

CONSIDERATIONS FOR CREATION OF TRIBAL LAND TRUST

May 10, 2023

Curtis G. Berkey

Berkey Williams LLP

1. Unincorporated Entity Created Under Tribal Law

An arm of the Tribe could be created pursuant to a resolution of the Tribal Council. It could have the following characteristics:

- As an arm of the Tribe, the entity would most likely qualify under California law to hold conservation easements because Tribes are eligible under State law.
- Completely controlled and managed by the Tribal Council and its board would likely be comprised of Council members and/or Tribe citizens.
- Possesses the Tribe's sovereign immunity from lawsuits, unless expressly waived in writing.
- Funding could come exclusively from the Tribe, but other sources could be sought.
- Depending on the degree of tribal control and integration into governmental functions, it may not qualify for exemptions from otherwise applicable federal or State taxes, although the organization's sovereign immunity may prevent the State from collecting such taxes. (There is no such immunity from federal enforcement of tax obligations).
- Often difficult to distinguish between charitable purposes of an arm of the Tribe and governmental purposes.
- In the public mind, an arm of the Tribe may appear to be indistinguishable from the Tribe itself, and that may hamper fundraising efforts.

- Would not qualify for County real property tax exemptions because the California Board of Equalization will not grant an organizational certificate to an Indian tribe or, most likely, to an arm of the tribe, which is a prerequisite to obtain a County real property tax exemption. (Sovereign immunity may prevent collection of such taxes, however).
- Would qualify for the same exemptions from federal law to which the Tribe is entitled, such as exemptions from Title VII as an “employer” that enable granting of Indian preference without violating federal anti-discrimination laws.
- Would operate solely for the benefit of Tribe members and would not be required to adhere to charitable purposes defined by non-Indian governments and laws.
- Unclear whether an unincorporated entity of the Tribe could apply to have the United States take the land into trust on its or the Tribe’s behalf, but most likely that would be permissible.

2. Incorporated Organization Under Tribal or State Law

A separate organization can be incorporated pursuant to the Tribe’s Corporate Code, or pursuant to a resolution of the Tribal Council, or it can be incorporated pursuant to California law. It would have the following characteristics:

- If the organization has 501(c)(3) status with the IRS, it would also qualify under California law to hold conservation easements. Without that status, its authority under State law to hold a conservation easement would depend on its relationship to the Tribe.
- Without 501(c)(3) status from the IRS, income generated is taxable by the federal and State governments. IRS will grant such status to a corporation organized under tribal laws if it is separate and apart from the tribal government.
- Must be clear distinction between charitable purposes of a separate organization and tribal governmental powers. In fact, the IRS disqualifies tribal organizations that exercise sovereign powers from obtaining 501(c)(3) status.

- IRS test for charitable status requires clear statement of charitable purposes in articles of incorporation, avoidance of exercise of sovereign powers, and dedication of assets to charitable purposes upon dissolution, which can include conveying the assets (the land) to the Tribe.
- To maintain 501(c)(3) status, the organization must, over a five-year rolling average, receive one third (1/3) or more of its financial support from the “public.” If the public support fraction is less than one-third, the organization can still qualify if at least one tenth (1/10) of its support comes from the public and it continues to function like a “public charity.” Government grants are included as public support for purposes of this test, as are grants from private foundations and gifts from private donors. If this support test is not met, the organization becomes a “private operating foundation” for IRS purposes, which has less favorable tax treatment.
- Incorporation under Tribal law, control by the Tribal Council, and wholly funded by the Tribe may entitle the organization to sovereign immunity, although the test for this is hard to meet. Incorporation under California law would make the test even harder to meet.
- With 501(c)(3) status, the organization can obtain an organizational clearance certificate from the California Board of Equalization, which must be obtained in order to apply to the County for real property tax exemption for the land held in conservation status.
- Would minimize management responsibilities of the Tribal Council because the board of directors most likely would not be comprised of Council members, although they could serve.
- New organization could raise management and administrative capacity concerns, with new obligations for financial accounting, insurance, tax reporting, employee supervision and related issues.
- Incorporated organization completely shields Tribe’s assets from recourse for the liabilities of the organization. Unincorporated arm of the Tribe may put assets at risk if sovereign immunity is found not to apply.
- Incorporated organization may create other opportunities for the Tribe to acquire and hold interests in land.

- Unclear whether land held by an organization incorporated under Tribal law could apply to the Department of the Interior to have the land taken into trust on its or the Tribe's behalf, but most likely that would be permissible.
- Incorporated organization would permit the Tribe to hold fee title to a parcel of land while the organization could hold a conservation easement on the same property if deed restrictions are not an appropriate means to protect the property from development.