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RESTORING ANCESTRAL LANDS

A six-session training on considerations and process of forming Indigenous Conservation Trusts

Report and Summary of Key Points from Session 2 Proceedings

Ted Griswold (Partner at Procopio, Cory, Hargreaves & Savitch) talked about Determining Goals & Deciding Structure for tribal land trusts. He explained that the first step in forming a land trust is to ask whether a land trust is actually necessary to achieve your goals. This point was also emphasized by Hawk Rosales in Session 1.

Mr. Griswold suggests you consider the benefits and challenges of setting up a trust. If you decide the benefits outweigh the challenges, your next step is to address the challenges up front. This means you should:

- Determine the structure of your land trust;
- Determine your vision and the methods you will use to achieve it;
- Decide on how decisions will be made, and how you will protect your resources and Board;
- Think through how you will expand the trust's services and roles in the future; and
- Consider your opportunities to fund your organization.

Mr. Griswold highlighted options for structuring your entity:

- Incorporation and nonprofit 501(c)(3) status (which can be done under either state or tribal law), or
- Political subdivision of a tribe with IRC 7871 status

Finally, Ted led us through steps for creating a tribal philanthropic organization.

Curtis Berkey (Partner at Berkey Williams LLP) summarized pros and cons to consider for each organization type.

Agency or Department of a Tribe

Pros:

- The entity is under Direct control of tribe, and Has the same sovereign immunity;
- Title to land is held by the tribe and assets are protected against liability, unless waiver or conditions were placed on the land;
- The Tribe can apply to the BIA to have land taken into federal trust; and
- Donations are tax deductible because a tribe is treated like state.

Cons:

- It is Difficult to remove politics from land acquisition;
- The agency or department needs to depend on Tribe's budget for funding
- It is not as easy to raise money if the structure is unfamiliar to donors; and
- No state tax exemption is available for land held in fee-title by the tribe

Unincorporated Tribal Organization

Pros:

- It is a separate tribal organization created by Council resolution, so it is not likely to be subject to tribal code;
- Tribe's sovereign immunity also applies to this type of organization; and
- It will need some sort of governing body, bylaws, budget, staff, procedures.

Cons:

- Property taxes still have to be paid to the state, unless the organization is a 501(c)(3); and
- A trust application to the BIA is unlikely to be approved.

Incorporation under Tribal or state law

If you choose this type of structure, you would need to create a new organization under the code of a Tribe or the state, and follow the rules of the code. Tribes can incorporate under the code of another Tribe.

Pros:

- Organization can apply for 501(c)(3) status;
- 501(c)(3) is familiar form for donors, which increases ability to fundraise
- It is exempt from federal taxes
- It can apply for a state Organizational Clearance Certificate which exempts it from paying property taxes to the state (if granted); and
- Donor contributions are tax deductible

Cons:

- A 501(c)(3) is Labor intensive. It requires a Board, financial accountability, bylaws, a principal place of business, and so forth;
- The IRS lobbying restriction applies; and
- A 501(c)(3) is not able to apply directly to the BIA to have land taken into federal trust.

As all our speakers have emphasized, it is important to do your planning up front so that you can avoid expensive surprises down the road. It's also important to talk with an attorney who is familiar with land trusts and tribal matters so that you can make informed decisions.