



NORTHERN CALIFORNIA TRIBAL COURT COALITION PRESENTS: RESTORING ANCESTRAL LANDS

Tribal Land Trusts: Registration and Legalities

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Ted Griswold

Procopio, Cory, Hargreaves & Savitch LLP

Our Goal

“Providing tribal communities with skills, knowledge, and strategies to establish, operate, and maintain conservation land trusts.”

May 13th: History and Overview

May 20th: Determining Goals & Deciding Structure

June 3rd: Registration and Legalities

June 10th: Governing and Maintenance

June 17th: Funding Strategies

June 24th: Sourcing and Transferring Land

Why do Tribal Communities Want to Set Up Land Trusts?

- Ubiquitous Indigenous Land (with historic use area)
 - Within these areas, Tribal communities based on relationship to the land
 - Not just sites, but everything, everywhere, at all scales
- Lands Taken Away
 - Movement off lands
 - Reservation creation
 - Population reduction
 - Allotment Act
 - Relocation

Methods of Bringing Land Back

- Indian Reorganization Act; Fee-to-Trust
 - Regulatory basis (151 regulations)
 - Available to Tribal Governments
 - Costly, time consuming
 - Political involvement
 - Once in trust, flexible uses

Methods of Bringing Land Back (cont.)

- **Taking Matters Into Your Own Hands**—Taking land out of harm's way
 - Can you privately protect lands and resources?
 - Yes, there are several types of entities you can form for this purpose
 - Create an entity (conservancy, land trust, corporation):
 - For Land Acquisition and holding fee title
 - Purchasing Land
 - Land Donations from others
 - For control of land not in entity ownership
 - Land Trusts—Holding lands in trust for others
 - Holding Conservation easements

Methods of Bringing Land Back (cont.)

- Taking Matters Into Your Own Hands—
 - Entity holding property is still taxable, unless it gains nonprofit status
 - What is a nonprofit entity?
 - No taxes paid because the “public” benefits from your activity
 - Must provide an important public benefit, and not for private gain
 - The catch—formation and operation must be done a certain way
 - Limits what you can do with the land
 - Nonprofit benefit extends to entity and to donations from others (as their valuable asset is going to a “public benefit”)

Methods of Bringing Land Back (cont.)

- Taking Matters Into Your Own Hands—Land Trusts and Conservancies
 - Entity could also be a land trust
 - What is a land trust?
 - Rooted in local communities, land trusts work with residents, land owners and agencies to conserve natural areas for public benefits (cultural preservation, public health, education, etc.)
 - Conservation provides legal protections so that the resources are not damaged or lost to future actions. These legal protections will endure beyond any single landowner (Trust is perpetual to protect conservation purpose).

Methods of Bringing Land Back (cont.)

- Taking Matters Into Your Own Hands—Land Trusts and Conservancies
 - Elements of a trust
 - Legal entity
 - Trust Agreement—states the trust purpose, and includes
 - » Trustor—Source of the asset
 - » Trustee—Entity responsible for managing the asset for the trust purpose
 - This responsibility is trustee’s fiduciary duty
 - » Beneficiary—Public (if a land trust)
 - » Successor Trustees (so entity is sustainable)
 - Legally enforceable

Methods of Bringing Land Back (cont.)

- Taking Matters Into Your Own Hands—Land Trusts and Conservancies

Example of how a land trust conserves lands for “public benefit”

— Property is acquired via a deed from a Trustor

- Land Trust works with Trustor to develop the Trust Agreement—stating the trust purpose
 - » Designates Land Trust as Trustee—Entity responsible for managing the asset for the trust purpose
 - » Purpose states Beneficiary—Public (if a land trust)
 - » Designates Successor Trustees (so entity is sustainable)

Methods of Bringing Land Back (cont.)

- Taking Matters Into Your Own Hands—Land Trusts and Conservancies
 - **Entity can also be created for “public benefit” preservation purpose without owning the property**
 - Holding land as Trustee (subject to Trust Agreement)
 - Grantee of Conservation Easements
 - Management entity
 - Effective when property owner wants to hold property, but will (or must) relinquish use rights

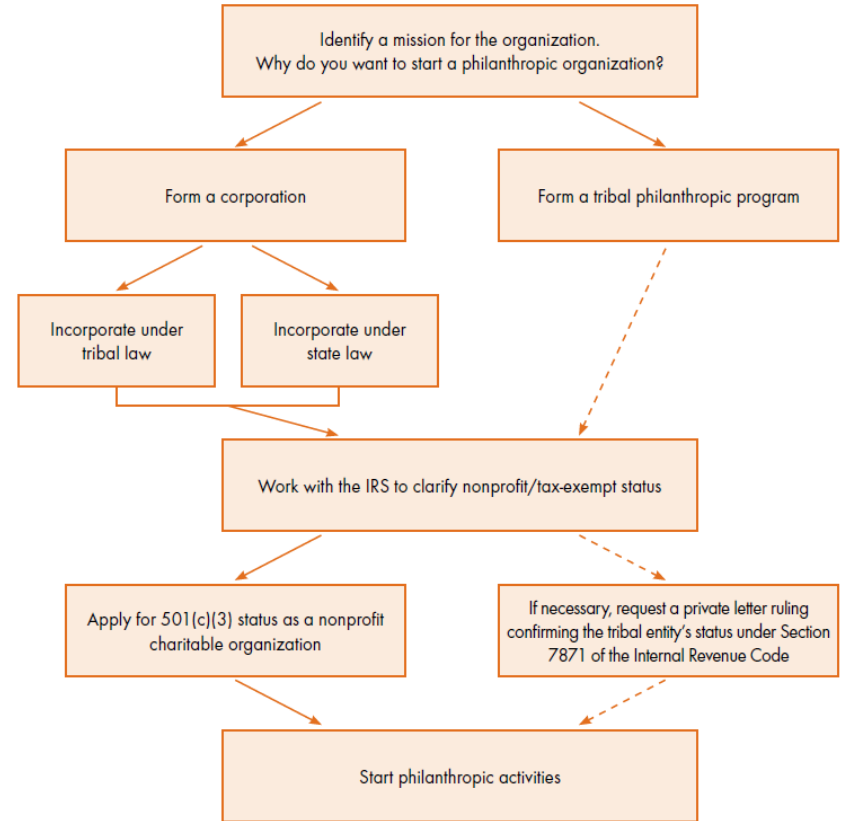
Why Tribal land trusts must seek nonprofit status

Public Interest Tax Exemption

- Tribes are excluded from the State Public Interest Exemption to state taxation –only applies to “local agencies”
 - “The exercise of the powers specified in this division shall be in all respects for the benefit of the people of the state, for their well-being and prosperity, and for the improvement of their social and economic conditions, and **the local agency** shall not be required to pay any tax or assessment on any property owned by the **local agency** under the provisions of this division or upon the income therefrom.” (California Health and Safety Code Section 55008)
 - Oversight not to include Tribal governments!!!

Steps to Creating a Tribal Government Philanthropic Organization

Figure 1: Steps to Creating a Tribal Philanthropic Organization



Steps Necessary to Create a Nonprofit Tribal Governmental Organization

- Steps required to maintain sovereignty of Tribal government(s)
 - Resolutions from each member Tribal Government resolving to participate
 - Creating legal entity, with those resolutions, create bylaws
 - Incorporate
 - Intertribal arm of Governments (IRC 7871)
 - Seek Nonprofit status/recognition

Incorporation and 501(c)(3) Status

- Incorporation in State (Delaware, California)
 - Sovereign immunity concerns, misconceptions
 - Establishment through Resolutions of all participating Tribes
 - Governed by Tribal Leaders
 - Include Non-waiver
- Incorporation by Tribe
 - Need a Tribe with appropriate Corporations Code and ability

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Seeking Non-profit Status for Corporation

- Obtain Tax ID Number
- Create charitable/nonprofit purpose
- Develop budget for First year/ projected next 2 years
- Apply for 501(c)(3) status (can be lengthy)
 - 1023 Form
 - Will submit Board members, organizational documents, budget, representatives, etc.
 - Short form if small (1023 EZ) See 1023 Eligibility Worksheet
 - Less than gross receipts of \$50,000 in any of first 3 years

IRC 501(c)(3) Status Requirements

- IRC 501(c)(3) status requires:
 - “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, ...”
- None of the \$\$ can inure to any private individual
- May not attempt to lobby as a substantial part of action or participate in political campaigns

501(c)(3) Additional Information

- IRC 501(c)(3) additional information:
 - Organization “shall be exempt from taxation...unless denied under section 502 or 503” (510(a))
 - Education entities generally “Public Charities”
 - A lot of recordkeeping and reporting requirements
 - Nonprofit Integrity Act applies if in California

Advantages of IRC Section 501(c)(3) Charitable Status

- The nonprofit is exempt from federal income taxes (other than unrelated business income taxes (UBIT)).
- Persons contributing to the nonprofit may be able to use the contribution as a deduction on their own income taxes.
- There is a well-established body of law for the treatment of nonprofit 501(c)(3) organizations, and several well-established state and national associations to represent their interests.
- Most major donors, such as United Way, will not make donations to organizations without Section 501(c)(3) charitable status (although this is changing as foundations learn more about tribal philanthropic programs).

Disadvantages of IRC Section 501(c)(3) Charitable Status

- The organization must file a tax form (either Form 990 or Form 990 PF) with the IRS on an annual basis:
 - While there is more paperwork required for a 501(c)(3) organization than a 7871 organization, such paper work (including the Form 990) is a widely accepted practice that assures your donor of your organization's accountability and integrity.
- The organization, if incorporated under state law, is subject to state law rather than Tribal law.
 - In contrast, organizations created as part of the tribal government or under tribal law are subject to tribal law, which is the case with a 7871 organization or nonprofit corporations created under tribal law.

Internal Revenue Code Section 7871 and Tribal Philanthropic Programs

- In 1982, Congress passed the Indian Tribal Governmental Tax Status Act
- Treats Tribal governments as State governments for certain tax purposes
- Allows Tribal governments, their political subdivisions, or any Tribal governmental fund, entity or program, that is an integral part of a Tribal government, to receive tax-deductible donations

Requirements for 7871 Tribal Entity

- Must be recognized by the Department of the Treasury, in consultation with the Department of the Interior, as an entity that exercises sovereign powers (in other words, a federally recognized Tribe)
 - Once recognized, placed on a list of such organizations
- Exercising sovereignty—Conducts “an essential governmental function” such as:
 - The power to tax;
 - The **power to police**; or
 - The power of eminent domain
- The division of the Tribal government must also be a political sub-division designed for exclusively public purposes

What Does this Mean?

- What does this mean? Based on **Private Letter Rulings...**
 - The entity is not separately incorporated under state law.
 - The Tribal government(s) exerts a substantial degree of control over the entity
 - The Tribal government(s) is liable for the acts of the entity
 - The entity is essentially an operating unit or agency of the Tribal government(s)
 - The Tribal government(s) has made a substantial financial commitment to the entity

Disadvantages (Considerations) of 7871 Status

The disadvantages (considerations) of 7871 status are:

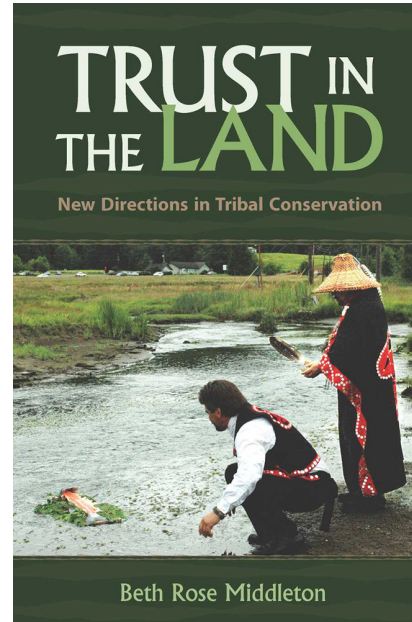
- Contributions made to IRC Section 7871 entities must be used for exclusively “public purposes” – a term that is not yet clearly defined in case law and rulings.
- All foundations that provide donations to the organization will require reporting and accountability for funding expenditures and many will require outside audits whether or not IRC Section 7871 requires such an audit.
- There is a lack of separation of the tribe from the program, and the organization may be subject to tribal politics as a result.
- Some private foundations are still hesitant to make donations to governmental entities (including tribal entities with Section 7871 status) because they have not been educated about the tax-deductible nature of their donations.

Steps Necessary to Create a Private Nonprofit (not a sovereign governmental entity)

- Creating legal entity through incorporation or development as a Trust
- Seek Nonprofit status/recognition—Same forms, same process
 - But—Also need Form 3500A (California FTB), CA registry of Charitable Trusts
- Challenges:
 - Developing and maintaining a viable Board of Directors
 - Engendering the trust of donors, grantors
 - Sufficient funding to create staff for operations

Steps Necessary to Create a Private Nonprofit (not a sovereign governmental entity)

- Seek out resources—There are plenty available
- This program!
- Land Trust Alliance
- California Council of Land Trusts



Questions?



Ted Griswold

Partner

Procopio, Cory, Hargreaves & Savitch LLP

ted.griswold@procopio.com

619.515.3277

What is Required to Hold Land for Conservation Purposes in CA

- Forming a Conservation Land Trust—Three Legal Documents
 - Deed to Property to be Conserved
 - Trust Agreement
 - Conservation Easement
- One Path to Establish Conservation Land Trust
 - Acquire Land to be Conserved
 - Establish Trust Agreement
 - Place Land in Trust and Record Deed
 - Record Conservation Easement Over the Land

Conservation Easements–Eligible Entities and Organizations

- California Civil Code Section 815.3
 - Only the following entities or organizations may acquire and hold conservation easements:
 - **A qualified, tax-exempt 501(c)(3) nonprofit organization** with its primary purpose to “preserv[e], protect[], or enhance[] ... land in its natural, scenic, historical, agricultural, forested, or open-space condition or use”
 - **A federally recognized California Native American tribe**
 - **A non-federally recognized California Native American tribe** on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place
 - **The state or any city, county, district, or other state or local governmental entity** authorized to acquire and hold title to real property
 - Eligibility for tribes and government entities is limited to conservation easements that are voluntarily conveyed