiting, or
      relating to:
      (i) the occupancy, use, or enjoyment of the Land;
      (ii) the character, dimensions, or location of any improvement
          erected on the Land;
      (iii) the subjection of land; or
      (iv) environmental protection;

2. Any governmental police power. This Exclusion 1(b) does not modify
   or limit the coverage provided under Covered Risk 8.

3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;

4. the effect of any violation of these laws, ordinances, or governmental
   regulations. This Exclusion 1(a) does not modify or limit the coverage provided
   under Covered Risk 6.

5. 2. Rights of eminent domain. This Exclusion does not modify or limit the

6. 3. Rights of eminent domain. This Exclusion does not modify or limit the

7. Any lien or mortgage on the Title or matter included in
   Covered Risks 1 through 8.

8. Any lien on the Title for real estate taxes or assessments imposed by

9. The effect of the operation of federal bankruptcy, state
   insolvency, or similar creditors’ rights laws, that the transaction vesting the
   Title as shown in Schedule A, is
   (a) a fraudulent conveyance or fraudulent transfer;
   (b) not known to the Company, not recorded in the Public Records at
       Date of Policy, but known to the Insured Claimant; or
   (c) resulting in no loss or damage to the Insured Claimant;

10. Any claim, by reason of the operation of federal bankruptcy, state
     insolvency, or similar creditors’ rights laws, that the transaction vesting the
     Title as shown in Schedule A, is
     (a) a fraudulent conveyance or fraudulent transfer;
     (b) not known to the Company, not recorded in the Public Records at
         Date of Policy, but known to the Insured Claimant;
     (c) resulting in no loss or damage to the Insured Claimant;

CONDITIONS

1. DEFINITION OF TERMS

   The following terms when used in this policy mean:
   (a) "Amount of Insurance": The amount stated in Schedule A, as
       may be increased or decreased by endorsement to this policy,
       increased by Section B(b), or decreased by Sections 10 and 11
       of these Conditions.
   (b) "Date of Policy": The date designated as Date of Policy in
       Schedule A.
   (c) "Entity": A corporation, partnership, trust, limited liability
       company, or other similar legal entity.
   (d) "Insured": The Insured named in Schedule A.
      (f) The term "Insured" also includes:
      (A) successors to the Title of the Insured by operation of
          law as distinguished from purchase, including heirs,
          devisees, survivors, personal representatives, or next
          of kin;
      (B) successors to an Insured by dissolution, merger,
          consolidation, distribution, or reorganization;
      (C) successors to an Insured by its conversion to another
          kind of Entity;
      (D) a grantee of an insured under a deed delivered
          without payment of actual valuable consideration
          conveying the Title
          (1) if the stock, shares, memberships, or other equity
              interests of the grantee are wholly-owned by the
              named Insured,
          (2) if the grantee wholly owns the named Insured,
          (3) if the grantee is wholly-owned by an affiliated
              Entity of the named Insured, provided the affiliated
              Entity and the named Insured are both wholly-owned
              by the same person or Entity, or
          (4) if the grantee is a trustee or beneficiary of a trust
              created by a written instrument established by the

2. CONTINUATION OF INSURANCE

   The coverage of this policy shall continue in force as of Date of Policy
   in favor of an Insured, but only so long as the Insured retains an
   estate or interest in the Land, or holds an obligation secured by a
   purchase money Mortgage given by a purchaser from the Insured, or
   only so long as the Insured shall have ability by reason of warranties
   in any transfer or conveyance of the Title. This policy shall not

   (b) not Known to the Company, not recorded in the Public Records at
       Date of Policy, but known to the Insured Claimant; or
   (c) resulting in no loss or damage to the Insured Claimant;

   (g) "Land": The land described in Schedule A, and all
      improvements to that land.

   (h) "Mortgage": Mortgage, deed of trust, trust deed, or other
       security instrument, including one evidenced by electronic
       means authorized by law.

   (i) "Public Records": Records established under state statutes at
       Date of Policy for the purpose of impounding constructive notice
       of matters relating to real property to purchasers for value and
       without Knowledge. With respect to Covered Risk 8(d), "Public
       Records" shall also include environmental protection liens filed
       in the records of the clerk of the United States District Court for
       the district where the Land is located.

   (j) "Title": The estate or interest described in Schedule A.

   (k) "Unmarketable Title": Title affected by an elided or apparent
       matter that would permit a prospective purchaser or lessee of
       the Title or lender on the Title to be released from the obligation
       to purchase, lease, or lend if there is a contractual condition

   (l) continue in force in favor of any purchaser from the Insured of either
       (i) an estate or interest in the Land, or (ii) an obligation secured by a
       purchase money Mortgage given to the Insured.
3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT
The Insurer shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(e) of these Conditions, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejeeded as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company’s liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS
In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS
(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as Insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE
(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall cooperate with the Company to the right to prosecute or provide defense in the action or proceeding, including the right toafs, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Insured’s expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If

(b) the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company’s obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(c) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, diaries, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of those records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others, unless in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY
In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance. To pay or tender payment of the Amount of Insurance under this policy, together with any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay. Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) To pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay;

(ii) To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys’ fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (b)(ii), the Company’s obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY
This policy is a contract of insurance against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as Insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as Insured,

(i) the Amount of Insurance shall be increased by 10%, and the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was
9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as Insured, in a reasonably diligent manner by any method, including litigation or the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as Insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guarantees, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joint or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (I) modify any of the terms and provisions of the policy, (II) modify any prior endorsement, (III) extend the Date of Policy, or (IV) increase the Amount of Insurance.

16. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has determined the premium charged thereon in reliance upon the law affecting interests in real property and applicable to the Interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located. Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply the conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at Claims Department P.O. Box 2026, Houston, TX 77252-2026.
MEMORANDUM

FROM: Thomas J. Bourguignon, Maclay Law Firm

TO: [Land Trust]

DATE: May 23, 2023

RE: _______ Ranch – Review of Preliminary Title Commitment

You asked me to represent ________ (“Land Trust”) in its acceptance of a donation of a Conservation Easement interest (“CE”) on property in ______ County, Montana, commonly known as the _________ Ranch (the “Property”), which is owned by ________ (“Landowner”). The CE will be donated by Landowner.

On June 29, 2022, I received the preliminary title commitment, File No. _______, issued by [Title Company], which has an effective date of April 5, 2022. You have told me that Land Trust does not plan to purchase a title insurance policy for this transaction, and that Land Trust is being charged an upfront research fee by First American Title for its preparation of the Commitment. You indicated that the research fee will also include a “date down” update by the title officer, in which an updated Commitment will be issued at or shortly before closing on the CE to confirm that no new exceptions have arisen since the effective date of the Commitment.

On April 18, 2023, I received the “date down” title commitment from [Title Company], File No. _______, Rev. No. 2, effective April 18, 2023 (the “Commitment”).

I have completed my review of the Commitment, and this Memorandum summarizes my notes and comments. Because Land Trust does not intend to obtain a title insurance policy, there is little need to ask the title officer to correct minor errors in wording or typographical errors. The process of reviewing the Commitment for this transaction is focused instead on ensuring there are no substantial defects in title that need to be cured before closing on the CE.

Executive Summary. The Commitment does not reveal any fatal defects or “dealbreakers” in Land Trust’s acceptance of a CE on the Property. There are no encumbrances that must be cured or removed prior to the closing of the CE (for instance, there are no mortgages or rights of first refusal affecting the property, and no liens or judgments docketed against the Property).

This memorandum will proceed through the different sections of the Commitment: Schedule A; the legal description; Schedule B, Part I; and Schedule B, Part II.

Schedule A

Paragraph 3: The interest being acquired is in fact a CE interest, not fee title. Since Land Trust doesn’t intend to purchase a title policy, there is not a reason to correct this.
Paragraph 4: According to the Montana Secretary of State, the formal name of the landowner is _______. I have reviewed corporate authorization documents for Landowner, and conclude that their signature is properly authorized if in the following form: [signature block]

Legal Description

Following is the legal description of the Property, taken from the Commitment.

Note that I include my comments in bold font immediately below parcels where appropriate. Also note that, after each parcel, I include a “parcel number” in parentheses. These do not appear on the title commitment; I add them here for reference, so that in the list of exceptions below, I can refer to the parcel numbers for shorthand. Some parcel numbers are excluded because the landowner excluded some parts of the larger property from the CE.

Parcel A:

That part of Section ___, Township 4 South, Range 8 East, of the Principal Montana Meridian, _____ County, Montana, described as Tract B-1 of Certificate of Survey No. _____, on file in the office of the Clerk and Recorder of said county. (Parcel 13)

Tract 2 of Certificate of Survey No. _____, being a relocation of common boundaries between Tract B-2 of Certificate of Survey No. _____ and the remainder of Section ___, located in the N 1/2 of Section ___, Township 4 South, Range 8 East, according to the official plat thereof on file and of record in the office of the Clerk and Recorder, _____ County, Montana. (Parcel 14 and 15)

That part of Government Lot 3 of Section ___, Township 4 South, Range 9 East, of the Principal Montana Meridian, _____ County, Montana, described as Tract 10 of Certificate of Survey No. _____, on file in the office of the Clerk and Recorder of said county. (Parcel 16)

TJB: On Cadastral, this tract appears to be aggregated with lands described in the following paragraph.
Also note that within Section ___, the parcel in the NW part of section is called Tract 1 of COS _____, which is same name as the Tract 1 of COS ____ in Section ___. The title officer reviewed this question, and concluded that the legal description correctly describes the lands owned by Landowner.

That part of the N½ of Section ___, Township 4 South, Range 9 East, of the Principal Montana Meridian, _____ County, Montana, described as Tracts 5, 6, 7 and 8 of Certificate of Survey No. _____, on file in the office of the Clerk and Recorder of said county. (Parcel 21)

Township 4 South, Range 9 East, of the Principal Montana Meridian, _____ County, Montana Section __: Government Lots 4, 5, 6, 7 (Parcel 22)
TJB: Seems to overlap with the legal description 3 paragraphs down (Section __, W1/2, W2E2). The title officer reviewed this question, and concluded that the legal description correctly describes the lands owned by Landowner.

That part of Section __, Township 4 South, Range 9 East, of the Principal Montana Meridian, __ County, Montana, described as Tracts 2 and 3 of Certificate of Survey No. ____, on file in the office of the Clerk and Recorder of said county. (Parcel 23)

That part of Section __, Township 4 South, Range 9 East, of the Principal Montana Meridian, __ County, Montana, described as Tract 4 of Certificate of Survey No. ____, on file in the office of the Clerk and Recorder of said county. (Parcel 24)

Township 4 South, Range 9 East, of the Principal Montana Meridian, __ County, Montana Section __: W½; W½E½; Excepting Therefrom Certificate of Survey No. ____; and Further Excepting Therefrom Government Lot 4. (Parcel 25)

TJB: See note for Government Lots 4-7 above. I suggested to the title agent that the description should exclude gov’t lots 4, 5, 6, and 7, not just Lot 4. The title officer reviewed this question, and concluded that the legal description correctly describes the lands owned by Landowner.

Parcel B:

That part of the S½ of Section __ and the SW¼ of Section __, Township 4 South, Range 8 East, of the Principal Montana Meridian, __ County, Montana, described as Tract A, of Certificate of Survey No. ____ on file in the office of the Clerk and Recorder of said County. (Parcel 39)

[End of legal description.]
Schedule B Part 1 – Requirements (for issuance of title policy)

Note: Since Land Trust doesn’t intend to obtain a title policy, these requirements are not of concern. Land Trust should independently obtain documents related to the landowner’s LLC to ensure proper authority to sign documents.

Schedule B Part II – Exceptions

Following is the list of “general exceptions” (#1-10) and “special exceptions” (#11-49), taken from the Commitment. I include notes immediately below each exception.

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the Public Records.

   **TJB:** This is a standard exception. Acceptable.

2. Any facts, rights, interests, or claims which are not shown by the Public Records but which could be ascertained by an inspection of said Land or by making inquiry of persons in possession thereof.

   **TJB:** This is a standard exception. Acceptable. Land Trust should inspect the Property and also ask landowner if landowner is aware of any such claims.

3. Easements, claims of easement or encumbrances which are not shown by the Public Records.

   **TJB:** This is a standard exception. Acceptable. Land Trust should ask landowner if landowner is aware of any such unrecorded easements.

4. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the title including discrepancies, conflicts in boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.

   **TJB:** This is a standard exception. Acceptable. Land Trust should ask landowner if landowner is aware of any such unrecorded encumbrances.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, ditch or ditch rights, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.

   **TJB:** This is a standard exception. Acceptable. Land Trust should obtain a mineral rights report if feasible in order to determine whether some or all of the mineral rights are severed from the surface estate.
6. Any liens, or rights to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the Public Records.

   TJB: This is a standard exception. Acceptable. At/before closing, Land Trust should have landowner confirm in writing that there are no such liens, or work done that might give rise to a lien.

7. Any right, title or interest in any minerals, mineral rights or related matters, including but not limited to oil, gas, coal and other hydrocarbons, sand, gravel or other common variety materials, whether or not shown by the Public Records.

   TJB: This is a standard exception. Acceptable. See #5 above—mineral rights report is recommended.

8. County road rights-of-way not recorded and indexed as a conveyance of record in the office of the Clerk and Recorder pursuant to Title 70, Chapter 21, M.C.A., including, but not limited to any right of the Public and the County of ____ to use and occupy those certain roads and trails as depicted on County Surveyor's maps on file in the office of the County Surveyor of ____ County.

   TJB: This is a standard exception. Acceptable. Happy to discuss this exception in terms of Land Trust’s general knowledge of county roads in ____ County. I haven’t obtained surveyor’s maps for ____ County in the past, and I don’t have any knowledge of county roads in ____ County.

9. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B, Part I - Requirements are met.

   TJB: This is a standard exception. Acceptable. This exception would normally be removed before issuing a title policy, since the title commitment gets “Dated down” to closing. I reviewed the “date down” commitment to conclude that no new exceptions were added.

10. 2023 taxes and special assessments are an accruing lien, amounts not yet determined or payable. The first one-half becomes delinquent after November 30th of the current year, the second one-half becomes delinquent after May 31st of the following year. General taxes as set forth below. Any amounts not paid when due will accrue penalties and interest in addition to the amount stated herein: [chart omitted]

   TJB: This is a standard exception. Acceptable.
Special Exceptions:

11. The affect of an order creating the _______ Irrigation District recorded September 29, 1920, in Book ___ of Miscellaneous, Page ___.


12. Right-of-way granted to Mountain States Telephone and Telegraph Company, recorded as in Book ___ of Miscellaneous, Page ___.

   TJB: Easement to construct, operate, and maintain telephone/telegraph lines incl. poles, wires, and fixtures. May attach to other companies’ lines. May trim trees along lines; may erect guy and brace poles. Lines to be located along route of present county road. Affects: Parcels 13, 14 (Sec 25); 30, 34B, 34C, 35B, 38A, 38B (Sec 19) Acceptable.

13. Easement for Park Branch Project No. ___ granted to State Water Conservation Board, recorded May 4, 1936 in Book ___ of Miscellaneous, Page ___.

   TJB: Easement for construction of canal for flow of water, and right to repair and maintain canal. 50’ wide. For purpose of operating an irrigation ditch or canal. Affects: Maybe Parcel 3 but the metes and bounds description seems to be on land owned by [neighbor]. Acceptable; but likely doesn’t affect the Property.

14. Easement for Park Branch Project No. ___ granted to State Water Conservation Board, recorded May 28, 1936 in Book ___ of Miscellaneous, Page ___.

   TJB: Easement for construction of canal for flow of water, and right to repair and maintain canal. 50’ wide. For purpose of operating an irrigation ditch or canal. Affects: Parcels 19 (Sec 4) and 20 (Sec 5). Acceptable.

49. All matters, covenants, conditions, restrictions, easements and any rights, interests or claims which may exist by reason thereof, disclosed by the recorded plat of Certificate of Survey No. ____, recorded March 24, 1999, as Instrument #____, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c).

   TJB: Survey shows 60’ wide county road easement on western boundary of parcel for Trail Creek Road.
Affects: Parcels 5, 6, 39
Acceptable


TJB: Easement to construct, operate, maintain, repair an underground electric distribution line, 20’ wide corridor;
Affects: Parcels 5, 39 (Sec 11)
Note: Same instrument as Exception 37.
Closing the Transaction

Posted December 9, 2020  Reviewed September 8, 2022

SOURCE
Land Trust Alliance

ABOUT THIS DOCUMENT
Closing a real estate purchase transaction should occur smoothly if the land trust completes all of its due diligence steps in a timely and thorough fashion, which will reduce the chance of unpleasant surprises.

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Closing a real estate purchase transaction should occur smoothly if a land trust completes all of its due diligence steps in a timely and thorough fashion, which will reduce the chance of unpleasant surprises.

### Addressing title matters and satisfying any requirements

The requirements listed below are a common set of tasks that must be completed prior to the title company issuing a title insurance policy. Most of these tasks are also applicable to closings where the title company provides neither title insurance nor closing services. You should ensure that your title company completes the following (if applicable) or otherwise see that these steps are taken:

<table>
<thead>
<tr>
<th>Task</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obtain properly executed and notarized deed or conservation easement</td>
</tr>
<tr>
<td>Record statement of authority or other evidence that the entity is authorized to complete the transaction (if grantor is an entity)</td>
</tr>
<tr>
<td>Execute a corrective deed to correct error in chain of title (if necessary)</td>
</tr>
<tr>
<td>Obtain a survey (if necessary)</td>
</tr>
<tr>
<td>Pay off mortgage and record release or record a mortgage subordination</td>
</tr>
<tr>
<td>Obtain and record satisfaction of other liens, such as mechanic’s or tax liens</td>
</tr>
<tr>
<td>Obtain a death certificate (to confirm the death of a joint tenant, for example)</td>
</tr>
<tr>
<td>Secure an affidavit from the grantor that they have taken no action that could result in the filing of a lien against the property</td>
</tr>
<tr>
<td>Secure confirmation of the status of property taxes for the property</td>
</tr>
</tbody>
</table>

### Additional steps
In addition to those closing steps related to title insurance above, some of the standard steps in a real estate closing include:

- Delivery of written closing or escrow instructions to the party handling the closing
- Confirming the legal description in the conveyance document (deed or conservation easement)
- Execution and notarization of the conveyance document
- Delivery of documents necessary for closing (resolution of seller, certificate of good standing of seller, subordination agreement or lien release, mechanic’s lien affidavit)
- Payment of funds to the seller
- Payment of closing fees and recording costs
- Recording documents in the public records

A real estate closing does not have to be handled by a title insurance company, but some land trusts use its services to close, even if not purchasing title insurance. A title company can provide valuable assistance in collecting and recording documents in the proper order, assuring any liens, mortgages or past-due taxes are paid at closing and collecting and disbursing funds through its escrow account. Many funders require the use of an escrow agent so that they have a neutral and trustworthy third party to whom they can wire funds for closing, and in such instances, use of a title company for closing can be a good option. Generally, title company closing fees are inexpensive (a few hundred dollars) and who pays them is negotiable, although many parties simply agree to split the fees. Title companies also assemble copies of all documents and deliver a copy of each to the parties. If closing without a title company, you should contract with an experienced real estate attorney to handle the closing to help ensure that all matters are dealt with promptly and accurately.

Once the transaction is complete, the land trust should make sure it takes the following steps, as applicable, with respect to title matters at closing:

- Secure recorded copies of the transaction documents and confirm that they were recorded properly and in the correct order, if applicable
- Review the title policy to confirm that it matches the title commitment
- Store the title policy and supplementary materials in your permanent files according to your land trust’s records policy

After the actual closing, it is also time to thank the seller and celebrate the conservation success represented by the transaction.
Transaction Costs: Who Pays for What

SEPTEMBER 27, 2022

Each of the due diligence steps will incur a cost to the land trust or the landowner. When making a donation, many landowners expect the land trust to pay all or most of the transaction expenses; therefore, land trusts should have a policy that covers who pays for what.

VIEW GUIDANCE (/resources/learn/explore/transaction-costs-who-pays-for-what#content)
Sample for Practice 3D: Conservation Transaction

This is a conservation transaction from the accredited Great Land Trust.

VIEW SAMPLE (/resources/learn/explore/sample-for-practice-3d-conservation-transaction#content)
Title Investigation

Posted September 27, 2022   ✔ Reviewed June 17, 2022

SOURCE
Land Trust Alliance

ABOUT THIS GUIDANCE
Ownership of land changes over time, and those purchasing land must have knowledge of who owned the land ("title") for a certain number of years to ensure that their purchase is valid and cannot be contested. This document provides an overview of title, various types of deeds and ownership, title insurance and its importance and legal descriptions. Included at the end are exercises to test your knowledge.

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Creating title

Ownership of land changes over time, and those purchasing land must have knowledge of who owned the land for a certain number of years in order to ensure that their purchase is valid and cannot be contested. A history of how title passed from one owner to the next owner is called a “chain.” The chain of title for every piece of land in this country begins with ownership by some country (the United States, England, France, Spain, Mexico or Russia). The first conveyance of title from a certain nation or state to another entity (including a private individual) begins a chain of title. How far back a land trust needs to look into a chain of title depends on many factors: the nature of the transaction, the likelihood of past uses affecting the conservation values of the land, state laws governing recording and re-recording (marketable title acts), title search custom and practice for your area, the degree of risk a land trust is willing assume, whether a fee or easement acquisition, and the land trust’s general knowledge of the area. In consultation with your attorney, follow general procedures, but each deal may require more investigation.

You may need to direct the title company to provide a chain of title along with the title commitment. In some areas of the country, it is common for a title company to go back a certain number of years, say 30, 40 or 50 (for example, in Michigan there is a 40-year marketable title act, so title companies tend to only go back 40 years). Also, if a land trust is completing a project cooperatively with a government agency, the agency may require a complete chain of title for its review or a 50-year chain of title. For example, the US Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule requires an environmental professional’s review of the chain of title, often as far back as 40 years.
Sample Chain of Title

Special Warranty Deed from Piper J. Jones to Cottonwood Farms, a Colorado corporation, recorded May 1, 1990 in Book 83 at Page 312

Personal Representative’s Deed from Estate of Rebecca T. Jones to Piper F. Jones, recorded April 10, 1990 in Book 83 at Page 243

Quitclaim Deed from Ronald L. Jones to Ronald L. Jones and Rebecca T. Jones as joint tenants, recorded November 16, 1930 in Book 17 at Page 19

Warranty Deed from Charles Smith to Ronald L. Jones, recorded March 3, 1920 in Book 15 at Page 2

US Patent to Charles Smith, recorded July 8, 1898 in Book 4 at Page 10

Figure 3-1: Sample Chain of Title

<table>
<thead>
<tr>
<th>BOOK/PAGE</th>
<th>GRANTOR</th>
<th>GRANTEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Book 4 at Page 10</td>
<td>US</td>
<td>Charles Smith</td>
</tr>
<tr>
<td>Book 15 at Page 2</td>
<td>Charles Smith</td>
<td>Ronald L. Jones</td>
</tr>
<tr>
<td>Book 17 at Page 19</td>
<td>Ronald L. Jones</td>
<td>Ronald L. Jones and Rebecca T. Jones</td>
</tr>
<tr>
<td>Book 83 at Page 243</td>
<td>Estate of Rebecca T. Jones</td>
<td>Piper F. Jones</td>
</tr>
<tr>
<td>Book 83 at Page 312</td>
<td>Piper F. Jones</td>
<td>Cottonwood Farms, a Colorado corporation</td>
</tr>
</tbody>
</table>

Figure 3-2: Sample Grantor/Grantee Index

Land trusts should go back as far as they deem necessary to satisfy themselves of good title. A title company may have a different rationale for how far back to research title than a land trust. Title companies are in the business of risk assessment, but land trusts are in the business of protecting land permanently. Land trusts should resist any pressure to limit the extent of a title search it deems necessary to protect land.

Figure 3-1 is a sample chain of title that was created from the chart of Grantor/Grantee Index (figure 3-2) that is similar to one found in a title company’s records. Beginning with the earliest owner, the United States, the chain shows how title passed to many individuals. Each owner is
linked to the next so that a chain is formed. An unbroken chain of title can be traced through linking conveyances from the present owner, Cottonwood Farms, back to the earliest recorded owner.

Most of us think of title as passing from one person to another by deed, but title is created in a number of different ways. In addition to deeds of conveyance, title can be created by patents, land grants, wills, inheritance, court decrees or operation of law.

**Patents**

Patents can be created from United States patents, state patents or land grants. A patent is a conveyance of ownership from a nation or state to an individual, and begins the chain of title. A land patent should not be confused with a patent on intellectual property that grants the holder exclusive rights to make, sell and use an invention for a limited period of time. Awards of new land patents are theoretically possible (if unlikely) because vacant public lands still exist that are public domain lands, never having left federal ownership and not reserved, withdrawn, dedicated or set aside for a certain purpose. These lands are located mainly in 11 western states, although scattered parcels exist in some eastern states as well. The most commonly patented lands in recent times are those patented for mineral development; however, a moratorium on the issuance of new patents for mineral development has been in place since 1994.

**Deeds**

A deed is a written instrument that, when executed and delivered, conveys title to or an interest in real estate. A deed can take several forms, depending on the extent of the grantor’s pledges to the grantee. The most common types of deeds include warranty or general warranty deed, special warranty deed, bargain sale deed, quitclaim deed, deed executed pursuant to court order, deed in trust and trustee’s deed.

*Warranty deed or general warranty deed.* A general warranty deed provides the greatest protection of any deed. It is called a warranty deed because the grantor is legally bound by certain covenants or warranties. In all but the most unusual cases, land trusts should acquire interests in land through a general warranty deed, because it provides the greatest protection in case there is a challenge to title. Essentially the grantor of a general warranty deed agrees to guarantee good title to the property against any claimants. The basic warranties are as follows:

- The grantor warrants that he or she owns the property and has the right to convey title to it.
- The grantor warrants that the property is free from liens or encumbrances, except for any specifically stated in the deed.
- The grantor guarantees that the grantee’s title will be good against third parties who might bring court actions to establish superior title to the property.
- The grantor promises to obtain and deliver any instrument needed to make the title good.
- The grantor promises to compensate the grantee for the loss sustained if the title fails at any time in the future.

*Special warranty deed.* Special warranty deeds may be appropriate in those unique circumstances when a landowner acquired title to a property that may have clouds in the title that the landowner either could not or would not take action to clear up. For example, land trusts in the Rocky Mountains will sometimes agree to accept a special warranty deed for the conveyance of mining claims, because such claims often have a chain of title that is difficult or expensive to clear. A special warranty deed essentially means the grantor guarantees title to the land during his or her ownership only. A special warranty deed contains two basic warranties:
That the grantor received title

That the property was not encumbered during the time the grantor held title, except as otherwise noted in the deed

_Bargain and sale deed._ This deed contains no express warranties against encumbrances and therefore should only be accepted by land trusts in a situation where the risks of accepting title in such manner have been thoroughly examined by both the land trust's attorney and its staff and board. A bargain and sale deed does, however, imply that the grantor holds title and possession of the property. In some areas, this deed is used in foreclosures and tax sales. Because the warranty is not specifically stated, the grantee has little legal recourse if title defects appear later. (This term is not to be confused with a bargain sale of property in which a landowner sells below fair market value and donates a portion of the value to the land trust. A bargain sale can be conveyed by any type of deed).

_Quitclaim deed._ A quitclaim deed provides the grantee with the least protection of any deed. It carries no covenants or warranties and generally conveys only whatever interest the grantor may have when the deed is delivered. If the grantor has no interest, the grantee will acquire nothing, nor will the grantee acquire any right of warranty claim against the grantor. Accepting land by quitclaim deed should rarely occur and requires additional attention and due diligence on the part of the grantee and thorough examination of the risk of accepting such a deed by the land trust's attorney, staff and board. These types of deeds are sometimes used to clear up clouds or defects in title, such as when a landowner is concerned that a neighbor may have acquired part of the landowner's property through adverse possession and the neighbor agrees to resolve the dispute by conveying a quitclaim deed to the area of land in question. By using a quitclaim deed, the neighbor conveys any interest the neighbor may have acquired by operation of law to the landowner worried about a loss of his or her property without warranting that the neighbor actually perfected title to the land.

Types of deeds do vary from state to state. For example, in Massachusetts a quitclaim deed includes warranties. Check with legal counsel for the specifics of your region.

_Deed executed pursuant to court order._ Executors' and administrators' deeds, masters' deeds, sheriffs' deeds and many other types are all deeds executed pursuant to a court order. These deeds are established by state statute and are used to convey title to property that is transferred by court order (such as through a partition suit where multiple owners of the same land sue to have the land apportioned among them) or by will.

_Deed in trust._ A deed in trust (or, more commonly, deed of trust) is the means by which a trustor (borrower) conveys real estate to a trustee for the benefit of a beneficiary (lender) as security for a loan. The real estate is held by the trustee to fulfill the purpose of the trust, but the trustor retains equitable title to and possession of the real estate. A deed of trust is similar to a mortgage, except for the presence of an independent third party that does not represent either the borrower or the lender (the trustee).

_Trustee's deed._ A deed executed by a trustee is a trustee's deed. It is used when a trustee conveys real estate held in the trust to anyone other than the trustor, such as in a land foreclosure action or sale of the land for failure to pay property taxes.

There are other (less common) types of deeds that vary from state to state.

Generally speaking, land trusts should be cautious about accepting a donation of the fee interest in land title assurance is not sufficient, and the land trust goes on to obtain title insurance. Some land trusts, however, when acquiring donated conservation easements, believe they can become sufficiently assured about the status of title and any exceptions to title by thoroughly reviewing a title report or title commitment (with the assistance of their attorney) that they can forego the additional expense of title insurance. There is a long and interesting history of how
Title assurance evolved into title insurance. Suffice to say that as the land ownership histories in our country grew more complex, the practice of assuring title eventually led to the title insurance industry.

**The importance of due diligence for gifts**

A conservation-minded landowner in Texas wanted her land to become a nature preserve after her death, but she failed to designate an organization to which the land would be conveyed by her estate. The Texas Attorney General subsequently found a land trust willing to accept the real estate as a trustee of a trust created to hold the land and to manage it as the estate required. In the flurry of activity surrounding the donation, the land trust did not perform complete due diligence on the property. Two years later, the organization received a bill for $20,000 — past due property taxes plus accumulated interest and penalties dating from before the time the land trust agreed to accept the land. The land trust did not have the financial ability to pay this large sum, so it had to seek approval from the Attorney General to modify the trust and allow the organization to sell part of the land to pay the tax bill. Fortunately, one lot in the parcel fronted a highway and had more economic value and less conservation value, and that one lot was sold, while the trust retained the more ecologically important parcel. The parcel is now tax-exempt, but the land trust paid thousands of dollars in interest because it did not do its due diligence by conducting a thorough title investigation.

**What is title insurance?**

Title insurance refers to an insurance policy that indemnifies the insured against loss resulting from defects or liens upon the title. The title commitment is converted to a title insurance policy when the entity listed as the proposed insured (the buyer or donee) closes the transaction to acquire ownership and when all conditions listed in the title commitment have been fulfilled.

**Coverage**

Exactly which defects the title company will defend depends on the type of policy. A standard coverage policy normally insures the title as it is known from the public records. In addition, the standard policy insures against such hidden defects as forged documents, conveyances by incompetent grantors, incorrect marital statements and improperly delivered deeds.

Extended coverage, as provided by an American Land Title Association (ALTA) policy, includes the protections of a standard policy plus additional protections. An extended policy would protect an owner against defects that may be discovered by inspection of the property: rights of parties in possession, examination of a survey and certain unrecorded liens.

As discussed above, title insurance does not offer guaranteed protection against all defects. A title company will not insure a bad title or offer protection against defects that clearly appear in a title search. The policy generally names certain uninsurable losses, called exclusions or exceptions. These include zoning ordinances, restrictive covenants, easements, certain water rights and current taxes and assessments.
Importance of title insurance

Unlike other insurance policies that insure against future losses, title insurance protects the insured from an event that occurred before the policy was issued. Title insurance is considered the best defense of title: the title insurance company will defend any claim based on an insurable defect and pay claims if the title proves to be defective. The title company is required to either defend the title (help to cure the title problem) or pay the claim and can decide which course of action it wishes to take.

There are multiple benefits to obtaining a title insurance policy when acquiring land. For example, if a land trust acquired property without public access (and the title report did not have an exception for a right of access), the title company would be required to correct the access problem. The company would likely reexamine the records to determine if an alternate access existed or if there was an existing easement that had not previously been discovered. If the title company could not find evidence of access, it would be obligated to pay the land trust for its financial loss in value (presumably the amount the organization would need to create access to the property), up to the face value of the policy. Therefore, it is important to secure a title policy that is equal to the value of the asset.

For land trusts, the primary motivation for obtaining title insurance may be a bit different from that of other types of owners. Land trusts make promises to landowners, supporters, members and the public that they will protect parcels of land forever. It is therefore essential that the land trust receive good title. It is good business practice to have insurance to cover the financial loss in case of a title problem, but primarily, the land trust must be confident that it owns the land (or holds the easement) and that there are no encumbrances that may damage its ownership and management.

In the case of purchases, land trusts are using donated dollars or government funds — money people have entrusted to them to protect land. As such, land trusts have a special responsibility to use this money wisely and defend their investment. Squandering these funds on property that has a defective title will not protect land and may jeopardize the land trust’s support in its community. While obtaining title insurance for all transactions is a good idea, at a minimum, land trusts should secure title insurance for all purchases of land or conservation easements. If a land trust acquires a conservation easement or fee interest in land that it proposes to later transfer or sell to another party, the land trust should secure title insurance in this instance too.

Choosing a title company

It is a good idea for land trusts to develop a good relationship with local title companies and seek out the best in their region. Get to know local providers. Find out who has been in business for several years and has a good reputation for thoroughness. Title companies keep their own records, called title plants, in their offices. When they investigate title, they use these records to produce an abstract of title and write a title commitment. Experienced local real estate attorneys will know who keeps the best records and provides the best service.

Amount of insurance coverage

Make sure that the amount of coverage is correct. The amount of title insurance should represent the fair market value of the property (fee land or conservation easement). There is usually a lower limit of $10,000.

A land trust may wish to lower its costs by buying a minimal amount of insurance, but it should be aware that such a strategy could prove costly in the end. For example, if a donated property has an estimated value of $100,000, a land trust may be tempted to purchase an insurance policy worth only $10,000. However, if there were a claim on the title, the damages paid under the insurance policy would likely only
be 10 percent of the cost of damages up to $10,000 (not the entire $10,000). The logic behind this payout being if the property was insured for one-tenth of its value, the title company will only pay one-tenth of the damages.

The industry standard for title insurance underwriters is that title insurance should be written for the value of the property — not more, not less. In practice, some title companies are willing to write a policy for a nominal amount (less than fair market value). However, this practice comes with financial risks and is not recommended. Ultimately, the amount of coverage a land trust should seek for an acquisition is guided by a risk-benefit analysis every land trust should perform in consultation with its attorney.

**Legal issues affecting title**

It is nearly unheard of for a parcel of real estate to be conveyed wholly, with no “defect” to title. A defect is any item affecting the fee title ownership of a property. So, although the term has a negative connotation in most contexts, not every title defect is problematic. Title defects are also known as “exceptions.” That is, the fee title being conveyed is the complete ownership of the bundle of rights, except for those defects identified in the deed or in the title policy (such as a utility easement, mortgage or mining lease). Title practitioners have identified somewhere between 30 and 60 different types of potential title defects. Nevertheless, all defects are not equal and not always fatal (cause a complete loss of title to the property). Title exceptions differ from title errors in that an error arises when the title examiner makes a mistake in reviewing a property’s chain of title (by listing an exception that does not apply to a particular property, for example), whereas an exception is an exception from title coverage because it relates to a defect in the title of the property that the title examiner has identified.

Some defects cause a complete break in the chain of title, while others, such as easements or rights-of-way, may simply affect an owner’s use and enjoyment of the property. Many defects are perfectly acceptable in real estate conveyances, but all title defects must be identified and evaluated. Every potential owner of property should look at the exceptions or defects to title to determine if they would prohibit the owner from using the property as intended.

**The impact of an exception depends on the land trust’s mission**

If a landowner offers a donation of land to a land trust with a mission to protect high-quality natural habitat, the land trust may find certain exceptions unacceptable. For example, upon review of title, the land trust discovers that a neighbor has an easement giving the neighbor access to the property and the right to trim trees for a scenic view. If vegetation cutting prevents the land trust from managing the preserve as a natural area, this land trust may decide the right to trim so adversely affects its intended use of the property as a nature preserve that it cannot accept the gift. On the other hand, a different land trust with a mission of protecting open space and providing public recreation opportunities might make the decision to accept the property subject to the neighbor’s right to trim trees.

Every situation is unique, so land trusts must read the title commitment (or report) and all title documents, including all of the exceptions to title (those defects the title company won’t insure). Be aware that many of the documents are difficult to read. They may be decades old, in a
small font or handwritten, copied so many times it is difficult to make out the text. Although they may be difficult to read, it is important to determine exactly what the documents say. Unless you know the details of the exception to title, you cannot make an informed decision about whether your land trust will need to address the matter. Keep the back-up documentation for each exception, because they will not be reproduced in the title policy and store these documents in accordance with your land trust’s recordkeeping policy.

Have the documents reviewed by an attorney early in the transaction — definitely before closing — so that any problems can be addressed. Items listed in the title commitment (such as exceptions) will be in the title policy, so the time to fix any problems is during the title commitment phase (due diligence phase), before closing.

**Legal names**

Make sure the names of the current record owners shown in the commitment or report exactly match the names you have on any deed of conveyance (or conservation easement). Make sure the names of the people selling or donating are listed in the same way on the deed by which they acquired the property, the deed by which they are conveying the property and the title commitment or report. Also, make sure the name of your organization is listed correctly and exactly as the land trust is incorporated. If any of these names differ, it may result in a failure of the conveyance of a property interest, because interests in land can only be conveyed by the record owners of the interest. Sometimes, if there are minor differences (for example, the deed by which a landowner acquired one part of the property listed Mary Jane Smith as the grantee and the deed by which she acquired the second part of the property shows she took title as Mary J. Smith), the deed to the land trust listing both names and using an “a/k/a” between them may be sufficient to cure the discrepancy and ensure that title passes as intended.

Check that marital status is listed and is correct, if required by your state’s laws. This point is particularly important in states such as Michigan, which has one-sided dower rights in which a wife owns one-half of all real estate a husband owns, but not vice versa. Even if the husband has title to a property individually, his wife would have to sign as co-owner when conveying the property. It is important to know when a spouse needs to sign a deed or conservation easement, otherwise the conveyance may not be complete.

Make sure everyone listed on the title report as an owner is still alive, if the ownership is held by individuals. If a husband and wife are listed as owners, but the husband has passed away, this title defect must be cured (and it is usually easy to do so, generally by obtaining a death certificate for the deceased party). If this situation occurs, notify both the title company and the landowner, who should be obligated to clear the situation.

If someone other than who you expected is listed as the owner, investigate why. Did the individual inherit the land, and the devise was not properly documented? Did someone forget to record a deed? Was there a name change or conveyance into an entity? Is the legal description correct? Sometimes the answer is easy — a husband and wife formed a family limited partnership and placed the land in the partnership and forgot to tell you — but sometimes the answer may lead to a more difficult situation to address. This type of situation is precisely why due diligence on title work is so important!

**Even experts make mistakes**

National and regional land trusts had been working for more than a decade to purchase and protect an undeveloped island and learned, after finally going under contract, that even the experts make mistakes that cause delays. In this situation, the family’s representative was not only
an attorney specializing in real estate and estate law, but also owned the only title company in town. During negotiations of the purchase agreement, several family members’ names were given as owners and, therefore, as signers to the contract. After the purchase contract was signed by the presumed owners, the title commitment revealed that some of the presumed owners did not, in fact, own the land, and some additional actual owners who had not been involved in the transaction up to that point were not listed as owners! Some owners shown on the deed had also passed away. Cleaning up the discrepancy in ownership included re-executing the purchase agreement with proper owners and making sure that the proper affidavits or certificates were filed with regard to deceased former owners. The closing was considerably delayed by the clean-up efforts. It is common for people to forget who exactly owns family property and how it is held (individuals, partnerships, trusts and so on). Remember, if an experienced real estate attorney and title agent can make this error, anyone can.

Entity ownership

Entity ownership may also complicate acquisitions. If the property is owned by an entity, land trusts must complete additional due diligence steps. If the owner is a business organization, the land trust should contact the appropriate government agency (often the Office of the Secretary of State) in the state where the property is located and determine the exact entity name on file. The land trust should establish whether the entity is in good standing and, if it is a foreign (out-of-state) organization, qualified to do business in the state where the property is located. If the entity is foreign, the land trust should contact the agency that governs it (the secretary of state) and verify its existence and good standing. A land trust can also ask the landowner or landowner’s counsel to provide certificates from the requisite government offices and an opinion letter from landowner’s counsel that the entity is in good standing in all jurisdictions where it conducts business or owns property.

Land trusts or their counsel should also review the business’ organizational documents (partnership agreements, operating agreements) to verify who has the authority to execute documents such as contracts, deeds, purchase agreements, options and easements (see Table 3-1 for a list of required documents). Although these may be considered private documents by the landowner, thorough due diligence requires their review, or at least review of the sections of these documents that pertain to transfers of real estate interests and who is authorized to transfer such interests on behalf of the entity. If a landowner will not provide even relevant sections of these documents to a land trust for review, such matter should be considered during the land trust’s risk-benefit analysis with respect to acquiring the property interest. The land trust should also review the organization’s incumbency certificate, which identifies who is authorized to sign for the entity (this document serves a purpose similar to that of the signature cards on file with a bank for its account holders). All of this work is necessary to ensure that the person signing the documents conveying the property interest owned by the entity has the requisite authority to sign the documents on behalf of the entity and to bind the entity to the agreements and conveyance. Failure to do so may open the transaction to a lawsuit by the entity or its members, shareholders or partners attempting to reverse the transaction or claiming that the conveyance was not valid.

When the landowner is a trust, there are issues unique to trusts that must be addressed in any conservation acquisition. How a trustee signs a deed or conservation easement is a matter of state law, but generally there must be a trustee’s certificate executed, which may be part of the deed or a separate document. The trustee signs the trustee’s certificate and through this certificate confirms that the person signing swears that he or she has the authority to bind the trust to the transaction. In most situations, a trustee’s certificate should be sufficient, but if there are doubts about whether a trust has the right to transfer land, it is best to review the trust documents. However, these are private documents and landowners may not be comfortable sharing them. If this is the case and depending upon the circumstances, the land trust may want to require an opinion from the attorney for the trust confirming that the trustee has authority to enter into the deed or conservation easement.
<table>
<thead>
<tr>
<th>Type of Ownership</th>
<th>Required Document</th>
</tr>
</thead>
</table>
| Corporation               | 1. Articles of Incorporation (may be called “Certificate of Formation” in some jurisdictions). These should be obtained from the Office of the Secretary of State or other government agency in charge of business entities.  
2. Bylaws                                                                                     |
| Limited Partnership*      | 1. Certificate of Limited Partnership. A copy should be obtained from the Office of the Secretary of State or other government agency in charge of business entities.  
2. Partnership Agreement                                                                    |
| Limited Liability Company | 1. Articles of Formation (may be called “Certificate of Formation” in some jurisdictions). A copy should be obtained from the Office of the Secretary of State or other government agency in charge of business entities.  
2. Operating Agreement                                                                    |
| Trust                     | Trust agreement (may be revocable, irrevocable, or testamentary)                                                                                   |

* In most states, general partnerships do not have to register with the state.

Table 3-1: Required Documents for Entity Ownership

Finally, before closing, land trusts should have on file a resolution from the entity that states:

- The transaction is authorized by the entity’s decision-makers
- The person signing the documents is authorized to sign on behalf of the entity (or perhaps naming more than one authorized signer in case the first is absent or incapacitated)
- Any actions taken up to the point of the resolution toward finalizing the transaction are ratified
- Nothing related to the transaction conflicts with any other agreement or law affecting the entity or the land

For transactions with pass-through entities of unrelated parties, the land trust must also follow the steps outlined in Practice 10C4 (Avoiding Fraudulent or Abusive Transactions) and the Land Trust Alliance Tax Shelter Advisory.
Legal descriptions

Make sure that the legal description in the title commitment or title report matches the legal description in the deed or conservation easement and, if it is not the same, you should investigate the difference. If there is a survey of the property, the legal descriptions in the title work and conveyance documents should also match the surveyed legal description. It is also a good idea to verify the legal description with the taxing jurisdiction (county or township). It is imperative to make sure that the correct legal description appears in any deed or conservation easement in order to ensure a complete transfer of the property interest the land trust wishes to acquire. Often a discrepancy may be no more than a typographical error that is easily corrected by a review of the descriptions by a surveyor, attorney or even a highly qualified title company employee.

The legal definition of properties may vary from state to state, area to area and property to property. It is important to know the custom in your region, because there are unsystematic and systematic ways to describe land. See Practice 9D1, Determining Property Boundaries.

Access

It is absolutely critical to make sure the property or land encumbered by an easement has both legal and physical access. You will not have the ability to adequately monitor the property or invite the public to the land if you do not have access to the property, and if you cannot monitor the property, your land trust cannot fulfill its promise of conserving the land forever. Access is also an important consideration in appraising the property or easement; lack of access will have a negative impact on the parcel’s fair market value. If there is an exception to title regarding access, the title company believes there is no recorded access to the property and that the property is not adjacent to a public road; the company will, therefore, not insure that there is access.

If there is an exception to title regarding access, the first step to take is to ask the landowner how they access the land. Often, you will find the answer is that an access easement exists across another property that provides legal access to the conservation project land. In most cases, such easements can also serve to provide access to a land trust (or can be amended to do so, sometimes for a price), but you must consult the land trust’s attorney about how best to achieve this result. Most states provide a process for acquiring access to landlocked property across adjacent lands whose owners will not grant access voluntarily, but such methods can take a long time and cost a great deal of money. If there is no other way to gain access to a conservation property than through a court action, the land trust should consider this factor when it weighs the risks and benefits of the conservation project.

Finding a solution for a landlocked easement

The Trust for Land Restoration in Colorado worked with an owner of a 2,000-acre ranch to conserve large portions of the ranch that provide valuable habitat for the Gunnison sage-grouse, a species of special concern to the Colorado Division of Wildlife. The owner placed a conservation easement on a large portion of the land, except for a portion of the ranch that did not contain habitat for the bird. This land happened to be located between the conserved land and the only public road in the area. As part of the easement transaction, the landowner granted an exclusive and perpetual access easement to TLR so that it (and any entity to which the easement might be transferred in the future) could enter the property at any time to exercise the land trust’s easement rights. Using this method to create access resulted in the title company deleting its exception for lack of access in the final title policy.
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ORGANIZATIONAL MANAGEMENT

Title Insurance
2018 REVIEWED FEBRUARY 8, 2018 - LAND TRUST ALLIANCE

This is a set of Practical Pointers on title insurance. Use these pointers to help your organization avoid cloudy title and the high legal costs that can come with it.

Intermediate

VIEW PRACTICAL POINTER (/resources/learn/explore/title-insurance#content)
PRACTICE 9F: TITLE INVESTIGATION AND RECORDING

Practice 9F: Title Investigation and Recording

2017  UPDATED DECEMBER 5, 2022  LAND TRUST ALLIANCE

This guidance covers Practice 9F: Title Investigation and Recording.

VIEW PRACTICE  (resources/learn/explore/practice-9f-title-investigation-and-recording#content)
DUE DILIGENCE • EVALUATING AND SELECTING PROJECTS

Title Review: What Land Trusts Need to Know

MARCH 14, 2:00 P.M. - 3:30 P.M. EDT • LAND TRUST ALLIANCE • VIRTUAL • JOANNE DWOSKIN

Join conservation attorney Joannie Dwoskin as she provides an introduction to title for land trusts. She will cover the basics of title review with a practical, step by step approach to reviewing documents and solving common title problems.

💰 Basic

Registration for this webinar is closed.

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Learn Practice Element 9F1: Title Investigation

2018  UPDATED MARCH 5, 2020  LAND TRUST ALLIANCE

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the first element, 9F1.
Practice 9F: Title Investigation and Recording

About This Practice
This guidance covers Practice 9F, which includes three elements:

1. Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire
   a. Update the title at or just prior to closing
2. Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property's important conservation values
3. Promptly record land and conservation easement transaction documents at the appropriate records office

Accreditation indicator element | Terrafirma enrollment prerequisite | Required for both

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Title investigation

Prior to closing and preferably early in the process, have a title company or attorney investigate title for each property or conservation easement the land trust intends to acquire

a. Update the title at or just prior to closing

Why is title investigation important?

Title investigation is essential to ensure that the land or conservation easement is what the land trust expects it to be.

With thorough title investigation, a land trust will know:

- Who owns the property and, therefore, who the land trust must work with to complete the donation or purchase (including, for purposes of Practice 10C4, understanding the membership of any pass-through entities, such as LLCs or corporations)
- The correct legal description of the property
- Encumbrances on the property (for example, liens, mortgages, mineral or other leases, water rights) (See Practice 9F2 below)
- Any matter that must be addressed before the donation or sale is completed, including matters that are of concern to funders

If a land trust accepts a deed, whether for a fee property or easement, without proper title investigation, such a deed may:

- Not be effective or valid
- Encumber the wrong property
- Encumber only a partial interest in the property
- Be subject to encumbrances that threaten the permanence of the land’s protection
- Be subject to mortgages, mineral reservations, tax liens or judgments or other restrictions that prevent deductibility or may jeopardize the property’s permanent protection
- Be subject to easements, use agreements, covenants or other encumbrances that are inconsistent with the conservation purposes of the easement
- Lead to expensive title disputes and a diversion of resources
Definition of Title

Title is the legal means by which someone proves they own a piece of land or an interest in land. Title can be defined as the rights of ownership of real estate recognized and protected by law. These rights include the:

- Right of possession
- Right to control the property within the framework of the law
- Right of enjoyment (that is, to use the property in any legal manner)
- Right of exclusion (to keep others from entering or using the property)
- Right of disposition (to sell, will, transfer or otherwise dispose of or encumber the property)

Traditionally, real property is described as a bundle of legal rights. A holder of the entire bundle of rights is said to own the property in fee simple. Some rights in the bundle may be severed from the entire bundle of rights. Examples of rights that may not run with the titleholder of the property — rights that a separate party may own or control — include:

- Easements
- Rights-of-way
- Mineral rights
- Water rights
- Timber rights
- Restrictive covenants
- Life estates
- Rights of lien holders, such as tax liens, judgments and the like
- Conservation easements

Because the rights of ownership can be separated and individually transferred, this concept is often described as a “bundle of sticks,” the sticks symbolizing individual rights that can be separated from the whole.

When someone acquires an interest in land, a document of the acquisition is usually recorded, which means placing a document on file with a designated local public official, usually the recorder of deeds, registrar or register of deeds. Recorded documents are considered to be placed on open notice to the general public. While the specific instruments used to document ownership of one of the sticks listed above may vary, they usually include deeds, mortgages (whether or not in the form of deeds of trust), leases (usually longer term varieties), easements and court orders and other instruments affecting the title to real estate.

Title work due diligence

Land trusts often use the term title work when talking about due diligence for title investigation. “Make sure you order the title work early.” “Land trusts must review title work.” But what does this term mean? It can mean any number of ways to investigate and review title, including through abstracts, title reports, title commitments and title insurance.

It is important to remember that while a knowledgeable land protection specialist might glean a good deal of information from searching the
county records, this effort should not replace the professional investigation of a title company or an attorney. Title can be conveyed in a variety of ways; simply searching the recorded deeds at the courthouse is not an adequate investigation of title. After investigating title, it is critical that the land trust evaluate the information and address any issues accordingly. See Practice 9F2 below for more information.

Types of Title Investigation

Title Insurance

*Land Trust Standards and Practices* does not require title insurance, but it is recommended, particularly for land or conservation easement purchases. Some organizations always purchase title insurance for land acquisitions and generally for conservation easements. The importance of title insurance varies depending on what interests the land trust holds and what it paid for them. If the land trust does not obtain title insurance for conservation easements, it should encourage the property owner to carry their own title insurance to protect potential title problems.

Sometimes title problems occur that could not be found in the public records or are inadvertently missed in the title search process. To help protect a land trust in these events, many obtain an owner's policy of title insurance to insure them against the most unforeseen problems when they acquire conservation easements or fee-owned land. Owner's title insurance, called an owner's policy, is usually issued in the amount of the real estate purchase (or its value, if a donation). It is purchased for a one-time fee at closing and lasts for as long as someone (or a successor) has an interest in the property. Only an owner's policy fully protects the land trust should a covered title problem arise that was not discovered during the title search. Possible hidden title problems can include:

- Errors or omissions in deeds
- Mistakes in examining records
- Forgery
- Mortgage holder fraud, forgery or false information
- Undisclosed heirs
- Potential boundary issues if not excepted from coverage

An owner's policy provides assurance that a title company will stand behind the land trust—monetarily and with legal defense, if needed—if a covered title problem arises after the land trust acquires land or a conservation easement. The title company will help pay valid claims and cover the costs of defending an attack on the title. Receiving an owner's policy is not an automatic part of the closing process, and it is paid for by different parties (the buyer or seller) in different parts of the country.

Title Commitment

A title commitment is a temporary contract providing for the issuance of a permanent title insurance policy when certain conditions are met. The purpose of a commitment is to give the prospective insured client (for example, the purchaser, donee, lessee or lender) information and assurance that if they proceed to closing and the requirements of the commitment are met, the title company will issue a title insurance policy (containing the exceptions identified in the commitment). In short, the title company commits to insure the title of the property, as described within the commitment itself. A title commitment is also known as a title insurance commitment, preliminary title report or title binder.

A land trust orders a title commitment to determine ownership, encumbrances, liens, easements, property description, whether property or other taxes applicable to the property are current and so on. A title commitment will also usually require that an entity take certain actions
before insuring title conveyed by that entity to ensure the person acting on behalf of the entity has the legal ability to complete the transaction. Such information can be valuable to a land trust working with a corporation, trust, limited liability company, partnership or other entity acting as grantor. Usually the land trust’s attorney will review the title commitment (or title report) as part of the due diligence for a land or conservation easement acquisition. Any questionable items, those that negatively affect the conservation values of the property or those that would prohibit the land trust from acquiring the land or easement should be addressed at this stage (see Practice 9F2). While a title report will contain much the same information as a title commitment, it may be organized differently and will not lead to title insurance. Once any title issues have been resolved, the title company will update the title commitment with a new date, time and revised commitment number and will write the title policy to accurately reflect all conditions of title at the date of closing.

Typically, the title company rolls the fee for producing a title commitment into the cost for the title insurance, which is generally based on the land’s appraised value or purchase price. Some land trusts order title commitments with no intention of ultimately securing title insurance in order to complete their title work due diligence. Because title companies generally do not charge for commitments, it will not be long before a land trust that only orders commitments finds it is no longer able to get title companies to work with the organization. Land trusts have found ways to engage title companies as partners by explaining why they may need a title commitment, but not title insurance, and have found creative ways to compensate title companies for their time in producing a commitment. Some land trusts negotiate a fixed fee for a commitment, while some agree to buy the minimum amount of title insurance offered by a company, which may be as little as a $10,000 policy at a cost of $300 to the land trust. Who pays for the title policy is largely jurisdictional and is always negotiable.

Title Reports

Some title companies are willing to produce a report of title for a set fee. The title company does the same background work to investigate title as they do to write a title commitment. The title report determines the name of the owner of record, liens, exceptions to title and so on. However, the report provides no commitment to insure title. Title reports are sometimes called reference commitments or title searches. Payment for a title report is usually due at the time the title company produces the report.

Title reports can serve a land trust well in the right circumstances. A land trust can order a title report to gain information on a high priority parcel of land or to obtain an early indication as to whether a potential conservation easement donor has a mortgage on the property. It is a cost-effective way to determine ownership and encumbrances. However, a title report provides no protection for errors or omissions (unless negligence of duty was involved), so if the land trust chooses to acquire the property, it should consider ordering a title commitment to obtain title insurance. Further, a title report will not contain the requirements necessary to close and insure a transaction as a title commitment does. Therefore, a land trust will have to work with its attorney to determine what additional steps might be necessary to ensure that the grantor is authorized to sign the conveyance documents and to address any other details necessary to make sure the property interest is properly conveyed, subject only to the exceptions the land trust is willing to accept on the property.

The willingness of a title company to produce a title report varies from company to company and state to state. Developing a good relationship with title companies in your region may make them willing to help the land trust with challenging projects or tight timelines. Title companies are also usually willing to conduct additional research at the client’s request, although this additional research will add to the cost of the report. Use the title company as a partner and seek its guidance; in some cases, it is just as cost effective to obtain a title commitment as it is a title report.

Title Opinion

Many land trusts rely on a title opinion, which is the written opinion of an attorney, based on the attorney’s title search into a property. It
describes the current ownership rights in the property and encumbrances, as well as the actions that must be taken to make the stated ownership rights **marketable**, to protect the conservation values and to ensure the easement will not be extinguished.

**Abstracts**

Abstracting is the process of making notes or abbreviating the chain of title from the public record or the title plant (the compilation of real property records). The purpose of an abstract is to discover, assemble and examine all documents that create a link in the chain of title. Missing links are noted, and a detective search begins to find them.

Title companies utilize abstracts to define the chain of title. Title examiners use the information in abstracts to write title insurance commitments and title insurance policies. While abstracts provide great information and can help in assurance of title, they do not provide protection for a landowner or potential owner. In addition, it is sometimes difficult to find an attorney who is willing to create a title abstract, and those who are available can be very expensive. For these reasons, title investigation in most states is conducted using title reports and title commitments.

**Ownership and Encumbrance (O&E) Report**

Some title companies offer a product known as an **ownership and encumbrance report**, which provides exactly what its name suggests: information on the owner of record of a parcel of land and any financial liens (mortgage, deed of trust, mechanic's lien and so forth) affecting such land. An O&E report does not provide sufficient information to permit adequate title due diligence because it does not reveal any of the recorded documents that may negatively affect a land trust's ability to protect the land's conservation values, such as oil and gas leases, easements and rights-of-way affecting the property, reclamation orders, covenants and similar encumbrances.

For accreditation, a land trust can document title investigation with title insurance, a title commitment, a title report, a title opinion or a title abstract, so long as a title company or attorney prepares it. An O&E report is not sufficient for accreditation. The title investigation needs to identify ownership and encumbrances, such as mortgages, severed mineral rights, severed water rights, tax liens or judgments, easements, use agreements, covenants or other restrictions.

If the title investigation includes a general exception for the investigation of rights that would impact the conservation values, a land trust will need to separately document how it addressed those rights. For example, some title commitments have a general exception for the investigation of mineral rights. This exception can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. Because of this, a land trust needs to evaluate such exceptions and assess the risk that the minerals were potentially severed. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk (see Practice 9F2 below). Similarly, if water rights are excluded from the title investigation but they are essential to maintaining the conservation values, then the land trust needs to document these water rights in a separate document, such as a due diligence report, deed or the baseline documentation report.

**Timing of the investigation**

*Early in the process:* It is important to investigate the title as early as possible in the acquisition process — often title is not vested as people (even the owners) think it is. Knowing about problems early in the acquisition can give the parties involved time to cure any defects or change in whose name title is held. Starting the title investigation process early is particularly important when timing is tight, such as when a donor
wants to close in a certain calendar year. Many transactions have been slowed down or even halted due to unresolved title issues. Inaccurate legal descriptions, mortgages or other forms of debt, mineral interests and other ownership legalities are some of the quite common issues that can delay or prevent closing of a transaction.

Update at or just prior to closing: If the land trust conducted its initial title investigation early in the transaction process, it must have a professional title company or attorney update the title at or just prior to closing (preferably within 30 days) to ensure no additional encumbrances have been placed on the property since the initial title investigation. A land trust could find itself in a difficult situation if a landowner secured a mortgage after the initial investigation and before closing, which could have been addressed if the title was updated or brought current as close to the closing as possible.

For accreditation, a land trust can provide a title update from a title company or attorney through an updated title report or title commitment, a title insurance policy, a written communication from an attorney or title examiner that the investigation was brought current at closing or written escrow or closing instructions requiring that the title investigation be brought current at closing. The title update needs to be completed within 30 days prior to closing.

Period of time covered by the investigation

Ownership of land changes over time, and those acquiring land must have knowledge of who owned the land for a certain number of years in order to ensure that their acquisition is valid and cannot be contested. A history of how title passed from one owner to the next is called a chain. The chain of title for every piece of land in this country begins with ownership by some country (the United States, England, France, Spain, Mexico or Russia). The first conveyance of title from a certain nation or state to another entity (including a private individual) begins a chain of title. How far back a land trust needs to look into a chain of title depends on many factors: the nature of the transaction; the likelihood of past uses affecting the conservation values of the land; state laws governing recording and re-recording (marketable title acts); title search custom and practice for your area; the degree of risk a land trust is willing to assume; and the land trust’s general knowledge of the area. In consultation with your attorney, follow general procedures, but each deal may require more investigation.

In some areas of the country, it is common for a title company to go back a certain number of years, say 30, 40 or 50 (for example, in Michigan there is a 40-year marketable title act, so title companies tend to only go back 40 years). Furthermore, if a land trust is completing a project cooperatively with a government agency, the agency may require a complete chain of title for its review or a 50-year chain of title. For example, the US Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule requires an environmental professional’s review of the chain of title, often as far back as 40 years.

Land trusts should go back as far as they deem necessary to satisfy themselves of good title, but always in compliance with state law.

Transfers from other organizations

Land trusts should investigate title as part of their due diligence when accepting the transfer of land or conservation easements from an affiliate or other conservation entity.
For accreditation, a land trust will need documentation of how it investigated title when accepting the transfer of land or a conservation easement. The documentation can be a full title investigation, a copy of the conservation partner’s past title investigation, along with evidence the title investigation was brought current within 30 days prior to closing, or a statement of how the land trust assessed and addressed title risks. This risk assessment can include evaluating the title information from the conservation partner or conducting additional title investigation.

If the land trust works with partners, the land trust still needs to complete its own due diligence to safeguard the assets it will hold and meet the accreditation requirements by obtaining and reviewing the title investigation and title update before closing. If a partner completes the title investigation and/or title update, the land trust needs to receive and review the partner’s title documentation on its own behalf before closing and retain a copy of the documentation.

**PRACTICE ELEMENT 9F2**

**Evaluating title exceptions**

Evaluate the title exceptions and document how the land trust addressed mortgages, liens, severed mineral rights and other encumbrances prior to closing so that they will not result in extinguishment of the conservation easement or significantly undermine the property’s important conservation values.

**Evaluating title**

Once the title investigation is complete (see Practice 9F1 above), a land trust needs to evaluate the information it received and decide on next steps, which usually includes a review by an attorney and communication with the title company about questions or changes.

1. Every title work due diligence review should include the following steps:

2. Land trust personnel (whether staff or a board member for all-volunteer land trusts) review and understand the title commitment or report

3. Land trust attorney reviews and understands the title commitment or report

4. Questions or changes regarding the title commitment or report are sent to the title company or attorney for change or clarification

Because the land trust often orders the title work, it is best if the land trust personnel responsible for the acquisition take the first look at the title report or commitment, reading the entire document and all exceptions to title listed in the report or commitment. They can then ask the land trust attorney to answer specific questions or confusing issues raised by the results of the investigation. The land trust’s attorney will review the title work more thoroughly and should not only evaluate all exceptions to ensure that the title is good and that the land trust’s conservation goals can be accomplished, but also to ensure that the exceptions listed are accurate (they actually apply to the particular property in question) and to confirm that the land trust documents reflect the name of the record owner and legal description accurately.
Legal issues affecting title

It is nearly unheard of for a parcel of real estate to be conveyed wholly, with no defect to title. A defect is any item affecting the fee title ownership of a property. So, although the term has a negative connotation in most contexts, not every title defect is problematic. Title defects are also known as exceptions. That is, the fee title being conveyed is the complete ownership of the bundle of rights, except for those defects identified in the deed, in the title policy or through the title investigation (such as a utility easement, mortgage or mining lease). Title practitioners have identified somewhere between 30 and 60 different types of potential title defects. Nevertheless, all defects are not equal and not always fatal (cause a complete loss of title to the property).

Every situation is unique, so land trusts must read the title commitment (or report) and all title documents, including all of the exceptions to title. Unless you know the details of the exception to title, you cannot make an informed decision about whether your land trust will need to address the matter. Keep the back-up documentation for each exception (they will not be reproduced in the title policy) and store these documents in accordance with your land trust’s recordkeeping policy.

Have the documents reviewed by an attorney early in the transaction — definitely before closing — so that any problems can be addressed. If you are obtaining a title insurance policy, items listed in the title commitment (such as exceptions) will be in the policy, so the time to fix any problems is during the title commitment phase (due diligence phase), before closing.

Mortgages and Other Liens

Examining mortgages and other liens that are exceptions to title is important for two primary reasons. First, if the land trust is purchasing or accepting a donation of the fee interest in the land or purchasing a conservation easement (whether for fair market value or at a bargain sale price), it should instruct the title company to pay off any loans, mortgages or liens from sale proceeds or from funds provided by the landowner at closing and record a release or discharge. Doing so removes the clouds from the title and releases both parties from such monetary obligations so that these encumbrances do not appear in the final title insurance policy (if the land trust acquires title insurance for the project) and, for fee interest acquisitions, ensures that the land trust is not financially liable for the debt.

Second, if a landowner is granting a conservation easement on their land, the land trust must make sure that the property is not subject to an outstanding mortgage. If there is a mortgage, the landowner must pay off the mortgage or the mortgagee must subordinate its interest in the loan to that of the conservation easement prior to closing. If the mortgage is not subordinated or released, the conservation easement may be extinguished if the lender forecloses on the property. In the case of a donated conservation easement where the donor intends to seek a charitable deduction for federal income tax purposes, subordination is required by federal law. Treasury regulation §1170A-14(g)(2) states, in part, “no deduction will be permitted . . . for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.”

A mortgage subordination means that a lender can still foreclose on a property, but that the conservation easement will remain in effect. A mortgage subordination agreement can take many forms, ranging from a single paragraph to a four-page document, but it must at least contain the language set forth in the preceding paragraph as required by the Treasury regulations. Some land trusts attach the mortgage subordination as an exhibit to the conservation easement. Other land trusts record the easement and mortgage subordination simultaneously; usually the subordination is recorded immediately prior to the conservation easement document thereby effectively removing the encumbrance from record before the conveyance of the easement interest. A separate mortgage subordination document can be more
attractive to the parties because a lender only has to review and sign the subordination document, rather than the entire easement, and can do so before the easement closing.

The landowner should be responsible for “cleaning” the title by paying off debts or securing the subordination agreement. It is important to start the process as early as possible because it can take some time for the lender to sign the agreement. Often, the land trust has to get involved to explain the conservation easement to a bank or its attorneys or to provide a sample subordination form for signature. Land trusts and their attorneys must review the subordination to ensure it satisfies the Treasury regulations and must ensure that the representative signing on behalf of the lender is authorized to do so. This may require the bank to provide a certificate of authority along with or within the subordination agreement. One Colorado land trust helped a landowner secure a subordination agreement by mailing the lender’s attorney a copy of the Treasury regulations and highlighting the pertinent language. Once the attorney understood that the law requires the agreement and specific language, he gave a green light to his client, the lender, to sign the document. Most lenders are willing to sign subordination agreements, as long as the appraised value of the land subject to the mortgage remains high enough to satisfy their lending requirements after the conservation easement is placed on the property.

For accreditation, a land trust needs to address mortgages by recording a mortgage subordination agreement before or contemporaneous to the conservation easement deed or having the mortgage discharged at or prior to closing.

Unpaid property taxes may result in a sale of the property by a public trustee or other local government official in order to secure money to pay the taxes, and this public sale may result in the extinguishment of a conservation easement. If your state has not addressed this situation legislatively, your land trust should refuse to accept the easement until the property taxes for the property have been paid to the closing date.

Mechanic's liens are liens created by state law that seek to guarantee payment for contracted services rendered to a particular piece of real property. The list of service providers permitted to file mechanic's liens against land is broad and usually includes surveyors, contractors and architects. Until the debt is paid and the lien released, the landowner does not have clear title to the land. If the landowner does not pay off the lien, the holder of the lien may foreclose on it, which may extinguish a conservation easement placed on the property after the lien. Therefore, a land trust must address any mechanic's lien that appears in a property's chain of title by requiring the landowner to pay off the lien and secure a satisfaction of lien or release from the lien holder, which is then recorded in the real property records prior to other transactional documentation.

**Mineral Rights**

Knowing the status and ownership of mineral rights is important in any acquisition. Although a title company’s willingness to investigate title and ensure mineral rights ownership varies from location to location, a land trust must determine whether the surface owner holds the mineral rights or whether they have been severed from the property. Often, owners of subsurface mineral rights have the right to use the surface of the land in order to extract minerals. Such rights can pose obvious problems for conservation transactions. Title companies may charge additional fees to investigate mineral rights ownership or there may be an alternative title agency that specializes in title insurance for mineral rights, or the land trust may have to hire a qualified expert, such as an attorney specializing in mining law or a geologist to research the status of mineral rights. If some or all of the mineral rights have been severed from a property, a surface use agreement, which may or may not appear in the public records, may have been completed by the fee interest and mineral owners and should be reviewed by a land trust during its title work due diligence.
Although it is sometimes difficult to obtain mineral information from a title commitment or report, there are a few places to begin investigation:

- Ask the landowner about the status of minerals. Have the minerals been leased?
- Is there mining activity in the area?
- What information does a geologist have about mining in the area?

Next, you should ask the title company to provide documents from which you can determine whether minerals have been severed from the surface ownership (most of which should appear as exceptions in a title commitment or report, although leases are not always recorded), including:

- Federal and state patents
- Deeds that reserved mineral interests
- Deeds that granted mineral interests
- Oil and gas and other mineral leases

It is important that the land trust review any of these documents secured from the title company. If necessary, commission a geologist’s or mining engineer’s report to examine how likely, or unlikely, the development of the minerals might be. With this information, the land trust should be able to answer the following questions:

- Were any mineral rights reserved to the United States or the state?
- Were any mineral rights reserved or granted to a private owner? (Mineral interests can be wildly fractionated if the owner in a chain retained portions of mineral rights with each conveyance.)
- What types of minerals were reserved?
- How likely are such minerals to be found in commercially developable quantities on or under the land?
- If minerals have been severed, what is the likelihood of surface mining?
- What are the terms of any leases or surface use agreements?

There are a number of important reasons why the land trust must determine the mineral rights ownership and its specifics. In either a fee land or conservation easement acquisition, the land trust will want to know if it is in danger of having some, or all, of the conservation value of the property destroyed by a future mining operation. In a fee acquisition, if a land trust can determine that the minerals have not been severed, it can manage the property without worry. In both cases, if the minerals have been severed, a land trust must evaluate whether any mining activity can be conducted in a manner that is consistent with the preservation of the conservation values of the property. At a minimum, a land trust should document its risk assessment and rationale for actions taken or not taken.

In the case of conservation easement acquisitions by donation or a bargain sale in which the landowner plans to seek tax benefits, evaluating mineral rights ownership is imperative because any federal income tax deduction may be in jeopardy if minerals have been severed from the property or if the landowner retains the right to use surface mining methods of their unsevered mineral interests (see the Practical Pointer **Easement donation disqualification for reserved rights of surface mining methods**). In the case of severed mineral rights, the landowner will have to take appropriate measures to assure the land trust that even though the minerals have been partially or wholly severed, their development by surface mining methods is “so remote as to be negligible,” as stipulated in the Treasury regulations. In most cases, the landowner hires a qualified geologist to analyze the potential for surface mining. Even if the result of the analysis is the desired conclusion that “the possibility of surface mining is so remote as to be negligible,” a land trust should still review this remoteness letter to assure itself that
the letter addressed all issues related to the particular land in question and it is not qualified in some manner that might leave the door open to a mining operation that could harm the conservation values the land trust wishes to protect on the property.

Identifying the owners of mineral rights can be cumbersome, because mineral rights are often passed from generation to generation without any real knowledge or written documentation. A mineral right may have many joint owners, some who may have no knowledge of ownership. This fact became important to a land trust seeking to protect a large ranch when it found through its title due diligence that all of the mineral rights had been severed from the property. After further research, the land trust also found that the mineral rights were conveyed over a 50-year period to more than 350 different fractional owners. The organization tried for months, without success, to locate these owners in order to secure a subordination of their mineral interests to the conservation easement or to determine if they were willing to sell their interests. After conferring with its attorney and geologist, the land trust decided to proceed with the transaction, concluding that the risk of more than 350 people agreeing upon a single mineral development plan was remote. The state agency that provided funding for the project agreed with the land trust's conclusion after performing its own due diligence, and the transaction proceeded.

For accreditation, a land trust needs to document how it addressed any severed mineral rights so that they do not significantly undermine the conservation values. Documentation can include a mineral remoteness report from a qualified geologist or similar professional, documentation that the severed rights have been reunited with the fee estate or a surface use agreement with the party that holds the mineral interests that has provisions to protect the conservation values.

If the title investigation includes a general exception for the investigation of mineral rights, a land trust needs to evaluate the exception and assess the risk that the minerals were potentially severed. For example, a title commitment with a general exception for the investigation of mineral rights can either mean the title company included mineral rights in its investigation but cannot guarantee them or it can mean the mineral rights were not part of the title investigation. If the risk is high that the title investigation excluded mineral rights and there is a high risk of severed mineral rights, the land trust will need to take additional action to address this risk. The land trust will need to obtain a mineral remoteness report or further investigate or address the minerals.

Other Encumbrances

Other encumbrances that the land trust will need to evaluate include the following:

_Easements and rights-of-way_. Existing easements are often overlooked or ignored, and while they often do not affect a land trust's ability to conserve the land, they can, at times, cause serious problems. It is not enough to acknowledge, for example, that a utility easement exists. The land trust must read the easement itself to determine where the easement is located, the extent of rights that were granted, terms of the easement, if applicable, and so on. Then, the land trust should consider the impact of the easement on the conservation values and the land trust's goals for the project and document its findings.

- **Timber rights.** A land trust should thoroughly investigate whether a third party (such as a commercial logger or neighbor) has the right to harvest timber on a potential conservation property. Such rights do not often appear in title work except, sometimes, in the case of older deeds reserving the right to the grantor to complete a timber harvest. A conversation with the landowner about this topic is likely the best way to make this determination.

- **Water rights.** Water rights also generally do not appear in title commitments or title reports; in fact, most title insurance policies will specifically exclude coverage of water rights. So how does a land trust investigate title to water rights, if the rights are important to protecting the conservation values on a particular piece of property? Land trusts in the West can check the records of the particular state agencies tasked with overseeing water rights. In the eastern parts of the country, water rights do not (yet) rise to the same level of concern as they often do in the West, but may become more important as water resources become a limiting factor to human use of land.
or as climate change affects water supplies. Land trusts should analyze the impact of water rights on the conversation values of a property and document their findings appropriately. For more information, see Land Trusts and Water: Strategies and Resources for Addressing Water in Western Land Conservation.

- **Leases.** Recorded leases could affect ownership of property, and a land trust must consider them on a case-by-case basis. In many instances, the entire lease will not appear of record; instead, there may simply be a notice that a lease affects the property. In such cases, you need to obtain a copy of the full lease from the landowner for review.

- **Life estates.** For fee acquisitions, it is important to know the status of any life estate and evaluate how it might affect the protection of a property, its fair market value, its public use as a preserve and the general desirability of the property for acquisition. Many land trusts have successfully completed transactions by granting a landowner a life estate, thereby often lowering the property’s value and project costs.

- **Contract interests.** There may be exceptions to title from recorded contracts with other individuals, such as land contracts or rights of first refusal. The land trust should read these documents and understand their implications and potential impact on the project.

- **Covenants or restrictions.** Some exceptions to title are listed as covenants or restrictions (for example, restrictions that protect a scenic view, require a buffer or limit the size of outbuildings). While some land trusts may never see such an exception if they only deal with vacant land, land trusts in more urban or developed areas may see these exceptions more frequently.

A land trust should retain documentation that it analyzed the risks related to these encumbrances and what actions it took to ensure that the encumbrance would not affect the organization’s interest in the land or the protection of the conservation values. This is most often documented in project selection forms, project descriptions provided to committees or the board, committee or board meeting minutes, attorney correspondence or in a memo to the project file.

For accreditation, a land trust needs to document how encumbrances are addressed so that they will not result in extinguishment of the conservation easement or significantly undermine the conservation values. Documentation can include a memo to the file with an analysis of how substantial access easements or rights-of-way could impact the project, a written release of timber rights, water rights due diligence reports or release of a right-of-first-refusal.

**PRACTICE ELEMENT 9F3**

**Recording land and easement transactions**

Promptly record land and conservation easement transaction documents at the appropriate records office

**Why is it important?**

If a document such as an option, purchase agreement, grant deed, conservation easement or survey is not recorded, there is no public notice or legal record of the transaction. Consequently, a title search of the property does not reveal the contract, conveyance or encumbrance, and the transaction can be legally entangled, even nullified, by documents subsequently recorded by other parties. For example:

- If a conservation easement is not recorded, as evidenced by a recorded deed, the new owners may not be bound by the conservation easement when the property changes hands. The recording of their deed takes precedence over the unrecorded conservation easement.
• If an option agreement is not recorded, an unscrupulous owner could sell or option the property to someone else.
• If a grant deed is not recorded, creditors of the former owner could file claims against the property.

What is recording?

Recording is the process of placing a document on file with a designated local public official for public notice. Deeds are recorded in the office of the recorder of deeds, registrar or register of deeds in the county or municipality where a property is located. The recording of a deed consists of having it transcribed into the proper book and indexed. Documents filed with the recorder are considered to be placed on open notice to the general public.

Claims against property usually are given priority on the basis of the time and date they were recorded, with the most preferred claim going to the earliest one recorded, the next claim going to the next one recorded and so on. This type of notice is called constructive notice or legal notice. The effect of recording a document is to give constructive notice to all the world of the content of any instrument or document filed for the record.

Recording documents

Recording should happen immediately upon execution of the pertinent documents, but no more than one week following the date of the last signature. For land trusts that use a title company to close transactions, the title company delivers the document to the appropriate governmental office for recording. The land trust must be very clear in its written closing instructions to the title company that the property deed or conservation easement be recorded in the same year as the date signed.

If a donor of land or a conservation easement is planning to claim a tax deduction, it is important to understand when the transaction is deemed complete in order to substantiate the timing of the gift. For gifts of fee land, the conveyance is deemed complete (the gift has been made), when the donor delivers the deed to the donee for recording (without recording having yet occurred). However, in the case of conservation easements, the gift is only deemed complete when the conservation easement has actually been recorded or there is documentation of delivery to the recording office. The reasoning is that the easement must be permanent and enforceable to be a valid contribution for federal income tax purposes and it would not be enforceable if not recorded. This distinction can become important in year-end donations of conservation easements. Land trusts should be wary of waiting until the last minute to accept and record easements because they should be recorded in the same year the gift was made.

For accreditation, conservation easements and fee title deeds need to be submitted for recording within a week after the final signatures. Generally, the documentation provided in the accreditation application is the signed deed with the dated recording stamp. However, a land trust can provide documentation of when the delivery was made to the recording office if the recording office delayed the formal recording.

Order of Recording
Generally, the closing documents that should be recorded first represent the resolution of any title issues, such as releases, discharges or subordination of debt, clarification of ownership or other resolved issues. Next is the deed of conveyance for fee land acquisitions (whether donated or purchased) or for conservation easement transactions, the conservation easement deed. There may be exhibits to the deed or conservation easement to record, as well as any certificates of authority or legal existence (for corporate entities). The attorney or recorder should record the documents in the order dictated by the title resolution and with the knowledge of the land trust.

The original documents, with the recording stamps, should be returned to the land trust and kept as part of the permanent file (see Practice 9G2). Recording may seem like a formality, a minor step at the end of a long process. It is not. Land trusts should be sure recording is done and done immediately.

**Re-recording conservation easements**

While recording a deed of conveyance or deed of easement is considered a basic transaction step, it is also important to know if your jurisdiction requires re-recording of deeds and easements in order to ensure their perpetual status. Due to marketable title acts and recording acts adopted in some states, certain interests in land must be re-recorded at the end of a given period — usually 30 years — in order for the interest to remain valid. In these cases, recording becomes an ongoing due diligence responsibility for a land trust, and it should make sure that its calendar systems and recordkeeping provide for reminders of when easements need to be re-recorded.
Explore related resources

DUE DILIGENCE • PRACTICE 9F: TITLE INVESTIGATION AND RECORDING

Learn Practice Element 9F1: Title Investigation

2018 • UPDATED MARCH 5, 2020 • LAND TRUST ALLIANCE

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the first element, 9F1.

VIEW COURSE (/resources/learn/explore/learn-practice-element-9f1-title-investigation#content)
Due Diligence • Practice 9F: Title Investigation and Recording

Learn Practice Element 9F3: Recording Land and Easement Transactions

2018 • Updated March 5, 2020 • Land Trust Alliance

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the third element, 9F3.

)view course (/resources/learn/explore/learn-practice-element-9f3-recording-land-and-easement#content)
Learn Practice Element 9F2: Evaluating Title Exceptions

Land Trust Standards and Practices, Practice 9F: Title Investigation and Recording, includes three elements. This module addresses the second element, 9F2.

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Title Investigation

Ownership of land changes, and those purchasing land must have knowledge of who owned the land to ensure that their purchase is valid and cannot be contested. This document provides an overview of title, various types of deeds and ownership, title insurance and its importance and legal descriptions.
Lien and Mortgage Subordination

The Alliance recommends that land trusts obtain comprehensive subordinations of mortgages and other liens on conservation property that give the land trust an absolute priority to proceeds associated with easement extinguishment and condemnation as well as complete protection of the first priority position for the conservation easement or other right. This pointer will focus on subordinations and partial interests but, as a reminder, with respect to land ownership, title should be fully cleared of all liens prior to the land trust accepting a deed of the full fee simple title. (For more information, see narrative for Land Trust Standards and Practices 9F2).

Subordination

U.S. Tax Court cases underscore the importance of comprehensive subordination of lenders’ rights to proceeds, including insurance and condemnation proceeds arising from extinguishments of easements or other partial interests. This also applies to 1) all other liens and 2) where the grantor is not seeking a federal tax deduction. Land trusts must obtain clear title and a first priority position in all conservation holdings in order to ensure the land trust’s continued legal right to monitor, enforce and defend its conservation interest. Such subordinations are especially important to establish land trusts’ first priority rights to proceeds after conservation easement terminations and extinguishments (including condemnations) and to show compliance with T.R. 1.170A-14(g)(2) and T.R. 1.170A-14(g)(6).

The Tax Court has decided several important cases pertaining to subordinations. In particular, the history of Kaufman v. Commissioner is important (and complex), because the First Circuit Court of Appeals disagreed with the IRS and the Tax Court about the necessary scope of lenders’ subordination agreements, requiring less stringency in Kaufman v. Commissioner, 687 F.3d 21 (1st Cir. 2012) (Kaufman III). That First Circuit decision recognized the difficulties landowners have in requiring lenders to agree to an absolute proceeds priority in favor of the land trust on easement termination, and accordingly, thought that a strict interpretation of T.R. 1.170A-14(g)(6) requiring such “absolute priority” did not reflect congressional intent.

The Tax Court disagrees, however, and does not follow the decision in Kaufman III anywhere outside of the First Circuit (Maine, New Hampshire, Massachusetts Rhode Island, and Puerto Rico). See, e.g., Palmolive Building Investors, LLC, v. Commissioner, 149 T.C. 380 (2017) (declining to follow First Circuit decision in Kaufman in other federal circuits); 901 South Broadway Limited Partnership v. Commissioner, U.S.T.C. No. 14179-17 (unpublished Order, Apr. 27, 2021). The IRS also insists that if the property has a mortgage or lien in effect at the time the easement is recorded, the easement contribution is not deductible unless the mortgagee or
lien holder subordinates its rights in the property to the rights of the land trust to enforce the conservation purposes of the easement in perpetuity. (See IRS’ Conservation Easement Audit Technique Guide.)

Recording
The Tax Court and the IRS also require recording of subordination agreements before or contemporaneously with the recording of the conservation easement. The Alliance recommends recording the subordination prior to the conservation easement even if you record all documents simultaneously and obtain a time stamped copy of each.

Even if the conservation easement is purchased or exacted, the land trust still must obtain and record lien subordinations with all conservation easements to assure that the conservation easement will be protected in perpetuity. Substantial compliance does not apply to failure to properly subordinate. See, Mitchell v. Commissioner, 775 F.3d 1243 (10th Cir. 2015)(Mitchell III), affirming 138 T.C. No. 16 (U.S.T.C. 2012)(Mitchell I); T.C. Memo. 2013- 204 (U.S.T.C. 2013)(Mitchell II); Minnick v. Commissioner, 775 F.3d 1243 (9th Cir. 2015)(Minnick, aff'g T.C. Memo 2012-345 (U.S.T.C. 2012).

Points to Consider in All Subordination Agreements:
1. Identify the purpose for the subordination (also known as a lender agreement), particularly the intention to comply with the perpetuity requirements of the Tax Code and Treasury Regulations for donated easements and for the land trust’s compliance with its mission and Section 501(c)(3) requirements.
2. Include an affirmative agreement that the lender is subordinating its rights in the property to the rights of the land trust to enforce the easement in perpetuity, not merely consenting.
3. Include a lender acknowledgement of the property right vested in the land trust and an express agreement that any exercise of the lender’s rights in the property may not diminish or affect the conservation rights of the land trust as stated in the conservation easement.
4. Include an acknowledgement that upon termination, extinguishment, or condemnation of the conservation easement, in whole or in part, that the lender shall not have a priority claim over the right of the land trust to receive any insurance payments, condemnation awards, or other proceeds paid upon, or subsequent to, judicial extinguishment of the conservation easement.
5. In the event of a foreclosure after a judicial extinguishment, protect the priority interest of a land trust’s lien to secure its right to subsequent property sale proceeds before payment is made to lenders to satisfy their interests in the property.
6. Include a statement that the lender agreement should be interpreted for purposes of qualifying the easement as a Qualified Conservation Contribution under section 170(h).
7. Watch out for lenders insisting on limitations on land trusts’ right to obtain or charge the landowner or other responsible parties for restoration or mitigation of easement violations, including the lenders themselves if they are in possession of the property after foreclosure and are responsible for the violation.
8. Develop relationships with local lenders rather than the large national lenders. Educate local lenders.
9. Record the subordination before the conservation easement. Be prepared for IRS objections if they find a tardy subordination on audit.
Clause Suggestions for the Lender Agreement
(See Land Trust Standards and Practices 9F for more sample language for mortgage subordination agreements and statements available on The Learning Center):

1. Mortgagee hereby acknowledges that the Easement vests in Donee a real property interest in the Property and the right to receive a proportionate share of any proceeds of a sale, exchange or involuntary conversion subsequent to an extinguishment of the Easement or condemnation as provided in paragraph ______ of the Easement. Lender agrees that extinguishment proceeds, casualty insurance proceeds, and condemnation proceeds shall be divided as and when received so that Donee receives its full proportionate share, before any other claims are paid or satisfied.

2. Section 1.170A-14(g)(2) of the Treasury Regulations requires that, in order for the Mortgagor’s donation of the Easement to be treated as a “qualified conservation contribution,” the mortgagee of any mortgage outstanding on property subject to such a donation must agree to subordinate its rights in the property to the right of the qualified organization to enforce the conservation purposes of the donation in perpetuity. The Mortgagor has asked that the Mortgagee subordinate its rights in the Property to the Easement in order to comply with these regulatory requirements, and to insure that the Easement will, in fact, protect the Property in perpetuity, as required by Section 170(h)(5) of the federal Income Tax Code and Treasury Regulations 1.170A-14(g)(2) and 1.170A-14(g)(6).

3. Mortgagee does hereby subordinate its rights to the rights of the ________[Trust] to the Easement and the right of the ________[Trust] to enforce the conservation purposes, as set forth in the easement, in perpetuity. No sale of the Property by Mortgagee, or by, through or under the powers vested in Mortgagee pursuant to the Mortgage, shall occur except under and subject to the Easement. In the event of foreclosure or deed in lieu of foreclosure, the Easement may not be extinguished and must remain in full force and effect.

4. Lender hereby agrees that the sale or transfer of the Property pursuant to a foreclosure, condemnation, or any proceeding or settlement in lieu thereof shall not extinguish any lien to secure Donee’s entitlement to its proportionate share of extinguishment proceeds as provided in paragraph ____ of the Easement.

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