



Contract Guidance for TU Chapters and Councils

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**I.
Introduction.**

Our chapters and councils routinely enter into agreements with governmental agencies and private parties to further Trout Unlimited's mission to conserve, protect, and restore North America's coldwater fisheries and their watersheds. Those agreements cover a wide range of activities, from stream-improvement projects, to arrangements for access to streams for fishing or conservation, to youth camps, to room rentals for banquets and other events.

Many of these agreements involve risk for the chapter or council and for the national organization. The purpose of this guidance document is to alert chapter and council leaders to those risks, to suggest ways for chapters and councils to structure agreements to minimize those risks, and to require that TU's national staff approve certain kinds of agreements.

In this document, the words "agreement" and "contract" are used interchangeably.

**II.
Required Reviews and Getting Help.**

In TU, there is a wide range of sophistication among our chapters and councils. Some are very sophisticated, routinely consult lawyers on their contracts, and are quite capable of taking on complex projects. Others are not. The first rule is to "Know Yourself." Each chapter and council should be aware of what it can and cannot successfully undertake without help.

If at all possible, a lawyer skilled in that kind of contract should review every proposed contract of any complexity. The lawyer can be someone retained by the chapter or council or one of the volunteer lawyers working with the Volunteer Operations staff. Lawyers retained by a chapter or council to review proposed contracts should be familiar with and follow the guidelines set out in this document.

The Volunteer Operations staff routinely reviews proposed contracts for chapters and councils. That review process has resulted in several chapters avoiding overreaching contractual language that would have imposed inappropriate liabilities on the chapters. Chapters and councils should take advantage of the knowledge of the staff and send proposed contracts to the Vice President of Volunteer Operations for advice and review.

Certain kinds of contracts present significant risk to the involved chapter and council and to the whole organization. The Volunteer Operations staff must review those contracts before a chapter or council may sign them even if a lawyer representing the chapter or council has reviewed them. Those kinds of contracts are:

1. Any proposed contract under which a chapter or council agrees to indemnify anyone unless the proposed indemnification language limits the indemnification obligations to the acts and omissions of the chapter or council that are covered by TU's insurance. Appropriate indemnification language is set out below in Section V B 6.
2. Any proposed contract involving the removal or repair of any dam, any work on abandoned mines, and any work on possibly polluted sites. As discussed below in Section IV, such projects involve very high risk.
3. Any proposed contract with a federal agency when the amount of the contract is \$100,000 or more. Federal procurement rules become very strict and technical for contracts of \$100,000 or more, and TU's staff is knowledgeable about those requirements.
4. Any proposed contract with a state agency. State agencies also have technical procurement rules, and contracts proposed by state agencies frequently have overreaching indemnification provisions.
5. Any proposed contract involving a public road or highway or involving a railroad right of way.

Volunteer Operations staff will work with chapters and councils to minimize the burden of the required review of these kinds of contracts. Contract forms that have been reviewed and approved for one project, for example, may be used for other projects without further review. Also, Volunteer Operations staff may exempt from this review process proposed contracts of chapters and councils that have established their own appropriate legal review of contracts and that follow the guidelines in this document.

Any proposed contract to be reviewed by the national staff should be sent to the Vice President of Volunteer Operations. Volunteer Operations staff shall review proposed contracts as soon as possible but no later than within two weeks of the staff's receiving them. It is best, of course, to get proposed contracts to the Vice President as early as possible.

III. Existing TU Policies.

TU has existing documents addressing some of the major risks that agreements present for TU. They are available in the "Important TU Policies" section of the "Tackle Box" on TU's webpage and include the following:

- The "Trout Unlimited Policy on the Ownership of Interests in Real Property" and the "Resolution Concerning Ownership of Real Property in Fee." These documents establish procedures that must be followed by any part of TU before interests in real property can be acquired. Interests in real property include easements, access agreements (other than those for recreational fishing), office leases, and rental agreements of longer than one year's duration. Among other provisions, these documents require that the Executive Committee of the Board of Trustees must approve the acquisition or retention by any part of TU (including chapters and councils) of any real property.
- The "Policy on the Ownership of Access Rights for Recreational Fishing." This document establishes procedures that must be followed by any part of TU before entering into agreements for access for recreational fishing.
- The "Resolution Concerning the Prohibition of Holding Interests in Conservation Easements." This document provides that no part of TU shall hold conservation easements or similar restrictions on the development of real property and that any such restrictions currently held by any part of TU must be transferred to another entity as soon as possible. Two other documents, both in the "Conservation Resources" section of the "Tackle Box," address how TU, chapters and councils can work with land trusts to protect land from development without the TU entity itself holding the conservation easement.
- The "Business Practices" section of the "Tackle Box" contains other documents addressing risk management issues, including the "Leadership Manual" and the "Risk Management FAQ."

Chapter and council leaders should be familiar with each of these documents.

IV. TU's Liability Insurance

TU has liability insurance that covers all parts of the organization, TU staff and TU volunteers. This insurance is more fully described in the "Leadership Manual" and in the "Risk Management FAQ" in the "Business Practices" section of the "Tackle Box." Generally, this liability insurance provides coverage for property damage and bodily injury caused by the negligence of TU, its chapters and councils, its staff and its volunteers.

If a chapter enters into a contract that requires it to do certain things or to meet certain standards of performance, the chapter is legally required to fulfill those obligations. If the chapter fails to do so, insurance coverage for that breach of contract may not be available. For this reason, chapters and councils need to be careful not to assume contractual obligations that they may not be able to meet.

TU does not carry professional liability insurance for chapters and councils. This means that, depending on the facts of the particular situation, chapters and councils may not have insurance coverage for any damage caused by errors in judgment (also called professional negligence) in connection with the design and construction of projects. Chapters and councils should not take on the role of engineers or other design specialists or the role of construction contractors.

Liability insurance policies contain an exclusion from coverage, with some exceptions, for damages caused by pollution. As stated above, chapters and councils must not undertake any work on dam removal or dam repair, abandoned mine reclamation, or other projects at potentially polluted sites without thoroughly discussing the proposed work with TU national staff and without obtaining national staff approval. In some situations, it may be possible to obtain additional insurance for that work, but that insurance--if obtainable--is expensive. In addition, any work on polluted sites (even very little work) could make the chapter or council liable under some federal and state environmental laws for pollution that was present on the site before the chapter or council had any involvement with the site. Most professional contractors that do this sort of work, however, have adequate insurance that can cover most or all of the work done on a project.

V. General Principles for Minimizing Risk in Stream-Improvement And Other Construction Contracts.

A. Avoid Being a Contracting Party If At All Possible.

It is important for chapters and councils to receive credit for their conservation efforts. That desire for proper credit, however, should not lead chapters and councils into contractual arrangements when other entities are more appropriate to be the contracting party.

Chapters are frequently asked by governmental agencies, landowners, or other entities to take on major responsibilities for stream restoration projects, and the chapter becomes the party responsible for hiring the engineer and the contractor and, sometimes, for the quality of the work of that engineer and contractor. Most chapters are not equipped to take on that responsibility, and a chapter that does so may be liable for the failure of the engineer or contractor to perform properly. Instead of taking on these obligations, the chapter should, where possible, help facilitate the project without itself being the contracting party. In that way, the project can get done without the chapter's taking on unnecessary--and perhaps uninsured--liability. The funding agency or other entity can in many circumstances contract directly with the engineer or contractor. The chapter then would not be liable for the contractor's and engineer's mistakes.

Chapters and councils must never be a contracting party on any dam removal or dam repair project or any other project at a potentially polluted site (such as an abandoned mine) without first reviewing the project with national staff and obtaining national staff approval. The liability risks are simply too great.

B. Minimize Risk If the Chapter Or Council Is the Contracting Party.

If a chapter or council does take on responsibility for stream restoration or other construction-related projects, it should take the following steps to minimize risk. If the chapter or council has responsibility for hiring contractors or engineers, it is critical that the chapter hire good contractors and engineers that will do the job right and that have the right insurance to cover the project if there are any problems.

1. Make Sure That Any Contract Is Carefully Tailored To The Role The Chapter Has In the Project.

In some instances when TU receives money for a stream restoration project, the party paying the money (which may be a governmental agency, a business, or a landowner) provides TU with the same form of agreement that the party uses when hiring a contractor. These contracts typically include broad indemnification provisions making the contractor responsible for any injuries, property damage, or other liability arising from the project, regardless of whose fault those liabilities might be. Although contractors typically carry insurance covering these indemnification provisions, TU's liability policy has limitations on coverage when a chapter or council agrees to be responsible for the liabilities of a contractual party.

TU is not a set up as a contracting business, does not have a contractor's license, and does not have the same kind of insurance that most contractors do. TU chapters and councils should not sign agreements designed for general contractors or other professional service providers. Chapters should strive to sign agreements tailored to their role in a project and arrange for appropriate contracts for businesses hired to perform the project work. Chapters and councils must not sign any agreement with indemnification language without the approval of TU's volunteer operations staff, unless that language limits the liability of the chapter or council to claims covered by TU's insurance.

2. Obtain All Required Permits and Permissions.

Before beginning work on projects, chapters and councils should make sure that they or the other entities with which they are working have obtained all required governmental permits. Most jurisdictions require assorted permits, followed by site inspections. Even if the contract documents make an engineer or contractor responsible for obtaining necessary permits, the chapter or council should make sure that the engineer or contractor complies with those obligations.

Permissions from landowners to work on or to cross their land should always be in writing and should specify in detail what the terms of access are and what work will be done on the property. The permissions should make clear what the chapter or council is responsible for doing, the way access is to be achieved, whether heavy equipment is to be used and how it is to cross the property, which persons or entities will have access to the property, and what the landowners' responsibilities to the chapter or council are. A contract with any project designer, engineer, or construction firm should make clear which entity is responsible for obtaining needed

permits and complying with them. The chapter or council should make sure that it fully complies with all permits and permissions, even if under the contracts the engineering firm or another party is responsible for such compliance.

A chapter or council should make sure where the landowner's property boundaries are before beginning work on the property. If the property boundaries are uncertain and the neighboring landowner does not agree in writing to have work done on his land, the chapter or council should have the boundaries surveyed.

3. Do Not Take on Continuing Maintenance or Monitoring Obligations.

A chapter or council should not take on obligations to maintain projects or to monitor their effectiveness after their construction. These obligations should be handled by an agency or other entity with adequate staff. Volunteer leaders move on from their TU involvement, and many chapters and councils cycle through periods of strong activity and dormancy. A chapter could face serious liability if, for example, it agrees to maintain an in-stream structure, does not do so, and the structure fails, causing bodily injury or property damage. Most chapters and councils are not equipped to meet obligations that continue over several years.

4. Use Licensed and Insured Contractors and Engineers.

If a chapter or council does take on responsibility for stream improvement or other constructions projects, it should not design or implement any but the most basic projects. Chapters and councils are not contractors or engineers. Traditional volunteer-led stream restoration activities, such as planting trees and conducting minor in-stream improvements can, of course, be done without hiring a contractor or an engineer, but that is not so for any significant stream restoration project. Any project that involves significant bank stabilization, the construction of major in-stream structures, or the use of heavy equipment must be designed by engineers or other professional design experts and must be implemented by professional contractors.

When TU uses engineers or contractors, it should make sure that they are capable and that they are licensed to do the work. Have engineers and contractors produce written verification that their licenses are current and that they are in good standing with the state licensing agency and verify the engineers' and contractors' status directly with the state licensing agency. Find out whether engineers and contractors have been involved in litigation about their work.

Make sure that engineers and contractors have adequate insurance. The insurance should cover the failure of the engineer or contractor to properly perform the obligations he or she has agreed to undertake and to cover his or her acts and omissions relating to the project, and the insurance should be in an amount appropriate to the risks of the project.

5. All Construction-Related Contracts Should Be In Writing and Should Have Provisions that Protect the Chapter or Council.

Any agreement with an engineer, a contractor, or any other party should be in writing with the complete rights and obligations of each party clearly set out. Negotiating and writing design and construction contracts require legal skill, and such agreements (while still in early-draft form) should be sent to the Volunteer Operations staff for review unless the chapter or council uses legal counsel skilled in such work for that review. As indicated in Section II above, some kinds of proposed contracts require review and approval of the national staff even if the chapter or council uses its own legal counsel to prepare or negotiate the proposed contract.

Agreements between engineers and contractors, on the one hand, and chapters and councils, on the other, should have standard provisions that protect the chapters and councils. Those provisions include:

- a) The engineer's and contractor's agreement to carry insurance covering the work to be performed in an amount sufficient for the risks of the project.
- b) The engineer's and contractor's agreement to provide copies of their insurance policies to the chapter or council and a provision that the chapter or council has the right to review and approve those policies before the project may proceed.
- c) The engineer's and contractor's agreement to add the chapter or council, its staff, its volunteers, and TU national as additional insureds on the engineer's and contractor's insurance policies covering work on the project. Being an additional insured under the engineer's and contractor's insurance creates obligations from the insurers directly to the chapter or council. This relationship is especially important if the engineer and contractor do not have adequate resources to pay claims arising out of their work, which is frequently the case.
- d) Language in the agreements under which the engineer and contractor indemnify the chapter, council, and TU national from damages resulting from any acts or omissions of the engineer and contractor. "Indemnification" is the legal term for an agreement by one party to a contract to pay for damages or losses incurred by another party arising out of the contract. Below is a sample form of indemnification agreement a chapter or council could use:
 - i. To the extent permitted by applicable law, Engineer [or Contractor] shall indemnify, defend, and hold harmless the _____ Chapter, the _____ Council, Trout Unlimited, a Michigan corporation, and all of their officers, employees, directors, trustees and volunteers from and against any and all claims, lawsuits, demands, damages, judgments, awards, interest, attorneys' fees, costs and other expenses of any kind arising out of the failure, in whole or in part, of the Engineer [or Contractor] to perform properly any of

the terms and conditions of this agreement. Engineer [or Contractor] shall on request and at its own expense defend any action, suit or proceeding against the _____ Chapter, the _____ Council, Trout Unlimited, a Michigan corporation, and any of their officers, employees, directors, trustees and volunteers arising under this agreement and based in whole or in part on the failure of the Engineer [or Contractor] to perform properly any of the terms and conditions of this agreement.

- e) The engineer's and contractor's agreement to comply with all applicable laws, rules, regulations, ordinances, and requirements of any governmental authority relating to the work to be done under the contract.

A chapter or council that obtains these commitments in agreements with an engineer and a contractor should make sure that the engineer and contractor complies with them. It does no good to have a contractor agree to include a chapter as an additional insured on insurance policies, for example, if he or she does not do so or if the insurance policies do not cover--or do not cover adequately--the contractor's work on the project. It is up to the chapter or council to follow up on the engineer's and contractor's commitments to make sure they are fulfilled.

A chapter or council should be sure to keep in a safe place all documents relating to the project, including any bid documents, contracts, permits, licenses for engineers and contractors, e-mails, correspondence, and notes of telephone conversations. Those documents can be of crucial importance if a dispute arises.

6. Do Not Sign Agreements With Overreaching Indemnity Provisions.

With increasing frequency, chapters and councils are being asked to sign agreements under which they indemnify the parties with which they are working from any damages or other losses those parties may suffer in connection with the agreements. Many of those provisions are overreaching and impose significant potential liabilities on chapters and councils. Chapters and councils are seeing these overreaching indemnification provisions in proposed agreements with landowners, with funding agencies, and with other parties involved in stream restoration and other projects.

Unlike a contractor or engineer, a chapter or council is, in most cases, not the party on the ground actually designing the project or implementing it. The chapter or council is often only the party that facilitates a project by, for example, bringing a landowner, a funder, an engineer and a contractor together. While it is appropriate for engineers and contractors (which have professional design and construction skills and insurance to cover their work) to provide broad indemnification agreements to the parties with which they are working, it is not appropriate for chapters and councils to do so. This is especially so when, as is often the case, the chapter or council is involved in the contractual chain primarily to accommodate the procurement requirements of an agency or other entity.

If at all possible, chapters and councils should not agree to indemnify anyone.

Contractual indemnification provisions increase the liabilities that the chapter or council would otherwise have under the law. If on a critical project the parties with which a chapter or council is working insist that the chapter or council provide some indemnification, that indemnification should be limited to indemnification for the chapter or council's own acts and omissions and should not cover anyone else's acts or omissions. While TU's liability insurance has limited coverage for the assumption of the tort liabilities of a contractual party, there are restrictions on that coverage. If a project partner insists that a chapter or council indemnify the partner for claims arising out of the partner's own fault or the fault of anyone else except the chapter or council, the chapter or council must have the proposed agreement reviewed and approved by TU's Vice President of Volunteer Operations.

Below are examples of overreaching indemnification language proposed by entities working with chapters and appropriately worded indemnification language proposed by TU.

Example 1.

Objectionable Language Proposed by Other Party:

Chapter shall defend, indemnify, and hold Landowner harmless from and against any and all claims, demands, actions, suits, damages, liability, loss, costs, and expense, including reasonable attorneys' fees or costs of enforcing this indemnity, which may be brought against, suffered, or incurred by Landowner resulting from, arising from, or in connection with the performance by Chapter, its Agents, or any person or entity other than Landowner, of the work contemplated by this Agreement or the breach by Chapter of this Agreement, except to the extent resulting from intentional misconduct or willful violation of law by Landowner.

This proposed provision is objectionable because it would make the chapter liable for damages to the landowner caused, not only by the chapter, but also by anybody else.

Appropriate Indemnification Language Proposed by Chapter:

To the extent permitted by applicable law, Chapter shall defend, indemnify, and hold Landowner harmless, solely to the extent of Chapter's insurance, from and against any and all claims, suits, damages, liability, loss, and costs, which may be brought against or suffered by Landowner arising from any bodily injury or property damage caused by the acts or omissions of Chapter, its employees, or its volunteers in connection with work done pursuant to this agreement. This indemnification does not cover any claims resulting from the acts or omissions of any of the contractors or subcontractors identified by Chapter. All such contractors and subcontractors shall separately execute indemnity agreements that are acceptable to Landowner covering their activities.

The chapter's proposed language limits the chapter's liability to bodily injury and property damage caused by its own acts and omissions and to the extent of its insurance. In this situation, the chapter was unable to reach agreement on the indemnification language, but the project proceeded with other parties.

Example 2.

Objectionable Language Proposed By Other Party:

To the fullest extent permitted under applicable law, the Chapter shall, through its subcontractor, indemnify and save harmless the State and the Department from and against all actions, liability, claims, suits, damages, cost or expenses of any kind which may be brought or made against the State or the Department arising out of or as a result of this Agreement. To the fullest extent permitted by law, the Chapter is responsible for all damage to life and property due to its activities, or those of its agents, employees, sub-grantees, or sub-contractors, arising out of or in connection with its performance under this Agreement until all services under this Agreement are declared accepted by the Department.

This proposed language is objectionable because it imposes liability on the chapter, not only for damages caused by the chapter itself, but also for any claims against the state or department arising out of the agreement.

Appropriate Indemnification Language Proposed By Chapter:

To the extent permitted under applicable law, the Chapter shall indemnify and save harmless the State and the Department, solely to the extent of the Chapter's insurance, from and against all actions, liability, claims, suits, damages, cost or expenses of any kind which may be brought or made against the State or the Department arising out of any bodily injury or property damage caused by any acts or omissions of the Chapter or its volunteers or employees committed in connection with the performance of this Grant Agreement. All contractors and subcontractors identified by the Chapter shall separately execute indemnity agreements, acceptable to the State and the Department, covering their work under this grant agreement.

The Chapter's proposed language limits its liability to bodily injury and property damage caused by its own acts and omissions and to the extent of its insurance. In this situation, the state accepted the chapter's proposed language.

Example 3.

Objectionable Language Proposed By Hypothetical Other Party:

Chapter shall defend, indemnify and hold State Parks harmless from all claims, including costs of defense and attorneys' fees, arising in whole or in part from the acts or omissions of Chapter.

This language is objectionable because of the "whole or in part" clause, which has the effect of making the chapter wholly responsible for any claims against the agency even if the chapter were only minimally responsible for the problem giving rise to the claim. The language also does not limit the indemnification provision to claims arising out of the contract.

Appropriate Indemnification Language Proposed by Hypothetical Chapter:

To the extent permitted by applicable law, Chapter shall defend, indemnify and hold State Parks harmless, solely to the extent of Chapter's insurance, from all claims, including costs of defense and attorneys' fees, arising from any bodily injury or property damage caused by the acts or omissions of Chapter, its employees, or its volunteers in connection with work done pursuant to this agreement.

This example is a hypothetical to emphasize the risks of a chapter's or council's signing an agreement making it fully responsible for damages that might be its responsibility "in whole or part." States have different rules concerning how to apportion fault among parties that are jointly responsible for causing damage. Chapters and councils should avoid taking on liabilities that are not imposed by law. In addition, the chapter-suggested language limits the chapter's liability to "bodily injury or property damage" caused by the chapter's acts and omissions, which are the kinds of damage primarily covered by TU's insurance.

The best practice is for a chapter and council to have every draft agreement that imposes on the chapter or council an indemnification obligation reviewed and approved by TU's Volunteer Operations staff well before the agreement must be signed. As indicated in Section II above, any agreement under which a chapter or council agrees to indemnify another party must be submitted to the Vice President of Volunteer Operations for approval unless the indemnification language follows the appropriate indemnification language set out in the examples above.

VI. General Principles for Minimizing Risk in Other Contracts.

Most of the troublesome contractual issues that confront chapters and councils have arisen in the context of stream-improvement and other construction-related contracts, but the principles outlined above also apply to other contracts that chapters and councils negotiate.

All contracts that chapters and councils enter into should be in writing and should clearly set out the rights and responsibilities of each of the parties to the contract. Having a clearly written contract is the best way to avoid contractual disputes. If disputes do arise, a written contract helps assure that a court will correctly interpret the intent of the parties when the contract was entered into.

Chapters and councils renting sites for youth camps have been asked to sign agreements with overreaching indemnification provisions. As in construction-

related contracts, chapters and councils should avoid indemnifying anyone if at all possible. If that is not possible, they must not agree to indemnify another party without the approval of the national staff unless the indemnification provision is limited to claims covered by TU's insurance.

Chapters and councils should also be aware of the risks involved in leasing real property. Agreements to rent a room for a banquet do not usually raise risk management issues, but agreements to lease office space or other commercial space can. Frequently, such agreements impose on the chapter or council an obligation to make tenant improvements, which can be expensive. For these reasons, the "Trout Unlimited Policy on the Ownership of Interests in Real Property," discussed above, provides that TU's staff must review and approve any office-lease agreement that imposes on the chapter or council an obligation to make tenant improvements that require a building permit. That policy also requires that the Executive Committee of the Board of Trustees must approve the acquisition or retention by any part of TU (including chapters and councils) of any real property. Chapter and council leaders should be familiar with that policy and with the other policies and documents listed at the beginning of this document.

VII. Conclusion.

The heart of Trout Unlimited is the work that its chapters and councils do on the ground in stream-restoration projects, organizing activities, and advocacy. Anything that anyone does involves risk, and the purpose of this document is not to discourage any of the great projects that chapters and councils routinely undertake. However, being aware, ahead of time, of the legal risks that a particular project or agreement involves allows chapters and councils to take appropriate action to minimize risk and still get the project done.