

Some Practical Risk Management Steps for Any Land Trust

Ann Taylor Schwing*

I. Perpetual Calendar—Make Sure You Have Time for Reasoned Decisions—Stop trying to remember so much, reduce your stress, and avoid the risk of missing an important date. Every item that you can record onto a perpetual calendar is an item that you don't have to keep alert to and worry about remembering. What goes into a perpetual calendar? Every time-related event your land trust has in its future. The following list is a work in progress and is necessarily incomplete as to specific land trusts and varying state requirements.

Federal filings (plus tickle dates to send to/get from CPA, attorney) www.tax.gov/calendar/

- Form 990 + extension dates (plus add time for board meeting to review)
- Form 8283 + extension dates
- Federal Unemployment Tax Return (FUTA)
- Form 941 Employer's Quarterly Federal Tax Return
- Form 945 Annual Return of Withheld Federal Income Tax
- 1096/1099 Forms for subcontractors, rents, raffle or game winners and others
- Copyright/trademark filings to protect land trust logo, trade name, etc.
- And whatever else your lands trust needs to or must file

State filings (State of principal place of business and incorporation) (add tickle dates)

- Annual report (officers and directors, agent for service of process)
- Tax/financial returns (may be as simple as a copy of the 990)
- Quarterly state employer's tax returns
- Sales tax filings, if any
- Charitable solicitation registration
- Raffle or other fundraising filing if required
- Tax exemption certificate filing (exemption from sales tax or property tax)
- Filings with the State Attorney General as to specific events
- And whatever else your State requires

State Filings (other States) (also add tickle dates as needed)

- Charitable solicitation registration (if engaged in the level triggering required registration, varies from State to State; see <http://www.multistatefiling.org/>)

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- Intrastate business registration (if doing **intrastate** business, instead of **interstate** business) (<http://www.nolo.com/legal-encyclopedia/qualifying-do-business-outside-state-29717.html>)
- Tax exemption certificate filing (exemption from sales tax)
- Anything else?

Local Filings (also add tickle dates as needed)

- Tax payment dates for all forms of local taxes
- Property tax exemption filings if applicable
- Water rights reporting obligations
- Dates to obtain any permits/licenses for events (liquor license, sales permit ...)
- Fictitious business name renewal (if using a name in addition to incorporated name)
- What else?

Routine Items (also add tickle dates as needed)

- Rent, utilities
- Payroll (paychecks, FICA, etc.), other employment filings
- Filing dates for grants and other fundraising and reporting
- Land trust meeting dates for board, committees, staff. • send meeting materials
- Next strategic plan • risk management plan • accreditation renewal
- Update bylaws, board manual, policies, formal delegations of authority
- Board and staff evaluations, committee member evaluations. For paid positions, also salary review
- Recruiting for new board members, term limit dates if any
- Audit preparation and review
- Dates for regional land trust conferences/meetings, Rally
- Newsletter and similar communications (solicit articles, edit, finish, publish)

Fee Lands

- Annual monitoring dates
- Full boundary check as needed depending on state law (4 years in California to avoid adverse possession/prescriptive easement, typically longer in other States)
- Photo update schedule (frequency based on nature of land, activities, changes)
- Tax payment dates (if applicable)
- Insurance payment dates (plus review of adequacy of insurance)
- Recheck property records for issues, slander of title (perhaps every 10 years)
- Preparation of annual work plan (trails, repairs, events, ...), plus four or six month

checks on progress

- Caretaker evaluations
- Tickle reminders to invite search and rescue providers to train on fee lands, to ensure that they and police/fire know access codes or have keys as needed

Conservation Easements

- Annual monitoring dates (reminders to invite owner, thank owner)
- Any deadlines specified in the easement deed
- If any issue is discovered, dates for follow-up, committee and board consideration, next steps, final date within a year for resolution (or calendaring of additional dates)
- Photo update schedule (frequency based on nature of land, activities, changes)
- Dates to recheck property records for any issues (perhaps every 10 years)
- Dates to rerecord CE (perhaps every 30 to 40 years, depending on state Marketable Title Act and on title company routine look-back periods)
- Reminders for communications with CE landowners not related to monitoring
- Dates to review and improve the CE template

Events

- Volunteer appreciation event (calendar a date to plan the event, then the event)
- CE Owner event • Major donor event • Board retreat • Staff retreat
- Preserve or fee land events, picnics, hikes
- Schedule for other land related events (hikes, ice skating party, vernal pool visit, evening owl visit, whatever works on any land)
- Anniversaries of fee and CE donations, for thank you/solicitation letters
- Newsletters and preparation of text, layout, other dates
- Informational events for neighbors of CE lands
- Annual or bi-annual educational events for title company officers, real estate brokers, appraisers, estate planning/tax and real estate attorneys and others appropriate to land trust work
- Tickle reminders to do educational programs for Rotary, Elks, Lions, bar associations and similar groups
- All holidays and days of religious observance plus Mother's and Father's Day and any other days creating conflicts (e.g., high school graduation in the LT town)

II. Financial Risk Management—No organization is entirely safe, but these steps can help.

- Have land trust bank statements and credit card statements mailed direct from the bank to a trusted board member who is not a check signer, and charge this person with the duty to question any expenditure that does not make sense.
- If the land trust has enough staff, have checks prepared by one person, then reviewed and mailed by another. A trusted volunteer (such as a retired financial person) could do the preparation. Having one person do both tasks greatly increases the ease of fraud.
- Have two people open mail and record checks and other funds received each day, stamping checks for deposit only and noting cash on the deposit slip.
- Personnel in sensitive positions should be required to take uninterrupted holidays of sufficient length to test the land trust's ability to cope with unavailability and to detect fraudulent activity. Sadly, thieves are often engaging personable individuals, and no one can believe that sweet Sally or smiling Sam was an embezzler when caught.
- Solicit risk management ideas from the land trust's fidelity insurer (fidelity insurance covers an employer against loss due to dishonesty or nonperformance of an employee).
- For cash events, sales, raffles and the like, be sure two individuals are responsible for receipt and safekeeping of funds, preferably one or both staff. Strongly encourage use of checks in lieu of cash—both for safety and to get names/addresses for future solicitation.
- If necessary to give cash advances to employees or board member for some purpose, have a form or procedure to log out the cash and then log in any cash returned and the receipts or statements of cash spent that should total the amount of cash taken out.
- Change auditors at least periodically.
- Audit committees should meet more than once a year and should work on fiscal management and protection issues as needed.
- Have at least one member of the executive committee be a non-officer, non-checksigner who is charged with the duty of being the eyes and ears for the rest of the board, especially if significant power is delegated to the executive committee.
- Minimize petty cash and use credit cards to ensure a record is created for who spent what.
- Minimize the number of people who know where petty cash, checkbooks and other financial papers are kept. Exercise control over the keys to the drawer or cabinet.

III. Document Drafting—Much can be done to reduce risk in drafting land trust documents. Not all ideas are appropriate for all documents.

- Have one person draft and another/others review. Leave time for thoughtful drafting.
- Recitals. Recitals are critical elements of any important document because they provide factual background, establish public benefit and other facts, set out the intent of the parties, and identify other documents of importance. Recitals are typically numbered or lettered. Parties rarely quibble over the recitals, so a drafter can include significant points that can be helpful if disputes later arise. Judges typically like recitals and rely on them.
- Defined Terms. Many drafters define terms and then fail to use the defined terms unambiguously in the remainder of the document, creating unnecessary ambiguity. At final draft, use word search to locate every defined term and be sure it is used correctly.
- Elastic Clause. After listing the land trust’s rights in a conservation easement (e.g., entry, enforcement), include a version of this clause “Additional Rights—To exercise such additional rights as may be reasonably necessary to effectuate the purposes of this Easement.” This broad clause protects against an unduly restrictive interpretation of the other rights paragraphs and against contingencies not contemplated in drafting.
- Restrictions. The more restrictive or onerous the document, the more important to ensure clarity and to provide protection lest a court deem it too restrictive. Courts are reluctant to enforce severe prohibitions, so self-serving paragraphs that make the grantor’s intent very clear are valuable. Especially with an elderly donor and/or severe restrictions, consider making a videotape of the donor explaining the prohibitions and the reasons for them. Also remember that absolute prohibitions may not account for very real future needs. It may be necessary to hunt a mountain lion that develops a taste for humans.
- Boilerplate. Actually read your boilerplate and tailor it to the document. Address indemnification for general liability and environmental liabilities.
- Use checklists to ensure that all critical terms are included.
- Signatures--Ensure that the signatories have actual authority to sign and authority to encumber the property. Especially with entities and government bodies, check for evidence of full authority and make the individual liable if authority is lacking. One such provision states:

(xx) Representation of Authority of Signatories. Each individual executing this Document/Easement represents and warrants to the other Party that the execution and delivery of this document and all related documents have been duly authorized by the Party for which the individual is signing and that the individual has the legal capacity to execute and deliver this Document/Easement and thereby to bind the Party for which the individual is signing.

IV. Other Risk Management Steps and Ideas

- Careful investigation and documentation of lands projects, including the condition of property as well as its conservation values, detailed baseline documentation, public records search for hazardous conditions (is there an old asbestos mine on site?), property search for potential liabilities (Is there a hazardous waterfall with known trespassers and past injuries?), mitigation of these risks through insurance coverage or in another way, thorough title work analyzed for ownership, severed mineral interests or other divided interests, access, mortgages, options, and so on.
- Preserve documents for future use as needed, with duplicates, and preservation off site.
- Ensure future admissibility of documents to the maximum extent possible. Be conscious of the business records rules in your State and in federal court and prepare documentation to establish satisfaction of those rules so that land trust documents will be admissible in court. One example on baselines follows, but similar rules apply to other documents.

Baseline Authentication and Admissibility

Standards and Practices Practice 11B—Baseline Documentation Report—provides in part, with added emphasis:

For every easement, the land trust has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement.

The federal regulations governing deductions for donated easements, 26 C.F.R. §1.170A-14(g)(5), provide, with added emphasis:

Protection of conservation purpose where taxpayer reserves certain rights—

(i) Documentation. In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. . . . The documentation, including the maps and photographs, must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying “This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer.”

If these requirements are satisfied, **this form of authentication is sufficient for the donor to obtain a tax deduction but not enough to protect the land trust. The land trust needs to ensure that the baseline documentation (and subsequent updates) will be admissible in court if there is an enforcement action. That lawsuit may occur many years later, when everyone involved in the original donation and preparation of the baseline is dead or has disappeared.**

Baseline Reports Are Inadmissible Hearsay. From a court’s perspective, baseline documentation is hearsay. In legal terms, hearsay is an out-of-court statement offered in evidence to prove the truth of the matter stated. Fed.R.Evid. 801(c).¹ A “statement” can be written or oral. Fed.R.Evid. 801(a).

Hearsay is inadmissible absent an exception from the hearsay rule. Fed.R.Evid. 802. The baseline would primarily be offered to prove conditions of the land at a specific time—to prove the truth of facts in the baseline—so the baseline is inadmissible without an adequate showing of facts supporting an exception from the hearsay rule. Three possible exceptions to hearsay might be available in most States.

¹ Citations are to the Federal Rules of Evidence. Many States have adopted these Rules with little or no variation, following the Uniform Rules of Evidence. Links to both Federal and Uniform Rules are at <http://www.law.cornell.edu/rules/fre/index.html> and <http://www.law.cornell.edu/uniform/evidence.html>. Hearsay law is well established and substantially similar throughout the United States. Local counsel should always be consulted for any variations and updates.

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One exception is an admission of a party opponent or an opposing party's statement, which is not hearsay at all because of its probative value and the presence of the party who can refute or explain the statement. If the land trust sues the original donor who signed the baseline as required by the Regs, then the baseline is an admission by the defendant donor, Fed.R.Evid. 801(d), because the Regs require the donor to make a written admission that the baseline is accurate in depicting the property.

This exception is limited because few land trusts have reason to sue the original easement donor. In some States, a court might admit a baseline against a subsequent owner, especially with proof that the subsequent owner saw the baseline before acquiring the land and is reasonably bound by its contents. No one should count on such generosity. The usual requirement when a hearsay statement was not made by the opposing party is that the opposing party must have manifested adoption of the statement or a belief that it was true. Proof that a person bought land and saw the baseline does not prove manifest adoption of the baseline or belief its contents were true. A buyer would have constructive and perhaps actual knowledge of a recorded baseline, but knowledge of its existence or even its contents is not an admission of the truth of the contents. Even if an attorney believed this factual difficulty could be overcome, no case so holds, so a land trust would face the risk and expense of attempting to make new law. As the one offering the evidence, the land trust would have the burden of proof.

Another exception is a present sense impression: a statement describing or explaining an event or condition made while the speaker was perceiving the event or condition or immediately thereafter. Fed.R.Evid. 803(1). If the baseline or other evidence revealed that it was prepared while visiting the land and within a very short time after, a court might accept at least part of the baseline under this exception, but the chances are very slim. Most or all courts require some degree of spontaneity. Years after a baseline is prepared, land trusts are not likely to have proof of the timing and other information sufficient to establish admissibility of the baseline on this theory, even if it could be used (and no existing law meaningfully supports its use).

The principal exception that land trusts will need to use is commonly called the business records exception or, more generally, the exception for records of regularly conducted activity. Fed.R.Evid. 803(6). The technical description of the exception is dense, but each element is important. Under this exception, recognized in all or substantially all States, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business (or nonprofit) activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by proper certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

A baseline is certainly a memorandum, report, record, or data compilation of events, conditions and opinions. The other commonly applied requirements are

- made at or near the time,
- by, or from information transmitted by, a person with knowledge,
- kept in the course of a regularly conducted business (or nonprofit) activity,
- when it was the regular practice of that business (or nonprofit) activity to make the memorandum, report, record, or data compilation,
- as shown by the testimony of the custodian or other qualified witness, or by certification, and
- the source of information or the method or circumstances of preparation do not indicate lack of trustworthiness.

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If all these are satisfied, the baseline is admissible to prove the truth of both (i) the affirmative statements it contains (endangered plant X is located in identified vernal pools) and (ii) the absence of facts on which the baseline is silent when it plainly would have revealed those facts had they been discovered at the property. In other words, the baseline and other land trust documents that satisfy the business records requirement can be admitted to prove the nonoccurrence or nonexistence of a fact, if the fact was the kind of which a memorandum, report, record, or data compilation would regularly be made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. Thus, admission of a well-prepared baseline will provide evidence that there was no second residence on the property, no road or no orchard.

In a perfect world, the baseline authentication itself should address the critical elements of the business records exception and provide factual support as to

- the timing of its creation in relation to the time the information was gathered,
- the identity of the person(s) who created it and/or supplied the information,
- the knowledge and qualifications of the person(s) to collect the information and prepare the report,
- the land trust's regular practice to prepare baselines, and
- the land trust's regularly conducted course of activity to keep and preserve the baselines.

Additional evidence on these points can be supplied by the custodian at the trial, and the custodian will have to establish that the land trust retained and preserved the baseline from its preparation to the date of trial. For example, if baseline authentication shows that Tom Jones prepared it and used information he collected as well as information Mary Smith collected, the custodian may be able to fill in the gaps with testimony that Tom had a college degree in botany and six years experience in land stewardship and other qualifications and that Mary was a surveyor's assistant with training in map making. Of course, if Tom and Mary were summer interns or long departed employees, and there are no records of what they knew or what experience and training they had, then admissibility becomes more difficult. Some courts would admit the baseline and discount its credibility while others would exclude it. The same would be true for problems with proof of the other points required for admission of the baseline. The weaker the showing on any point or overall, the less hope of admissibility exists.

The less detailed the baseline and the more time that has elapsed, the greater the problems the land trust will face in offering the baseline. Proof of the timing may be assisted if photographs have dates or if records can be located showing visits to the property (expense reimbursement records with explanatory notes may help, but these may have been discarded). If employee records have been discarded, it may be impossible to identify the scribbled initials and establish the preparer's qualifications. As staff turns over with time, it may be impossible to prove the land trust's course of activity in earlier years. The issue is not just having a good baseline but also being able to establish that it is good and why. Even if the entire baseline is inadmissible, the photographs may be admissible if someone familiar with the land can be located to identify and authenticate the photographs.

Verification/Notarization of the Baseline Authentication. IRS Regs do not require a "swearing" to the truth of the authentication. Nevertheless, presence of a swearing is likely to enhance admissibility and credibility of the baseline. The gold standard for swearing out of court is an affidavit—with a notary attesting to the identity of the signer and the fact that the signer swore to the truth of the statements. If the land trust does not have a notary on staff, and the donor is in another location, getting notarized signatures can be such a burden that no signatures at all are obtained. A declaration under penalty of perjury is a near equivalent to an affidavit in many States and does not have the nuisance of a notary.

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E.g., 17 U.S.C. §1746; Alaska Stat. §09.63.020; Ariz. R. Civ. P. 80(i); Cal. Code Civ. Proc. §2015.5; Fla. Stat. §92.525; Haw. R. Circuit Cts. Rule 7(g); Ill. Comp. Stat. ch. 735, §5/1-109; Ind. R. Trial P. 11; Iowa Code §622.1; Kan. Stat. §53-601; Mass. Laws ch. 268, §1A; Minn. Stat. §524.1-310; Nev. Stat. §53.045; N.J. Court Rules 1:4-4; Okla. Stat. tit. 12, §426; Or. R. Civ. Proc. 1(E); Pa. R. Civ. P. 76; Tenn. R. Ct. 72; Utah Code §78B-5-705; Va. Code Ann. §8.01-4.3; Wash. Code §9A.72.085; W. Va. Code §39-1-10a; see Uniform Unsworn Foreign Declarations Act, [http://www.uniformlaws.org/Act.aspx?title=Unsworn Foreign Declarations Act \(2008\)](http://www.uniformlaws.org/Act.aspx?title=Unsworn Foreign Declarations Act (2008)). Less weight is given to a simple signature, without the “under penalty of perjury” language that puts the signer at modest risk of criminal charges for perjury.

Recent Status of Authentication in the Land Trust Community. Examples on The Alliance Learning Center, modified to conceal the identity of land trusts and signatories, can be ranked roughly from worst to best. Some examples do not satisfy even Practice 11B and the IRS requirements. Virtually none begin to satisfy the requirements for admissibility under the business records exception to the hearsay rule.

EXAMPLE 1

This report was prepared by (volunteer’s name or names and the name of the staff Project Manager), for the Lost Land Trust, and is an accurate description to the best of (his/her/their) knowledge.

Preparer’s signature

Date

Omission of the donor’s signature would create IRS problems if this was a donated CE, and the omission triggers a violation of the Practice. The signature of the preparer may be illegible so that the person’s identity may be lost over time. There is no indication of qualifications of the preparer, and the closing “to the best of (his/her/their) knowledge” significantly diminishes the credibility of the statement that the baseline is an accurate description. E.g., *America’s Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir.1992); *Dellacava v. Painters Pension Fund of Westchester & Putnam Counties*, 851 F.2d 22, 27 (2d Cir.1988); *Katellaris v. County of Orange*, 92 Cal.App.4th 1211, 1215 (2001); *Roberts v. Davis*, 160 S.W.3d 256, 262-63 & n.1 (Tex. App.-Texarkana 2005). If the baseline itself was beautifully prepared in detail, and if the information was available in land trust records and the memories of those called to testify to fill in the gaps, a court might admit the baseline or portions of it. Admissibility would be enhanced by evidence that the defendant owner had a copy of it. Once the property changes hands once or twice, it may be impossible to prove that subsequent owners had a copy of the baseline.

EXAMPLE 2

In compliance with Section 1.170A-14(g)(5) of the federal tax regulations, this natural resources inventory is an accurate representation of the property at the time of the conservation easement donation.

Donor, [typed name]

Donee, [typed name]
for the Wandering Land Trust

Date

Date

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This example satisfies the IRS Regs and binds the donor as agreeing that the baseline is an accurate representation at the time of the donation. The baseline would definitely be admissible in a lawsuit against the donor. It might be admissible against a subsequent purchaser, but the land trust would have to put on additional evidence that might be unavailable, such as the subsequent owner's knowledge and acceptance of the baseline, the timing of its creation in relation to the time the information was gathered, the identity of those who created it and their knowledge and qualifications. Almost all of the business records requirements would have to be proved independently.

EXAMPLE 3

In compliance with Section 1:170A-14(g)(5) of the federal tax regulations this baseline documentation report is an accurate representation of the property, including its physical features and current uses, at the time of the conservation easement execution.

Document should always be formatted so this statement appears above the signatures

Grantor:

(Type in name of grantor)

Date

STATE OF _____

COUNTY OF _____, ss.

On this _____ day of _____, 200____, before me the undersigned officer, personally appeared _____ known to me (or satisfactorily proven) to be the person(s) described in the foregoing instrument, and acknowledged that she/he/they executed the same for the purposes therein contained. In witness whereof I set my hand and seal.

This form is modestly better as to the grantor, and the acknowledgement creates a presumption that the signature isn't forged. The form would be greatly improved with the addition at the end of the third line: "I declare under penalty of perjury under the laws of ___State___ that the foregoing is true and correct." Without that language, there is no swearing to the truth of the contents. There is no information about the preparer's identity or qualifications or the other information noted above as required for business records, however, and no signature block for the land trust as required by the IRS Regs. Those omissions enhance the problem of admissibility against subsequent owners.

EXAMPLE 4

(Alliance Curriculum: Conservation Easement Drafting and Documentation at 245-46)

Cover Page. The name of the project, date of its completion, names of the parties to the easement and name of the baseline preparer should be clear.

Table of Contents. A listing of all attachments, maps and lists.

Acknowledgment/Certification. This language must satisfy the Treasury Regulations requirements for tax-deductible easements. Sample language you might consider:

This is to certify that I/We _____, as Grantors and I _____, representing _____ Land Trust, the Holder of a conservation easement on land located in _____ known as _____, executed by the parties and recorded in the real property records of _____, are familiar with the condition of the land subject to said

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conservation easement and do acknowledge and certify that this Baseline Documentation Report, and all of its inclusions, is an accurate representation of the condition of the property as of the date of the conservation easement.

The preparer of the baseline should sign the document.

Some land trusts list all of the inclusions by name before the signature line for the acknowledgment, such as:

1. USGS topographic map _____, 15-minute series, showing approximate location of the protected property
2. Color photographs of the property taken _____, 200_ by Land Trust employee _____. Etc.

Some land trusts add a notarization block to the signatures when required by state law, when deemed necessary to authenticate the document and preserve its use in future enforcement actions as an exception to the hearsay rule and when the land trust believes it will help focus landowners on the importance of what they sign. This notary block indicates that the acknowledgment is a sworn statement.

This material from the Alliance Curriculum does not inform land trusts of the advantages presented if the land trust can satisfy the hearsay rule business records exception within the baseline documentation. There is no direction to include information on the qualifications of the preparer, nor is there information directly on when the baseline was prepared (other than before it was signed), or on the land trust's regular practice to make and retain baselines. Although the Curriculum states that the preparer should sign, it does not clearly state that both donor and land trust must sign, although that is implicit. Moreover, references to execution and recordation of the conservation easement appear to reflect that both occurred before the completion of the baseline, contrary to the Treasury Regulations.

EXAMPLE 5

This final example is from the Peninsula Open Space Trust (POST) is a thing of beauty. The Baseline starts with a table of contents and then the following.

Acknowledgements

Baseline Documentation Team:

Sam Smart, Land Stewardship and Acquisition Specialist

Samantha Solid, Land Stewardship Specialist

Zoe Ground, Ph.D, Soil Scientist

Location of the Original Document

The original signed document is stored in a fireproof cabinet located within the Peninsula Open Space Trust office. This original document was placed in this location on _____, 2007 by _____.

Declarations

I. Declarations of Accuracy

This baseline report (consisting of xx pages of text including the table of contents, 4 appendices, 5 maps and 14 pages of photographs) is prepared to document the current status of the Great Ranch Conservation Property to be held by the Peninsula Open Space Trust, a California 501(c)(3), nonprofit organization.

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We declare that, in the preparation of this baseline report, we acted under and fulfilled our duty to gather and record the information contained herein accurately and in the regular course of the business of the Peninsula Open Space Trust. Further, we declare that the information contained herein accurately reflects our personal knowledge gained by our field observations on December 2 through 4, 2006. We declare that the information contained herein was recorded at or near the time that the information was obtained and accurately describes the conditions of the physical features and uses of the Great Ranch Conservation Property.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

Sam Smart

Samantha Solid

Zoe Ground

II. Declaration of Reliance and Certification of Record

Acting as the President of the Peninsula Open Space Trust and as its Custodian of Records, I declare that the Peninsula Open Space Trust adopts, has relied upon, and will rely upon the information contained in this report to describe the condition of the Conservation Property. Further, I certify that the preparation of this document complies with our general procedures for creating and maintaining business records and specifically with our procedures for the creation of baseline reports. This document was created in the regular course of our business for the purpose of managing our conservation easement portfolio.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

Helen Speaker
President, Peninsula Open Space Trust

III. Declaration of Acceptance

I, George F. Donor, as Trustee of the George Y. Donor Trust, am the current owner of the Great Ranch Conservation Property subject to the conservation easement dated December __, 2006, to be conveyed to the Peninsula Open Space Trust and recorded in the official records of _____ County. I have read and independently reviewed this baseline report and declare that this report accurately describes the status of the physical features and uses of the conservation easement area.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December __, 2006.

George F. Donor,
Trustee of the George Y. Donor Revocable Trust

This multipart example covers all elements for the business records exception as well as satisfying Practice 11B and the Treasury Regulations. Although longer, it is no more difficult to complete than the earlier examples, as the several signing individuals can each sign at different times.

Conclusion

The land trust community is far from the goal of baseline authentication that will support ready admissibility of baselines against second and third generation owners. Possible reasons are that Practice 11B and the Treasury Regulations do not affirmatively mandate as much of the hearsay authentication as they might and because there has been so little litigation that the issues of admissibility of evidence have not risen to the forefront in appellate decisions.

Practice 11B requires:

For every easement, the land trust has a baseline documentation report (that includes a baseline map) prepared prior to closing and signed by the landowner at closing. The report documents the important conservation values protected by the easement and the relevant conditions of the property as necessary to monitor and enforce the easement.

The reference to documenting conservation values sufficiently to enforce the easement is normally taken to refer to the quality of the baseline information on the conservation values far more than to the admissibility for enforcement purposes. If land trusts are to fulfill their obligation to protect conservation easements in perpetuity when and as required by law, land trusts need to focus on the future admissibility of their baseline documents.

Bare minimum requirements for baseline authentication:

- A statement clearly referencing the baseline documentation
- Signed by the landowner (preferably under penalty of perjury or notarized)
- Signed by a representative of the land trust
- With the name and qualifications of the preparer
- Stating in substance: "This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer."

Additional contents for baseline authentication enhancing its admissibility would be

- The timing of baseline creation in relation to the time the information was gathered
- The identity of those who participated in its preparation or supplied information, and their qualifications
- The land trust's regular practice to prepare baselines
- The land trust's regularly conducted course of activity to keep and preserve the baselines
- The qualifications of the person who attests to the last two points
- Any other points that would indicate the trustworthiness of the baseline

Some Practical Risk Management Steps for Any Land Trust by Ann Taylor Schwing*

Baseline Documentation After the Fact. Both Practice 11B and the Treasury Regulations require that the baseline report be prepared before the closing. There are cases in which that requirement is not met. The land trust may prepare a current condition report in such a case, applicable to the conditions at the time the report is prepared. Such a report might also be made at the time the property changes hands or at a time when significant changes have occurred on the land that should be documented. If reserved rights have been built out, for example, or a natural disaster has altered the landscape, both land trust and landowner may be benefitted by an updated report. Such a report would not invalidate an earlier one but merely be additive to address the new circumstances.

The following acknowledgement could be signed by a grantor or subsequent owner, creating a baseline as of a date after the creation of the original easement.

ACKNOWLEDGEMENT OF BASELINE DOCUMENTATION

The undersigned, being the grantor/successor under a conservation easement granted to Tardy Valley Land Trust (“TVT”) with respect to land located at _____ (“the Property”), hereby certifies that I have read and independently reviewed this baseline report which includes the “relevant documents” listed below is an accurate representation of the current physical features and uses of the Property and its condition on the date hereof. [I agree that the conditions documented in said baseline documentation do not necessarily represent the conditions of the Property allowed or required by the conservation easement and that TVT in no way waives any rights, either at or in equity, to enforce the provisions of the conservation easement.]

I declare under penalty of perjury under the laws of the State of _____ that the foregoing is true and correct and that this declaration was executed on December __, 2010.

Grantor/Successor

Acknowledged by Tardy Valley Land Trust
By: _____

Relevant Documents:

- Conservation Restriction History, titled _____
- Baseline Inspection Report, dated _____
- Photos (numbered 1 through __, and dated _____)
- Photo Log, dated _____
- Photo Key, dated _____
- Preparer’s Declaration of Accuracy, signed and dated, _____
- Land Trust Custodian’s Declaration of Reliance and Certification of Record