

Restoring Ancestral Lands



Using Land Trusts to Rematriate Indigenous Homelands: A Self-Help Guide

Northern California Tribal Court Coalition is a 501(c)(3) non-profit organization, chartered under the laws of the Hoopa Valley Tribe, and operated by a collation of six Tribes: Bear River Band of the Rohnerville Rancheria, Hoopa Valley Tribe, Karuk Tribe, Tolowa Dee-ni' Nation, Cher-Ae Heights Indian Community of the Trinidad Rancheria, and Yurok Tribe. The Coalition's mission is to promote and strengthen Tribal justice systems to restore balance and order in our communities, while honoring sovereignty and cultural values. You can learn more about our work at www.nctcc.org, and by visiting the website for the Restoring Ancestral Lands project at nctcc.org/land.

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INTRODUCTION

The Northern California Tribal Court Coalition (NCTCC) completed this Self-Help Guide as part of an Access to Ancestral Lands grant from the First Nations Development Institute. The information provided is not intended to be and is not legal advice; instead, all information is for general informational purposes only. The Guide includes information from the NCTCC's Restoring Ancestral Lands Training Series, from presenters in that Series, as well as additional materials gathered through independent research. Training series videos are available on YouTube.¹

This Guide is meant to provide Indigenous activists, advocates, and cultural practitioners with an overview of land trusts, including the processes required to establish such trusts and the relevant rules that govern them. We recommend finding a licensed attorney to work with as you begin the processes described in this Guide.

CONSIDERATIONS, STRATEGIES, AND STEPS

1. Understanding Land Trust History and Uses

a. What is a land trust?

Generally, a land trust is a legal entity that takes control of real property at the request of the owner.² The entity serves as "trustee," holding lands of the owner or trustor. There are different types of land trusts, including private trusts and the federal

¹ NCTCC's Restoring Ancestral Lands Training Series can be viewed in its entirety here: <https://www.youtube.com/playlist?list=PLLK-UUd6K-ab6bYCx5i1ZrXEQD9GEAzBf>

² <https://www.investopedia.com/terms/l/land-trust.asp>

trusts used to establish tribal reservation and individual allotment lands. This Self-Help Guide focuses on conservation and community land trusts.

b. What do land trusts typically do?

Conservation and community land trusts are similar in that they are set up with the intent to permanently set aside lands to keep those lands and their resources out of commercial development, preserve open space, provide community access, protect agriculture (conservation) and/or to create and maintain collectively owned lands for such use as affordable housing (community).³ Unlike private land trusts, which are usually for-profit, conservation or community trusts are established through nonprofit entities and organizations.⁴

c. How can land trusts help repatriate Indigenous lands?

*“Repatriation is Indigenous women-led work to restore sacred relationships between Indigenous people and ancestral land, honoring our matrilineal societies, and in opposition of patriarchal violence and dynamics ... “*⁵

Although the use of land trusts sprung out of the broader conservation movement, Indigenous communities and their members have begun utilizing community

³ <https://landtrustalliance.org/land-trusts/gaining-ground/united-states>; [https://www.policylink.org/resources-tools/tools/all-in-cities/housing-anti-displacement/community-land-trusts#:~:text=A%20community%20land%20trust%20\(CLT,1969%20to%20support%20black%20farmers](https://www.policylink.org/resources-tools/tools/all-in-cities/housing-anti-displacement/community-land-trusts#:~:text=A%20community%20land%20trust%20(CLT,1969%20to%20support%20black%20farmers).

⁴ <https://la-lawcenter.com/land-trusts/>

⁵ <https://sogoreate-landtrust.org/what-is-rematriation/#:~:text=Repatriation%20is%20Indigenous%20women%20led,of%20patriarchal%20violence%20and%20dynamics>.

and conservation trusts as a method to collectively own, manage, and reconnect with stolen ancestral lands.⁶ For non-federally recognized tribes and communities, the legal status and protections provided by land trusts has been a critical strategy to protect and manage ancestral lands⁷. For federally recognized tribes, the establishment of such trusts as nonprofits offers an opportunity to exercise their sovereignty as well as partner with other tribes and communities to rematriate common ancestral lands. Throughout the lands now within the State of California, Indigenous land trusts are emerging as an expression of the ever-present work to preserve land and culture. Examples of these land trusts include:

- [Amah Mutsun Land Trust](#).
- [Dishgamu Humboldt Land Trust](#).
- [Intertribal Sinkyone Wilderness Council](#).
- [Kumeyaay Diegueno Land Conservancy](#).
- [Maidu Summit Consortium](#).
- [Native American Land Conservancy](#).
- [Sogorea Te' Land Trust](#).
- [Tongva Taraxat Paxaavxa Conservancy](#).
- [Tataviam Land Conservancy](#).

⁶ Manning, Beth Rose Middleton. *Trust in the land: new directions in tribal conservation*. University of Arizona Press, 2011.

⁷ <https://www.goodtimes.sc/how-the-amah-mutsun-tribe-is-reclaiming-its-heritage/>

2. Know Your Options.

There are different ways to structure land trusts and each option comes with benefits and drawbacks. During NCTCC's Restoring Ancestral Lands training series, presenters Theodore Griswold and Curtis Berkey presented three options to structure an organization for the creation of land trusts, which include⁸:

- An unincorporated entity created under tribal law (recognized as tax exempt under 26 U.S.C. §7871).
- An incorporated organization under tribal law (recognized as tax exempt under 26 U.S.C. §501(c)3).
- An incorporated organization under state law (recognized as tax exempt under 26 U.S.C. §501(c)3).

As with each state, tribes can and do authorize entities to organize as nonprofits under their laws, such as nonprofit corporations codes or other policies and practices. For example, the NCTCC is incorporated under the Hoopa Valley Tribal Code, Title 54.⁹

⁸ Theodore Griswold is a Partner at Procopio, Cory, Hargreaves & Savitch LLP. Curtis Berkey is a Partner at Berkey Williams LLP. See Appendix 1 for in-depth analysis of these options by Curtis Berkey.

⁹ Hoopa Valley Tribal Code Title 54, nonprofit Corporations. <https://www.hoopa-nsn.gov/wp-content/uploads/2015/06/Title54-NonprofitCorps062098.pdf>

Figure 1 below represents the steps involved in establishing a public service, charitable, or philanthropic organization as the start of the process of creating a land trust.¹⁰

Figure 1: Steps to Creating a Tribal Philanthropic Organization

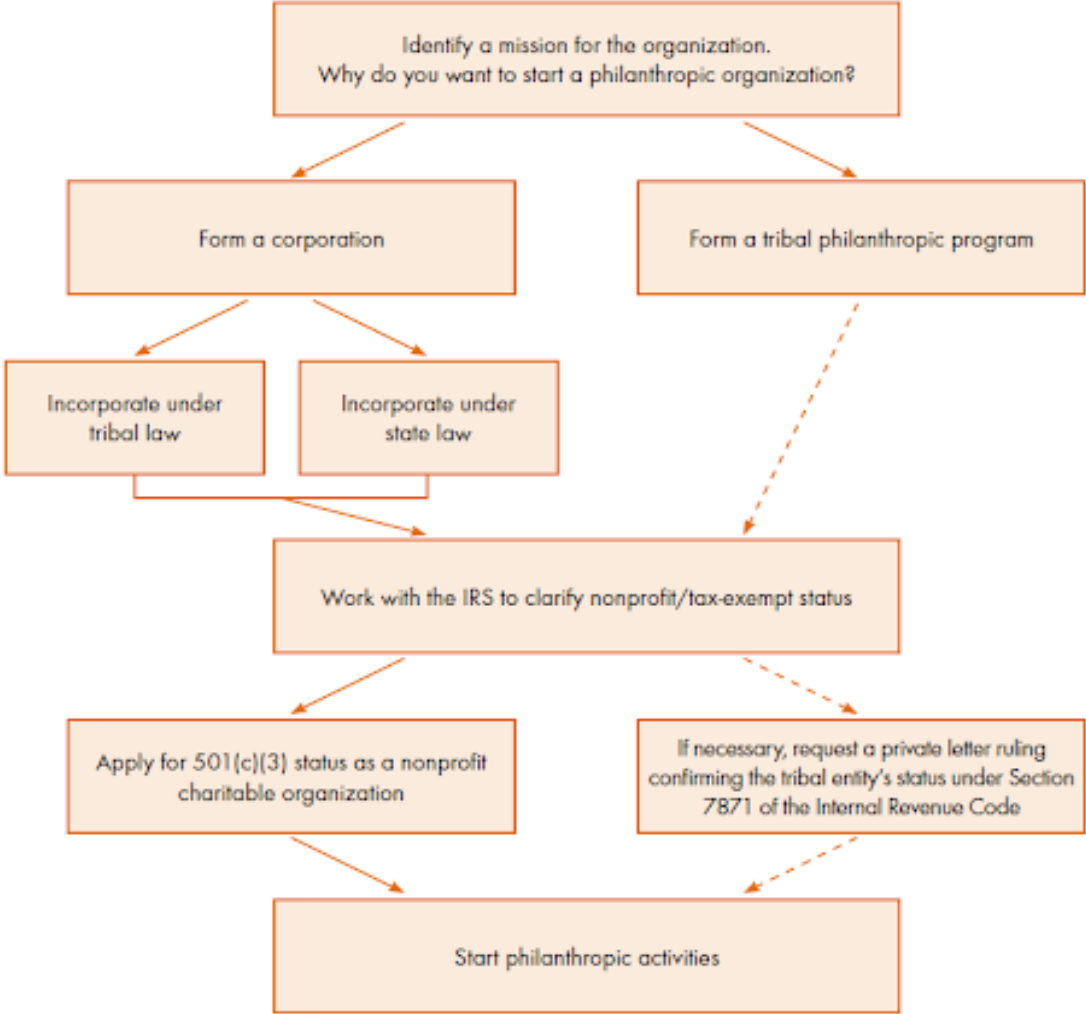


Figure 1. *Steps to Creating a Tribal Philanthropic Organization*. Created by Theodore Griswold of Procopio, Cory, Hargreaves & Savitch LLP. © 2023.

¹⁰ Theodore Griswold. 2023. Tribal Land Trusts: Registration and Legalities. Presentation. https://nctcc.org/land/wp-content/uploads/2023/06/T-Griswold-NCTCC-RAL-Slides-6_3_2023.pdf

Whether or not you choose to incorporate your land trust under state or tribal codes, your next step is to consider the structure of the organization. Public service organizations in the United States are typically established with governing purposes and procedures so as to qualify for tax exemption and other incentives under the requirements set out in the federal Internal Revenue Code and its regulations. The most common entity structure is commonly referred to as a “501(c)(3)” or “nonprofit.”¹¹ There are multiple resources available online regarding how to establish and structure nonprofits, including for the establishment of land trusts. Section 7871 of the Internal Revenue Code also provides recognition of the tax exemption of tribal governments and certain of their subdivisions the same as states for public and charitable purposes including tax deductions for donations and estates. This is known as “7871 status,” and gives unincorporated tribal entities similar benefits as 501(c)(3) nonprofits.¹² States such as California also typically have their own nonprofit organization codes and requirements to qualify for tax exemption and deduction.¹³

When weighing the type of structure to use, it is important to consider the requirements for each as well as their advantages and limitations. For instance, one potential barrier or issue for the use of an unincorporated 7871 subdivision for a tribal philanthropic land trust program is that, currently, they are not officially recognized by the State of California’s Board of Equalization as eligible for the Organizational

¹¹ 26 U.S.C. §501(c)(3) (2023).

¹² See <https://www.law.cornell.edu/uscode/text/26/7871>;
<https://www.law.cornell.edu/cfr/text/26/305.7871-1>. See also https://www.firstnations.org/wp-content/uploads/publication-attachments/2009_Charitable_and_Sovereign_7871_Report.pdf

¹³ See e.g., <https://law.justia.com/codes/california/2013/code-corp/title-1/division-2/part-2>

Clearance Certificate (OCC).¹⁴ This leaves some question as to California's approach to such land trusts and is an area of policy which leaves room for advocacy efforts.¹⁵ In addition, tribal community members and others may want to determine whether there is an existing tribal program or department that while it may not be a formal land trust, may be useful and suitable for a repatriation mechanism.¹⁶

Figure 2 below summarizes the various qualities of each entity as discussed in Mr. Berkey's *Considerations for the Creation of Tribal Land Trust*, including not only tax exemption status, but organization control, immunity, and the holder of property title.

¹⁴ California Board of Equalization Organizational Clearance Certificate (OCC) Application: <https://www.boe.ca.gov/proptaxes/pdf/boe277.pdf>

¹⁵ See Appendix for further analysis by Curtis Berkey.

¹⁶ *Id.*

Summary: Considerations for Creation Of Tribal Land Trust

Presented by Curtis G. Berkey Berkey Williams LLP

Entity type	Formation	Control	Sovereign immunity	Property Title	Federal Taxes	State real property tax
Agency or department of tribe	Tribal Council action	Tribe	Same as tribe	Held by tribe	not taxable	taxable
Unincorporated tribal organization	Tribal Council resolution	Governing body	Same as tribe	Held by tribe	not taxable	taxable
Incorporated under state or tribal law	Tribal or state corporations code	Board of directors	Likely not immune	Held by organization	not taxable	can get OCC exemption

Entity type	Governance	Donations	Fundraising	Lobbying	Transfer to federal trust statutes
Agency or department of tribe	Council or appointed director	Donations to tribe are tax deductible	Most likely source is tribe's budget since structure is unfamiliar to private donors	No restriction	By BIA application
Unincorporated tribal organization	some sort of governing body, bylaws, budget, staff, procedures	Donations to tribe are tax deductible	Most likely source is tribe's budget since structure is unfamiliar to private donors	No restriction	BIA is unlikely to consider application
Incorporated under state or tribal law	Labor intensive. Must follow tribe/state code: Board, financial, bylaws, principal place of business, etc.	Donations to 501(c)(3) are tax deductible	Familiar form for donors increases fundraising potential	Restricted	Must transfer land to tribe; BIA is unlikely to approve if land is encumbered by conservation easement

Figure 2. Summary of *Considerations for Creation Of Tribal Land Trust*. Created by Cynthia Boshell to summarize the presentation by Curtis Berkey and Theodore Griswold. © 2023.

3. Gather your team

"I have seen that in any great undertaking it is not enough for a man to depend simply upon himself." - Lone Man (Isna-la-wica), Teton Sioux

One of the ideas behind conservation and community land trusts is that we are stronger together, especially when we all bring unique skills to support one another. After considering your organizational structure, the next step is putting together a team that will lead your land trust. Generally, it is a good idea to find people who share similar values and vision, but who also have different strengths. You may want to consider these questions to help guide your search for a team¹⁷:

- Who do you know that is excited about the prospect of accessing and/or stewarding ancestral lands? What do they value?
- Where is the level of community and/or tribal council support for the initiative?
- What are the goals for this land? Restoration of ecosystems? Housing? Economic development? Cultural activities?
- Are there specific kinds of expertise needed on the team? Who are partners you can develop relationships with to meet those needs?

Many nonprofit organizations are structured with a board of directors who guide the organization with their vision, provide connections, and are resources for any staff. For small organizations in their early stages, board members will often take a large role

¹⁷ California Tribal Fund. Land Access Webinar. November 4, 2021.
<https://www.firstnations.org/wp-content/uploads/2021/10/Tribal-Land-Access-Webinar-Slides-Final-11.321.pdf>

in project development. Skills to keep in mind when considering, recruiting, or developing such a board include:

- Bureaucratic/government or nonprofit experience
- Knowledge of nonprofit accounting/bookkeeping
- Experience with fundraising/grant writing

4. Document Structure

Before you can begin doing the work of a land trust, you will need to start with formally documenting the structure of your organization, including preparing and submitting the necessary paperwork to make it official. If you choose to incorporate and seek nonprofit status the two main documentations that will establish the nonprofit are the articles of incorporation and the bylaws.¹⁸

California has forms for nonprofits available online and charges a fee depending on the type of nonprofit structure/organization chosen.¹⁹ Not all tribes have a nonprofit corporation code, so the first steps to organizing or incorporating under a tribe is to visit their website, call their court clerk, or reach out to their tribal secretary in order to connect with the tribe and determine whether or how they provide for nonprofit organizations and incorporation.

¹⁸ <https://calnonprofits.org/resources/starting-a-california-nonprofit#incorporation>;
<https://www.councilofnonprofits.org/running-nonprofit/how-start-nonprofit/how-start-nonprofit-step-3-incorporation-and-state-forms>

¹⁹ <https://www.sos.ca.gov/business-programs/business-entities/forms/corporations-california-domestic>; <https://bpd.cdn.sos.ca.gov/corp/pdf/articles/arts-pb.pdf>

Typically, nonprofits' articles of incorporation will include a statement of the organization's mission/purpose and list those responsible for managing the nonprofit, such as a board of directors.²⁰ Be prepared with this basic information:

- The name of the founder or founders;
- The name of your nonprofit;
- The names of your nonprofit's initial board directors, council, or governing body;
- The addresses for any initial directors;
- The nonprofit's mission statement;
- The location of the primary office and mailing address; and
- The name of the registered agent.

Your articles of incorporation are the structural documents that establish the organization. Your bylaws are the internal document used to govern the how, why, and when your governing body or board makes decisions.²¹ Unlike the articles of incorporation, which are structured to meet statutory or other requirements, bylaws can be tailored to fit your organization's unique values and needs.²² Typically, bylaws define:

²⁰ <https://www.boardeffect.com/blog/difference-between-articles-of-incorporation-and-bylaws/>

²¹ <https://learning.candid.org/resources/knowledge-base/nonprofit-bylaws/>

²² EBPREC Bylaws [ex1a-2b.htm](#)

- The size of any board and how it will function;
- The roles and duties of any directors and officers;
- The rules and procedures for holding meetings, electing directors, and appointing officers;
- Conflict of interest policies and/or procedures;
- How grant monies will be distributed; and
- Other essential corporate governance matters.

Organizational bylaws are required to receive 501(c)3 nonprofit status with the IRS, but are only required to be resubmitted during an audit when there are amendments.²³

When you are developing your articles and bylaws, it is an important time to consider how to integrate cultural and other values into your structure as well as checks on the governing body's authority. For example, a standard nonprofit structure gives an executive director final authority over operational decision-making. For a cooperative land trust focused on rematriation, traditional forms of cooperative governance may be more fitting and help ensure that cultural values and priorities are maintained.

5. Fund, Fund, Fund!

By the time that you file articles of incorporation and develop bylaws, the structure of the organization will be in place and you have found a group of dedicated

²³<https://www.councilofnonprofits.org/running-nonprofit/how-start-nonprofit/step-5-ongoing-compliance>

individuals to serve as your governing board or council. Now, it is time to find funding to support the organization's goals, hire staff, and run programming. Although working within the corporate non-profit world can be physically and emotionally draining, Dr. PennElys Droz, Power Building and Curriculum Coordinator at the NDN Collective, expresses the power of rematriating wealth into Indigenous communities using non-profits as a channel²⁴. These are three basic revenue streams for any nonprofit organization:

- Grants from federal, state, local, and tribal governments;
- Grants from public or private foundations;
- Fundraising and donations/charitable giving; and
- Sales/earned income.

While grants from state and federal governments generally have more stringent requirements, they are also more often larger grant sums.²⁵ The benefit of applying for local or institutional grants (public or private foundations) is that they are generally more flexible and require less work to write and maintain. Many times, organizations will use a piecemeal approach to meet their needs and aspirations. Some examples of philanthropic organizations that fund Indigenous lands stewardship include:

²⁴ Restoring Ancestral Lands, Session 5: <https://www.youtube.com/watch?v=joHj8ofKKPo>

²⁵ Some examples of land trust funds available in California include:

<https://www.caclimateinvestments.ca.gov/funding-for-land-conservancies>;

<https://www.gov.ca.gov/2023/04/27/california-announces-funding-for-projects-to-conserve-agricultural-land-and-fight-climate-change/>; <https://www.gov.ca.gov/2022/03/18/governor-newsom-proposes-100-million-to-support-tribal-led-initiatives-that-advance-shared-climate-and-conservation-goals/>

- [NDN Collective](#)
- [First Nations Development Institute's California Tribal Fund](#)
- [Native American Agriculture Fund](#)
- [Native Americans In Philanthropy](#)
- [Seventh Generation Fund](#)
- [Cultural Conservancy](#)
- [Liberated Capital Decolonizing Wealth Fund](#)
- [National Coastal Wetlands Grant](#)

6. Strategic Planning

It takes a great deal of work to get an organization up and operational, so sometimes strategic planning is pushed to the back burner. A good strategic plan can include the pillars, goals, and desired outcomes for a set amount of time that are determined by your governing board or council, staff, and/or key stakeholder groups²⁶. While this can be a time consuming and somewhat expensive project, it is one that sets the path for your organization to expand and grow in a way that aligns with the organization's purpose and vision. During the NCTCC's Restoring Ancestral Lands training series, Charman Valentin Lopez of the Amah Mutsun Tribal Band relayed the importance of their strategic plan and how it has influenced their organization.²⁷ Their

²⁶ <https://prosper-strategies.com/nonprofit-strategic-plan-example/#what-is-nonprofit-strategic-planning>

²⁷ Restoring Ancestral Lands, Session 4: <https://www.youtube.com/watch?v=QhwHGd3FpQQ>

five-year strategic plan is based on the underlying vision of “Connecting the Human, Natural and Spiritual World of the Mutsun and Awaswas Peoples,”²⁸ and includes topics such as:

- A background on the history of the Amah Mutsun Tribal Band and its initiatives;
- The vision and uniqueness its land trust;
- Commitments and approaches to work; and
- Benchmarks for their five-year goals.

Every organization will have unique values and purpose, and a strategic plan can help keep priorities organized and projects on track so that your group has more time to do the day-to-day work that really matters.

²⁸ Amah Mutsun Land Trust Five Year Strategic Plan 2014-2019.
https://www.amahmutsunlandtrust.org/s/AMLT_Strategic_Plan_Draft_v11compressed.pdf

Appendix: Considerations for Creation of Tribal Land Trusts

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.

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