

# Conquering

the Filing Cabinet **Demons** Good Records Save the Day ... and Conservation Easement Permanence

**FOR ASPEN VALLEY LAND TRUST**, one letter tucked in its files saved the day. When the owner of an 1,100-acre Colorado conserved property wanted to divide and sell part of the land, the land trust objected. The parties had established a conservation easement in two phases in 2006 and 2007 with a 'no subdivision' clause, and the land trust sent the landowner a letter in October 2007 specifying that the easement phases would be merged into one and that the land could not be divided.

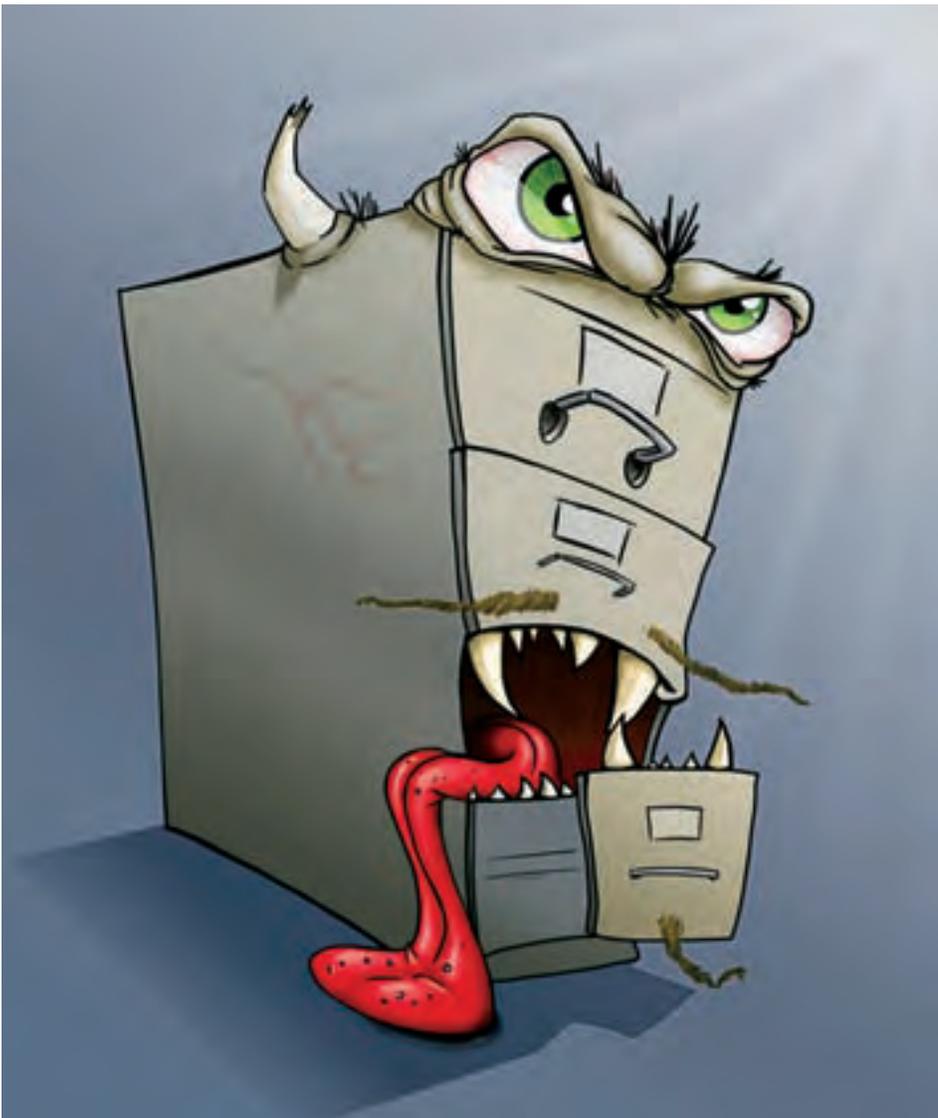
**A**lthough the easement stated that no subdivision would occur on the entire property, the landowner claimed that had not been his intention. "He told us he had no idea the phases were being merged and that that was not his intention, so having that little letter was very handy," says Associate Director Suzanne Stephens.

Aspen Valley Land Trust staff sent the landowner a copy of the original letter and the argument was settled. The moral of the story? The right document at the right time may not only sway or win a legal dispute, it could also prevent one.

## The Monster in the Cabinet

Your filing cabinet can be your greatest ally, but some of us find demons lurking there. Maybe it's a drawer into which you simply can't squeeze another file. Maybe it's a file naming system that's just not intuitive, especially for a new employee or volunteer. Maybe it's an uneasy feeling that if the office floods tomorrow, your land trust would be in more than deep water.

If any of this sounds familiar, it's time to face your filing cabinets, rethink your record-keeping system and get it working *for* you.



Your conservation work can only be as successful as your records, and it will only stand the test of time if it's backed by an efficient and effective recordkeeping policy and system.

Where to start? *Land Trust Standards and Practices* note the importance of records. Practice 2D directs land trusts to adopt a written records policy that governs how organization and transaction records are created, collected, retained, stored and disposed.

In addition to a records policy, many organizations have corresponding records archiving checklists. Your recordkeeping policy and related checklists should be informed by a number of factors. Charitable organizations must generate and keep many records ranging from bylaws and articles of incorporation to financial records showing that the organization has a broad base of support to qualify as a tax-exempt public charity. [See *Nonprofit Law and Recordkeeping for Land Trusts: Volumes 1 and 2*, by Jane Prohaska, part of the Land Trust Alliance's Standards and Practices Curriculum, [www.lta.org/publications](http://www.lta.org/publications).]

Your records policy and related checklists should identify the transaction documents your organization considers essential. Practice 9G of *Land Trust Standards and Practices* specifies that land trusts should keep originals of all irreplaceable documents essential to the defense of each transaction (such as legal agreements, critical correspondence and appraisals) in one location, and copies in a separate location. The Land Trust Accreditation Commission's *Guidance Document* on Indicator Practice 9G has specific requirements for which documents should be considered essential under this practice [See [www.landtrustaccreditation.org](http://www.landtrustaccreditation.org) for this and other *Guidance Documents*].

You should also consider what information your organization needs to meet federal reporting requirements. In 2006, the Internal Revenue Service began requiring additional information from organizations that hold conservation easements. [See instructions for Schedule A of IRS Form 990 for more information.] Reporting requirements include:

- The number, location and acreage of easements held at the beginning of the year and acquired during the year;
- The number and acreage of any easements modified, sold, transferred, released or terminated during the year;

- The number and acreage of easements monitored during the year, and time and expenses related to monitoring and enforcement;
- Annual expenses and the amount of staff and volunteer time spent on monitoring, inspecting and enforcing conservation easements;
- The number of easements on buildings or structures, related to golf courses, or acquired as part of certain conservation buyer transactions.

### Records as Legal Evidence

One very important reason for sufficient records of land transactions is to be able to legally defend the conservation values your land trust has labored to protect. For a record to be both admissible and credible in court, it must pass certain tests.

The *Federal Rules of Evidence* governs the introduction of evidence in federal court and serves as a model for many state courts. These rules generally say that written material falls into the category of "hearsay"—something that cannot be directly attributed to an available witness, and is therefore generally not allowed as evidence. The rules do, however, make an exception for public records (an additional reason to register conservation easements under the public deed and title records). *Federal Rules of Evidence* also makes an exception for business records such as "a memorandum, report, record, or data compilation...*kept in the course of a regularly conducted business activity.*"

Ideally the person who wrote a document or snapped a photo would testify in court to its authenticity, explains Jessica Jay, founding partner of Conservation Law, P.C., in Colorado. In the future, when those persons are no longer available to testify, "we would want to produce credible testimony from the person who manages the land trust's recordkeeping and documents as to the recordkeeping system, and its trustworthiness and integrity as a system and process," Jay says. "For this reason, it is important for land trusts to have a recordkeeping policy and corresponding system in place, and to follow it!"

Leslie Ratley-Beach, attorney and conservation defense director for the Land Trust Alliance, emphasizes the

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importance of speaking to an experienced litigator—an attorney who specializes in representing clients at legal hearings and court trials—for guidance on record-keeping practices. Because state laws vary, it's important to find an attorney in your state, she adds.

An experienced litigator will be able to advise on how best to keep records so they can be admitted as evidence and be credible. Be sure to discuss the most current standards on electronic records in your state. One important principle is that electronic documents serving as duplicates of originals should be mirrors of the original, with signatures and dates, just like their paper counterparts. Too often a land trust considers its unsigned template or draft document “good enough” for the electronic back-up. This will not pass the evidence test.

Timeliness is another key component of a record-keeping system. When developing an electronic stewardship recordkeeping system for The Nature Conservancy's California Field Office in 2003, the organization asked two litigators to examine when judges had decided *not* to admit records because they weren't made in a timely manner. “We wanted to get a sense of the standards of timeliness,” says Lynn Lozier, program director of ConservationTrack®, the software developed from the effort. “We found it was very different in different states.” As your land trust develops internal deadlines for documenting monitoring visits and its other regular recordkeeping, check with a local litigator on the typical timeliness standards for business records in litigation.

### Can You Keep Too Many Records?

With all this emphasis on recordkeeping, can there be such a thing as too much information? Absolutely, says Ratley-Beach. Anything unclear or ambiguous should go through the shredder, she explains. [See her “Risk Management Decision Tree” at [www.lta.org/cd-riskmanagement](http://www.lta.org/cd-riskmanagement).]

“The temptation may be to keep everything ‘just to be safe,’ but keeping too much information may risk unnecessary litigation and expense,” she says. Examples of documents she recommends tossing include scraps of paper with notes, jottings, partial thoughts, cryptic phone or email messages and similar records that are not clear or could be misinterpreted. But, she adds, if litigation is pending or expected, it's illegal to do any file cleaning on the transaction in question. As you develop your records

policy and checklists identifying what to save, you should also work with an experienced attorney to identify what documents you can destroy.

### The Next Disaster

When a pipe burst and flooded Minnesota Land Trust's second-story offices in May 2011, it was a reminder of the importance of backing up records, and storing duplicates offsite, says Minnesota Land Trust Conservation Stewardship Director Anne Murphy. “We lost a lot of our office, and it was totally unexpected,” she says. “A lot of our files were intact, but the things left out on peoples' desks were destroyed. We're very fortunate we have offsite record storage. We can rest assured we have everything backed up and we can re-create our files if necessary.”

When you are in business over many decades, the question is not whether some kind of destructive event will occur, but when, says Lozier, who knows of more than one TNC office damaged by fire during her tenure. Whether duplicates are paper or electronic, off-site data storage is essential. Electronic files can be backed up with two rotating hard drives alternately brought into the office and returned to an off-site location, or by using an online backup system that you have thoroughly vetted for security.

### Can You Trust the Cloud?

In a 2010 article for the American Bar Association's *Information Security and Privacy News*, attorney Scott Blackmer urges businesses to carefully scrutinize Internet- or “cloud”-based data storage systems. In the case of litigation, he notes, “it could become necessary to call for testimony from an employee of the cloud services provider to authenticate data produced from an outsourced application and a shared data storage facility, and to counter any challenges concerning the possibility of lost or altered data. The cloud computing service provider should be able to demonstrate that its procedures for accurately recording transactions, associating them with the author, date, and time, as well as storing the data securely, are consistent, effective, and (if possible) comport with industry standards or common industry practices,” he writes.

Faced with difficulty accessing paper records from remote areas where easements are located and monitored, Lozier worked to develop a Web-based

## Don't know where to start?

If you're thinking of reworking your land trust's records policy and practices, but don't know where to start, here are some ideas for taking it step by step.

First, start an organizational discussion about your land trust's needs and goals. What is working well with your recordkeeping? What could you improve upon?

MaryKay O'Donnell, Midwest conservation manager for the Land Trust Alliance, suggests in her recordkeeping workshop to think through the "why, what, when, where, how and who" of recordkeeping: What records are important to keep? What should you discard? How do you want to store them? Who will oversee records and the records policy?

Then consider taking these next steps:

Based on your organizational discussion, write down (or rewrite) your proposed policy and seek organizational input and buy-in.

Once you've settled on a policy, set a realistic timeframe for updating your recordkeeping system, and specify who will do the work and when.

You will probably also want to create a checklist of documents that's more specific than your overarching records policy. The Land Trust Accreditation Commission *Guidance Document* on Practice 9G's list of essential documents is a good place to start.

Speak with an attorney to review your policy, help you decide what to cull from your records, and approve your "essentials" list.

Try out your new/revised system with your newest records, and revise it as needed, then integrate your older records into the system.

Finally, understand that a good recordkeeping system will always be a work in progress. As your organization grows and technologies change, your practices and recordkeeping policy will need tweaking and reinventing over time.

recordkeeping system for TNC's California program. This open-source solution, ConservationTrack®, is available to other organizations, although it typically requires programming adaptations. The Society for the Protection of New Hampshire Forests uses Conserva-

tion Connection™, an integrated relational database application originally designed by the Society and Ewarenow.com, LLC. The customized software runs on Microsoft Access.

## Benefits Abound

While many land trusts consider recordkeeping in light of legal defense and potential litigation, the purpose and benefits of a good records system extend much further. In addition to its legal obligations, land trusts have stewardship responsibilities. Having good records of landowner intent and documentation of conversations regarding stewardship can foster strong long-term relationships. "Recordkeeping is about so much more than legal defense: morality and ethics (Can we live up to the promises we make today—and how do we track those forever promises?), planning, history (institutionalizing memories), communications, public relations, documenting changes, maintaining your nonprofit status and I'm sure a lot of other practical reasons," says the Alliance's Midwest conservation manager, MaryKay O'Donnell.

Records are also what help land conservation transcend the here and now and the knowledge of the staff or volunteer working on a project, making for smoother personnel transitions. Just ask a land trust that has recently made an ally of its records.

By electronically tracking every project from its early acquisition stages, Marin Agricultural Land Trust has institutionalized the acquisition process and stewardship procedures, says Jeff Stump, easement program director. "My goal is if I disappeared tomorrow someone could step in and know exactly where I am on a project."

For the New Jersey Conservation Foundation, which recently went through an overhaul of its system, the effort to review and convert more than 100 project files to digital format led to a more efficient organization, and a higher level of stewardship, says Southern Jersey assistant director Chris Jage: "It's about being able to defend property 50 to 100 years from now." 🍌

Go to [www.lta.org/savingland](http://www.lta.org/savingland) for more information on the vast topic of recordkeeping, including how to name files and where to find resources on recordkeeping. And in the next issue of *Saving Land*, look for "Tales of Records, Redundancy and Renewal: How Three Land Trusts Took on Their Filing Cabinets and Won."

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