

**CONSERVATION STEWARDSHIP AND MONITORING:
A GUIDE FOR THE RINCON INSTITUTE, TUCSON, AZ**

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CHAPTER 1: INTRODUCTION AND METHODOLOGY

The purpose of this report and supporting materials is to provide the Rincon Institute, a non-profit community land trust operating in the Tanque Verde, Rincon, and Vail Valleys with the tools it needs to develop a proactive conservation easement stewardship and monitoring program. Initial work on the project began in Spring of 2007 when the Institute identified a need to improve its baseline documentation efforts for current and future easements. The scope was then expanded to include easement monitoring. These two activities together make up the primary components of a sound, legally adequate conservation easement stewardship program.

The baseline documentation of a conservation easement is an important foundation document that allows for the future maintenance and enforcement of the easement. Ideally, a baseline document is created during the process of negotiating and granting a conservation easement to a land trust. Its purpose is to provide a clear and accurate description of the current condition of the land area to which the easement will be applied. This then allows a land trust to note changes to the land over time and determine if easement violations have occurred. The purpose of the baseline documentation is not to provide a comprehensive account of land conditions and uses at the time of the grant of the easement. Rather, it describes and documents the land conditions and uses that are relevant to the restrictions placed on the land by the easement.

The Rincon Institute does not currently have an organizational policy in place for baseline documentation. To address this need, this report will provide the following information and products:

- A description of the role of conservation easements in land conservation;
- A description of the strengths and weaknesses of

- conservation easements, in a general sense;
- An overview of the legal issues raised by conservation easements, background on how the legal system has dealt with easements in the past, and a consideration of the implications of this information;
- A detailed description of the role and content of baseline documentation as informed by a review of literature, reference to other land trust policies, and the results of the legal analysis;
- Recommendations for the content of future baseline documents;
- Other policy recommendations to fill policy gaps identified in the course of research.

Easement monitoring also plays a crucial role in the stewardship and enforcement of conservation easements. The purpose of easement monitoring is to track the conditions and land use of the land area covered by the conservation easement to identify potential violations of the easement. Monitoring is most successful when carried out according to a clearly articulated policy. Such a policy ensures the same procedure is followed each time monitoring is conducted, producing comparable results that are easily analyzed for violations.

Monitoring is commonly carried out internally by land trusts. This is the current procedure followed by the Rincon Institute. However, some land trusts have used participatory monitoring programs. This approach uses volunteers from the community to conduct monitoring visits. This report will provide the Rincon Institute with policy recommendations for both internal and participatory approaches to monitoring. This information will address the Institute's existing need for a consistent monitoring policy and will specifically address the following areas:

- A general description of conservation easement monitoring approaches, including both internal and participatory monitoring, and background information on the use of participatory monitoring in natural resources;
- The strengths of participatory monitoring as a tool for environmental educations, citizen participation,

- and building social capital;
- The importance of monitoring for legally maintaining conservation easements and potential legal issues associated with participatory monitoring;
- Recommendations for monitoring systems: when to use internal monitoring and when to use participatory monitoring;
- Recommendations for next steps in developing a participatory monitoring plan.

This project will also result in two templates for the Rincon Institute to use in their stewardship program: a baseline documentation template with accompanying instructions for use and a template for internal easement monitoring.

Methodology

The research approach for this project has three primary elements:

- a review of primary and secondary literature on conservation easement baseline documentation and monitoring,
- a review of primary and secondary legal literature about the legal requirements of baseline documentation and monitoring for conservation easements,
- and a limited number of informal interviews with conservation easement practitioners about their approaches to baseline documentation and monitoring.

Together, the analysis of these sources is used to develop a “best practices” evaluation of baseline documentation and easement monitoring. The results of the best practices evaluation inform the creation of specific policies for the Rincon Institute for implementation on-the-ground in its conservation easement program.

The review of the conservation and legal literature and the interviews address two separate, but related topics. Therefore, this report is divided into two sections. Baseline documentation is addressed first because it precedes and informs monitoring. While the literature

review and interview results for each topic is addressed separately, there is overlap between the topics in the literature and the some of the same sources are used for both topics.

The review of the conservation and legal literature follows the same method. First, I review the secondary literature – articles and books written about conservation easement stewardship and legal issues. This review informs the development of primary sources – examples of baseline documentation templates in use by land trusts in southern Arizona or other regions of the country and legal decisions particularly important for understanding the legal demands placed on easement documentation and monitoring. The goal of the literature review is two-fold. First, a thorough review of the secondary literature is required to determine what scholars and practitioners believe land trusts should be doing and the suggested methods for implementing their recommendations. The result of the review of secondary literature is a snapshot of what land trusts ought to be doing in a perfect world. This review is buttressed by a review of primary documents to balance the ideal with what is actually happening on-the-ground when land trusts are subject to the real world constraints of limited budgets and staff.

While this research was conducted incrementally, it is integrated in this report. By presenting the results of related primary and secondary research concomitantly, this report links practice and theory. This combined presentation makes it easier to explain any departures from the ideal presented in the secondary literature.

The purpose of the interviews with land trust practitioners is to supplement the review of primary literature. Informal discussions with land conservation professionals were held in the context of breakout sessions at the Land Trust Alliance Rally 2007. These discussions provided additional perspective on what land trusts are doing on-the-ground.

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CHAPTER 2: CONSERVATION EASEMENTS AND THE LAND TRUST MODEL

While there is a tendency in the conservation community to believe that land trusts are a relatively new invention, this is in fact not the case. Land trusts have been active in the United States in one form or another since the end of the 19th Century (Brewer 2003). The primary reasons those early land trusts were formed are similar to the reasons land trusts are formed today: the preservation of open space and important natural features (Brewer 2003). What has changed from the early days of land trusts is the reliance on conservation easements as the primary means for protecting land from future development. It was not until the last two decades of the 20th Century, and especially the 1990s, that the conservation easement became the favored approach of land trusts for protecting land (Aldrich 2005). This chapter will provide an introduction to land trusts and their mission, what conservation easements are and how they fit into the larger landscape of open space protection, and the strengths and weaknesses of conservation easements.

What is a Land Trust?

There are two common approaches taken to defining what a land trust is, one based on mission and the other based on legal characteristics. The mission-based definition is simple. Richard Brewer in his book *Conservancy: The Land Trust Movement in America*, offers this short mission-based definition of a Land Trust: an organization whose primary purpose is the permanent protection of land (Brewer 2003). Brewer uses this definition to develop an early history of the land trust movement and critique the current trend away from fee simple ownership by land trusts and towards conservation easements. The legal-centric definition of land trust is common in the practical literature about land trusts because of the importance of the legal status of a land trust relative to the ability of

Chapter 2: Easements and the Land Trust Model

land owners to receive tax benefits as a result of donating or selling land to a trust at less than market value. Generally, this definition states, at minimum, that a land trust is a private, non-profit organization that is able to receive tax-deductible donations and has land conservation as a primary component of its mission (Pidot 2005, Byers and Ponte 2005). Together, the two definitions of land trusts capture both the philosophy and approach of land trusts.

Over the roughly 120 years since Charles Eliot formed the first land trust, the Trustees for Reservations, in Massachusetts, the land trust model has been carried out with very little change. The goal of the Trustees for Reservations was to provide open space for parks and recreation around the city of Boston (Brewer 2003). There was an understanding that open space would not be preserved without the intervention of private citizens; government either lacks the willingness or the capacity to protect land on its own. Today, many of the parks in and around Boston are the result of early efforts by the Trustees for Reservations (Brewer 2003). While the scale at which some modern organizations, such as The Nature Conservancy, function may be much larger, the goals of land trusts are the same – permanent protection of open space (Brewer 2003). From one land trust in 1891, there are now over 1,500 land trusts operating across the United States (Aldrich 2005).

Conservation Easements

A legal construct, conservation easements are currently the most common method utilized by land trusts to facilitate permanent protection of privately owned land. Simply put, a conservation easement is “a legal agreement between a landowner and an eligible organization that restricts future activities on the land to protect its conservation values” (Byers and Ponte 2005). Here, an eligible organization is either a non-profit land trust as described in the legal definition above

or a public agency such as local or state government, the United States Department of Agriculture Forest Service, or the United States Fish and Wildlife Service. Unfortunately, conservation easements are significantly more complicated legally than this simple definition lets on. This section provides a brief introduction to the legal basis for conservation easements. Chapter 3 and 4 provide a more in depth analysis of the legal issues raised by conservation easements, requirements for tax deductibility, and the legal issues specific to baseline documentation.

There are two general types of easements recognized in United States' legal system: appurtenant easements and easements in gross. They both have their basis in English common law. Appurtenant easements are common and are a familiar concept to most owners of real property. An appurtenant easement burdens a property for the benefit of a third party. Often times this is a neighboring landowner. For example a landowner may need an easement across a neighbors land in order to access their land. Such an easement places a burden on the neighboring landowner because they are required to provide access across their property. These easements are affirmative easements; they grant the easement holder the right to do a specific thing on the burdened property. They do not, however, specifically restrict the property owner burdened by the easement from doing anything as long as it does not interfere with the ability of the easement holder to do what they are entitled to by the easement (Brewer 2003).

In contrast, an easement in gross provides a benefit on a property owner's land for the benefit of a specific person. Generally, this type of easement has been disfavored by common law. Easements in gross could be granted to an individual, but they could not be passed from one individual to the next through inheritance or assignment. Easements in gross are intended to be for

the benefit of only the original holder (Brewer 2003). Conservation easements, because they are legally for the benefit of the easement holder and not for the benefit of a neighboring property, are easements in gross (Kueter and Jensen 2006, Daniels and Lapping 2005, Brewer 2003).

Because the intention of a conservation easement is to protect a property in perpetuity, the nature of conservation easements as easements in gross is a concern. If common law were applied, it could be difficult to maintain an easement in perpetuity (Brewer 2003). Fortunately, most states now have a state law specifically authorizing conservation easements and allowing them to exist outside of these common law concepts (Brewer 2003, Mayo 2000). In Arizona, such a law has been adopted (A.R.S. §33-271).

Another, simpler, way to think about the function of conservation easements is to consider the classic "bundle of sticks" conception of property rights. An owner of real property in fee simple (when the land is unencumbered and owned outright) possesses a bundle of rights that come along with the property. Land use regulations restrict some of those rights, limiting the things a landowner can do with his or her property. In our system, the bundle of sticks represents everything a property owner can do with his or her property within land use regulations. A conservation easement is a limitation on this bundle of sticks. It limits or takes away certain components of the landowner's rights (or "sticks") to use his or her land. The landowner does so voluntarily – conservation easements cannot be imposed on someone. The purpose of the extraction of certain sticks from the bundle is to preserve the conservation values of the property. Conservation easements therefore are essentially privately imposed land use regulations. A landowner agrees not to do certain things in order to preserve his or her property

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while the land trust acts as the regulator, enforcing the provisions of the easement.

Two obvious issues are raised by thinking of conservation easements as a mechanism for a landowner to voluntarily submit him or herself to land use controls administered by a land trust. First, the land trust needs to have a clear understanding of what it is they are protecting with the easement when it is established. Only through knowledge of the baseline condition of the property can a land trust legitimately determine when there has been a land use violation. Second, a land trust must conduct regular monitoring of the property in order to determine if a land use violation has occurred. These two topics: baseline documentation and easement monitoring are the primary subjects of this study.

Strengths of Easements

Easements have become the dominant method of land preservation used by land trusts in the United States. By 2003 five million acres of land had been preserved by conservation easements (Aldrich 2005). This is an area roughly the size of New England. The popularity of conservation easements is the result of a number of factors, only the most significant of which will be covered here.

Conservation easements are often promoted as a buttress against sprawl. By permanently protecting a piece of land from development with a conservation easement, the amount of land available to urban sprawl is reduced. If a conservation easement program is carried out as a part of a larger government “smart growth” policy, a land trust can have a significant impact on the development pattern of a region (Daniels and Lapping 2005).

A noteworthy advantage of conservation easements is that they leave land in private hands. This poten-

tially appeals to land owners who may be interested in conservation but are against government regulation. Easements also potentially have a longer life than traditional, government enforced land use regulations. Land use laws may change with every administration, but conservation easements are permanent. Conservation easements also allow for the continuation of working landscapes. It is not uncommon to use conservation easements for the protection of farm and ranch land. Usually, these easements allow for the continuation of agricultural activities and help contribute to the maintenance of a viable agricultural economy in areas where farming and ranching may be losing ground to urban development (Tibbetts 1998).

Finally, conservation easements are lower cost, at least initially for land trusts and land owners. Typically, the primary alternative to a conservation easement is the purchase or donation of land in fee simple to a land trust. In the case of a fee simple purchase, the upfront expense is obviously greater, even if the alternative is purchase of a conservation easement. Because an easement is only the right to enforce limitations on property rights, it is not worth as much as fee simple ownership. If the choice is between donation of an easement or an entire property in fee simple, the cost of an easement still may be less to the land trust. While the transaction costs are probably similar, the cost of maintaining and managing a property are greater than that of an easement. With an easement the ongoing cost are limited to monitoring and the unlikely event of a violation. Consequently, a land trust may have to ask a landowner donating property for a significantly higher endowment to maintain it than would be asked of a landowner donating an easement (Brewer 2003).

Weaknesses of Easements

Of course, conservation easements also come with significant weaknesses. The Lincoln Institute of Land

Policy recently published a report, *Reinventing Conservation Easement: A Critical Examination and Ideas for Reform* (Pidot 2005), summarizing the common arguments against conservation easements and suggesting solutions to overcome the weaknesses raised by these arguments. The report is the result of a symposium held by the institute with leading conservation experts. It notes eight key conservation easement issues in need of reform:

- Variable quality in conservation easement design
- Lack of publicly accessible system for conservation easement tracking
- Lack of transparency and determination of public benefits in easement formation
- Failure by many easement holder to undertake appropriate stewardship duties
- Lack of clear valuation and other taxation standards for conservation easements
- Failure to consider implications of easements on land acquisition and regulation
- Failure to consider issues of equity and environmental justice in easement programs

Many of these issues are technical and require regulatory solutions. In fact, the majority of solutions to these problems suggested in the Lincoln Institute report require some type of regulatory solution (Pidot 2005).

The Land Trust Alliance (LTA) seeks to address some of these same problems through its Land Trust Standards and Practices Program. The Land Trust Standards and Practices are available to all LTA member land trusts on the LTA website. In addition, LTA publishes *The Standards and Practices Guidebook: An Operating Manual for Land Trusts* (LTA 2004). The Standards and Practices represent agreed upon best practices for land trusts. It was developed through consultation with land trusts to determine what is needed to run “a professional, ethical, and credible land trust” (LTA 2004). There are 15 Standards and Practices addressing issues from easement stewardship to board structure and accountability. LTA works

to encourage all land trusts to adopt the Standards and Practices as a common set of business practices (LTA 2004).

LTA has recently started the process of taking the Standards and Practices one step further by initiating an independent accreditation process for land trusts. LTA provides the administrative backing for the Land Trust Accreditation Commission, which operates independently from the LTA for maximum credibility. The purpose of the accreditation process is to verify that land trusts are properly and fully implementing the standards and practices and have the capacity to maintain their obligation to monitor and enforce the conservation easements they hold (Kueter 2007). While accreditation is voluntary, many land trusts are enthusiastically participating in the process. In fact, so many land trusts wish to participate that a lottery was conducted to select participants in the first round.

Finally, Richard Brewer raises a number of objections to the prolific use of conservation easements at the expense of fee simple ownership. Pointing out that the land trust movement began by protecting land through fee simple ownership, Brewer is skeptical of the capacity of land trusts to maintain their obligation to monitor and especially enforce easements over time. The real test of the conservation easement model of land protection, Brewer argues, is still a number of years away. He is concerned that when first generation landowners begin to sell and die, second and third generation landowners will be more likely violate the terms of the easement. Enforcement of easements in the face of violations can be expensive if the enforcement action requires the intervention of lawyers and the courts (Brewer 2003).

It is unclear whether Brewer’s concerns are well founded. Obviously, it is impossible to know what the future has in store for land trusts holding conservation easements. It is likely the number of violations will

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increase as secondary landowners take over encumbered properties. These landowners will not have the same sense of fidelity toward the conservation easement as the landowner who originally participated in its development. In addition, the 2003 Land Trust Census conducted by the LTA showed that most land trusts had only limited stewardship and enforcement endowments (Aldrich 2005). On the other hand, violations that proceed to litigation are relatively rare; most are resolved outside of court.

In addition, there is no indication in the literature that land trusts in New England are struggling to maintain their easements in the face of violations. Because this region has the oldest land trusts in the county, one would expect to see early problems with enforcement here. Ultimately, New England and other areas on the east coast of the United States where land trusts have been operating for decades may provide the early tests of conservation easements in courts. Because of this, it is possible that legal precedents will be well established before the transition to widespread secondary ownership in the western United States.

The most important step a land trust can take to overcome the weaknesses of conservation easements is to seriously consider and implement the Standards and Practices put forth by LTA. These guidelines provide best practices for land trusts and examples of such important documents as conservation easements and baseline documents. But the Standards and Practices are not one size fits all. Land trusts must adapt them to meet their needs and unique situation. This study provides the Rincon Institute with a summary of the legal considerations and best practices for baseline documentation and easement monitoring and develops this data into templates and guides for baseline documentation and monitoring specifically tailored to the Institute's needs. In addition, suggestions will be made for organizational policies for the implementa-

tion of a legally sound stewardship program. As a result, this study will allow the Rincon Institute to take a large step toward effective implementation of the Standards and Practices.

CHAPTER 3: LEGAL ISSUES WITH CONSERVATION EASEMENTS

A good conservation easement stewardship program should meet the requirements of two standards in equal measure: the Land Trust Alliance's Standards and Practices for easement stewardship and the distinct legal obligations of the land trust as the holder and steward of conservation easements. It is easy to lose sight of the latter obligation in the day-to-day grind of carrying out an easement stewardship program. The legal issues arising from conservation easements often seem disconnected from on-the-ground stewardship. Most discussions of conservation easements and the law in the academic literature do a poor job of relating legal theory to stewardship. Indeed, most articles make no effort to do so. But it is a mistake to wait until a violation of a conservation easement occurs to begin considering the legal obligations of the trust in stewarding the easement or the legal theories that will be applied to the case if it goes to court. Instead, a land trust should be proactive and design a stewardship program that is defensible against the most likely legal challenges.

Unfortunately, teasing out what the obligations of a land trust are in light of legal theory and practice is not an easy task. There has been relatively little litigation involving conservation easements. There are no cases of note within Arizona. In addition, because of the lack of a well developed case law on conservation easements, legal scholars are unsure how the courts will treat easements when cases do come to bar. Despite this, there is general agreement amongst legal scholars about the likely theoretical basis for challenging conservation easements. These concepts and their implications for conservation easement stewardship are discussed in this chapter.

Defining Easements

As a starting point, it is important to understand what an easement is as a concept of property law. While most states' conservation easement enabling legislation modifies the traditional definition of an easement, it is important to understand the general concept of easements. Most of the challenges to conservation easements are likely to grow out of the same concepts used to challenge the validity of traditional easements.

An easement is generally defined as a "nonpossessory interest in the land of another" (Bruce and Ely 2001). This simple definition has a number of important implications. First, it is necessary to understand what is meant by interest. An interest goes beyond a basic right to use another person's property and represents an actual ownership interest in another's property rights (Bruce and Ely 2001, Powell 2005). This is most easily understood by returning to the "bundle of sticks" analogy of property rights from Chapter 2. The owner of a piece of land has a number of rights associated with that ownership that together make up their property rights. When a piece of land is encumbered by an easement, one or more of the sticks is taken away from the property owner and given to the easement holder. The second important portion of the definition of easement is that it is nonpossessory. While the owner of the easement owns an interest in the property – one stick from the bundle of property rights – she does not have the right to permanently occupy the land encumbered by the easement.

It is simple to relate this basic definition of easements to conservation easements in practice. A conservation easement provides the land trust with an interest in the land subject to the easement – a scenic view from a highway, for example. The land trust does not seek to occupy the scenic area, however, but only to maintain it in the condition it was at the time of the grant of

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easement. Unfortunately, the basic definition of easements and its application to conservation easements is complicated by more specific definitions of easements based on the character and purpose of the easements. These details ultimately obviate the need for enabling legislation to ensure the legality of conservation easements and illuminate the basis for future challenges of easements despite such legislation.

As noted in Chapter 2, traditionally there are two types of easements, both owing their origin to English Common Law. The most common type is an appurtenant easement. Appurtenant easements are created for the benefit of one parcel of land (the dominant estate) over that of another (the servient estate). Generally, appurtenant easements require the two properties to be adjacent to one another. The easement must help the owner of the dominant estate with the physical use of the servient estate (Bruce and Ely 2001, Powell 2005). A common example of an appurtenant easement is an access easement allowing the dominant estate's owner to drive across the servient estate to access her property. A conservation easement is clearly not an appurtenant easement. The land trust is not seeking physical use of the dominant estate, nor does the easement benefit a neighboring property.

The second type of easement recognized by common law is an easement in gross. Conservation easements fall into this category. Unfortunately, easements in gross are generally considered bad and undesirable in common law and in current practice. The definition of an easement in gross is an easement that benefits an individual, not an adjacent property, whether or not they own land (Bruce and Ely 2001, Powell 2005). Common law does not favor this type of easement because it is not tied to the land and therefore represents a novel burden on the land (Blackie 1989, Bruce and Ely 2001, Powell 2005, and others). In theory, an easement in gross can be anything that benefits an in-

dividual (related to the property rights of the servient estate, of course) regardless of whether that individual owns land or not. Generally, easements in gross can only be given to an individual and cannot be inherited. So, the common law definition of easements in gross disfavors conservation easements for two reasons – they are not for the benefit of a dominant estate and they are intended to last forever, not just for the lifetime of an individual.

If that is not enough, conservation easements are inconsistent with one additional common law principle – the conditions under which negative easements are allowed. In addition to defining an easement as an easement in gross or an appurtenant easement, common law also defines easements as affirmative or negative based on their purpose. Affirmative easements are the most common. They allow the easement holder access to another's property that would otherwise be considered trespass (Bruce and Ely 2001, Powell 2005). The access easement described above is an example of an easement that is both appurtenant and affirmative. A negative easement is used to restrict actions of the landowner of the servient estate (Bruce and Ely 2001, Powell 2005). Conservation easements are clearly negative easements, though they have both affirmative and negative characteristics. The restrictions imposed on the land as a result of the conservation easement are negative. But the requirement for access to conduct monitoring is affirmative. Nonetheless, the negative component of the easements creates a problem under common law. Traditionally, only four categories of negative easements were allowed – “easements for light, air, support of buildings, and flow of artificial streams” (Blackie 1989). These four categories are clearly only applicable in the case of an appurtenant easement (Blackie 1989). Therefore, conservation easements, as easements in gross, cannot qualify under any of the categories.

The Uniform Conservation Easement Act and the Arizona Enabling Statute

It is clear that the common law definitions of easements are not friendly to the existence of perpetual conservation easements. Recognizing this, the National Conference of Commissioners on Uniform State Laws (NCCUSL) set out in 1981 to draft model enabling legislation that would inoculate conservation easements from challenges based on the common law definitions of easements outlined above. The resulting model statute, the Uniform Conservation Easement Act (UCEA), helped to stimulate the growth of conservation easements nationwide. The UCEA is also the conservation easement enabling legislation, with only minor changes, in place in the State of Arizona

The prefatory statement of the UCEA states that the purpose of the act is to remove the common law impediments to conservation easements by allowing:

- a qualifying organization to pass a conservation easement to successors,
- easements even though they are not for the benefit of another piece of land (easements in gross),
- parties to impose both obligations (negative restrictions) and affirmative duties on property,
- and conservation easements to be created in the same way as other interests in land (NCCUSL 1981).

The purpose of the UCEA is largely limited to these elements, which are all explicitly aimed at overcoming common law impediments. Therefore, its relevance to the specific stewardship obligations of a land trust holding a conservation easement is limited. Despite this, some stewardship obligations can be gleaned from the text of the act.

Perhaps the most important phrase in the entire UCEA from the perspective of easement stewardship is, “This Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity” (UCCUSL

1981, ARS §33-271 to 276). Importantly, Arizona added, “In determining whether to modify or terminate a conservation easement a court shall consider the public interest to be served” (ARS §33-271 to 276). The NCCUSL goes on to discuss this provision, noting that the same common law concepts used to terminate standard easements are applicable to conservation easements. It specifically notes the concepts of Changed Conditions and *Cy Pres* (NCCUSL 1981), which will be discussed, along with other approaches to termination, later in this chapter. The application of common law principles for the modification and termination of easements should raise a red flag for land trusts. The best defense against these principles in court is a robust stewardship program. How easement stewardship can be used as a bulwark against common law challenges to easements is discussed in the following sections.

Before leaving the UCEA, I want to consider briefly the implications of that additional phrase added by Arizona legislators – that the court will consider the public interest when determining whether to modify a conservation easement. What does this mean? This phrase is unique to Arizona; none of the other states that have adopted the UCEA have added it. The legal literature is disappointingly thin on insight related to the implications of this phrase (see for example Mayo 2000 and Hutton 2000). Scholars note that it exists but nothing more. The lack of analysis is unfortunate because this phrase could have important implications for Arizona. The state is leaving it up to a judge to decide what the public interest is on a case by case basis. Could a judge decide that an easement that has been in place for 100 years now serves the public interest more productively as a subdivision? There is no way of knowing. What is clear is that land trusts in Arizona must be especially diligent in their baseline documentation and monitoring efforts to note the pub

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lic interests served by the easement and to ensure that those interests are maintained over time.

Potential Challenges to Conservation Easements

Many of the future legal challenges of conservation easements are likely to arise out of common law principles. These challenges will be based on the traditional view of easements as described in the first section of this chapter and enabled by the ability to challenge conservation easements based on principles of “law and equity” under the UCEA and the Arizona Revised Statutes. There has been extensive treatment of the potential threats to conservation easements from common law and other sources in the legal literature. This literature neglects, however, the more practical aspect of relating the legal implications of challenges to stewardship activities and focuses instead on the validity of legal challenges. Here, I will present the most commonly mentioned threats to easements and their potential for success based on the opinions of legal scholars. I will then discuss the potential implications of each for monitoring and baseline documentation based on what can be inferred from the literature.

Changed Conditions and *Cy Pres*

The threat to conservation easements that is most frequently discussed in the literature is the doctrine of changed conditions (French 2006, McLaughlin 2005, Powell 2005, Blackie 1989 and others; Blackie provides the most comprehensive treatment). The doctrine of changed conditions states that a court may terminate an “equitable servitude when changed conditions in or around the burdened land frustrated the purpose of the restriction or created undue hardship on the owner of the burdened land” (Blackie 1989). This definition raises an immediate question with no easy answer: is a conservation easement an equitable servitude to which this doctrine applies? No one is quite

sure and the UCEA is intentionally vague on this question (Blackie 1989, NCCUSL 1981). The NCCUSL essentially decided to leave it up to the individual states and their case law to decide. Because no such case has been litigated in Arizona to date, the question is still open.

Scholars are undecided about the applicability of the changed conditions doctrine to conservation easements. Blackie, for example, tries to have it both ways – it should not apply as long as an easement “serves its stated purpose” (Blackie 1989), but should apply when the easement no longer serves its purpose. This argument is disappointingly circular – you have to apply the doctrine in order to determine if the easement is still serving its intended purpose. Regardless of whether the doctrine should be applied to conservation easements, there is general agreement that the doctrine is a potential threat to them and therefore should not be ignored. (French 2006, McLaughlin 2005, Thompson and Jay 2001, Blackie 1989, and others).

The primary threats to conservation easements stemming from the changed conditions doctrine are the occurrence of unforeseen events and the bias of the law towards using land for its highest and best use (Blackie 1989). Thompson and Jay (2001) provide insight into the first of these threats in their summary of the current state of the case law related to conservation easements. This article is especially useful because it is the only article currently available addressing the case law specifically, rather than legal theory. Thompson and Jay argue that the courts will focus on the intent of the drafters of a conservation easement (both the easement holder and the property it encumbers) when deciding if circumstances have changed enough to terminate an easement (Thompson and Jay 2001). Blackie and others forward this same argument based on the principle of *cy pres*. When a court applies *cy*

pres, it considers the original intent of the parties to the conservation easement and modifies the easement such that it continues to carry out its original purpose as much as is possible given the changed circumstances. Note that there is a traditional bias in common law toward invalidating easements that no longer serve their intended purpose. This stems from common law's general disfavor of perpetual encumbrances on property. A court lacking experience with conservation easements may fall back on traditional common law principles, despite the intent of enabling legislation to allow for perpetual easements, and invalidate an easement based on unforeseen circumstances without considering *cy pres* (Thompson and Jay 2001).

The second threat, the bias towards highest and best use of property, is perhaps more dangerous than the first. The highest and best use argument is also related to the general tenant under common law that things that last for perpetuity are bad. There should be a limit on "dead hand" control of property so as not to interfere with the orderly development of land (Tapick 2002). Blackie (1989) points out, however, that as circumstances change and development surrounds an easement that was once far out in the countryside, that the easement may in fact become more valuable, not less. Open space has real value in our society and as it becomes more scarce, its value increases. In addition, the fact that a property owner could realize a significant profit from their land if the easement restrictions were removed is not justification enough to take the property interest held by the land trust. Even if it were, it is likely that the land trust would have to be compensated for the value of the easement restrictions (because they represent a property right belonging to the land trust). The result would be a windfall for the land trust, not the property owner (Blackie 1989). Despite these theoretical arguments against highest and best use, Thompson and Jay (2001) point out that courts have shown a willingness to consider the

highest and best use argument through a balancing of the costs and benefits of maintaining a conservation easement.

There are clear implications for conservation easement stewardship resulting from the doctrine of changed conditions and *cy pres*. First, and most important, is clarity of intent. A land trust must be absolutely clear on what their intention is in accepting a conservation easement. This should be reflected in both the drafting of the easement itself and in the accompanying baseline documentation. By clearly showing the intent of the landowner and land trust in the easement itself and clearly documenting the resources related to this intent in the baseline documentation, the land trust will be in a strong position relative to an argument of changed conditions from a future landowner. What is also clear is that the land trust must be thoughtful in articulating what the specific intent of the easement is. If the actual purpose of the easement is to protect wildlife habitat generally, but the baseline documentation only records the habitat for an endangered species that happens to be present on the property, this could be construed by a judge to mean that the purpose of the easement was only the protection of the habitat of that species. If the species eventually becomes extinct, the purpose of the easement also vanishes. Therefore it is critical that a land trust considers exactly what their goal is in accepting an easement on a given property and to carefully document the conditions existing on the property specific to that goal. In addition, the original intent of the property owners granting or selling the easement to the land trust should be recorded in the baseline documentation. This will provide evidence of intent to the court to aid in a favorable application of *cy pres* if such a circumstance arises.

Monitoring also plays an explicit role in defense against changed circumstances and *cy pres*. An annual monitoring program will document the condi-

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tions of the easement property each year and will be helpful for arguing that the conditions of the property itself have not changed, although the area around it has. Monitoring should serve as a “check-in” on the resources the easement is intended to protect. In addition, monitoring could aid in a favorable application of *cy pres* if it does become necessary to modify an easement due to changed conditions. Regular monitoring of specific resources can show a long term record of easement intent and aid the court in its decision.

The application of cost-benefit analysis to conservation easements by the courts is difficult to address with stewardship activities. Thompson and Jay (2001) suggest that land trusts include a statement in both the recorded easement document and the baseline documentation stating that it is not the intent of the parties to the easement that the courts consider cost-benefit analysis in the event of an attempt to terminate the easement. It is unclear, however, whether a court would actually consider such a statement (Thompson and Jay 2001).

Abandonment

The concept of abandonment is thankfully nowhere near as complicated as the preceding discussion of changed circumstances. Not much has been written about abandonment in respect to conservation easements, likely because most scholars feel it is unlikely to be a common occurrence. Abandonment occurs when a land trust fails to enforce an easement (Mayo 2000). For example, if a land trust holds an easement restricting grazing and the land owner engages in grazing for a number of years (it is unclear how long a period of time would actually be necessary) without the objection of the trust, it could be argued that the land trust abandoned its obligation to enforce the easement and by extension the abandoned the easement itself. Realistically, it is likely the only circumstances in which an easement will actually be abandoned is

when a land trust holding an easement ceases to exist without transferring the easement to another party (Mayo 2000).

The implications of abandonment for a land trust are obvious – the trust must simply follow through on its obligations to steward an easement. These obligations include creation of baseline documentation at the time of the grant of the easement and ongoing monitoring to ensure no violations are occurring. The recommendations of this report will provide these essential tools to the Rincon Institute.

Adverse Possession

Another topic that has seen little discussion in scholarly literature about conservation easements is adverse possession. While a topic with important implications for conservation easements, adverse possession is also a threat that a land trust can easily overcome through the implementation of an annual monitoring program. Therefore, I will provide only a brief introduction to adverse possession for the purposes of demonstrating the need for a monitoring program.

Adverse possession is “a method of transferring an interest in land without the consent of the true owner and over the objections of the true owner” (Klass 2006). There are four conditions required for an individual to acquire land through adverse possession:

1. Actual and exclusive use,
2. Open and notorious use,
3. Use is adverse or hostile to the actual owners property right, and
4. Continuous possession of the property for an amount of time defined by statute (Klass 2006).

These four conditions mean that a individual must be using a piece of land that does not belong to them in such a way that the actual land owner should know for a certain amount of time. For the purposes of this

inquiry, it is important to note that a land trust, as a result of neglect, can lose a piece of a property encumbered by an easement or lose the right to enforce the easement itself. The former is the likely result of a neighboring landowner encroaching on the easement property, while the latter could be the result of the land trust failing to enforce the restrictions imposed by the easement. In this sense the latter example is similar to the example given in the abandonment section above. Remembering that a conservation easement is an interest in a property – one stick from the bundle – it may be possible to lose the stick the easement represents by allowing the landowner to continue with her use as if the easement did not exist (Klass 2006). Note also that, while this applies to both affirmative and negative easements, negative easements are more vulnerable to its application. In the land trust context, the affirmative right to generally access a property to conduct monitoring is virtually impossible to adversely possess. There is nothing the landowner could do to possess this right. But the negative easements essentially take a property right from the landowner. If a land trust does not prevent the use of their property right, it can lose that right. Land trusts, when considering acceptance or purchase of a conservation easement should not underestimate the ongoing obligation of enforcing its terms.

Thankfully, it is relatively easy for a land trust to avoid an adverse possession claim through the development of sound baseline documentation and annual monitoring. It is essential that the baseline documentation include a professional survey of the property encumbered by the easement. This will ensure, in conjunction with monitoring, that no property covered by the easement is lost due to encroachment. Monitoring should be undertaken with specific attention to ensuring that there have been no encroachments at the edges of the property and that the specific restrictions of the easement are being followed. It bears repeat-

ing, however, that the monitoring obligation should not be underestimated. Beyond opening the door to an adverse possession claim, inadequate enforcement of easement provisions through monitoring can also aid a landowner seeking termination of an easement through changed circumstances. Blackie (1989) believes that, while a court is unlikely to terminate an easement due to changed conditions around it, the likelihood of termination grows substantially when changed conditions have occurred on the easement property itself. This can be in the form of allowing a landowner to violate the restrictions of the easement for a long period of time or allowing encroachments at the property boundaries.

Other Issues

There are two other issues that could potentially result in a loss of a conservation easement, though neither of them can be overcome by implementing an effective stewardship program. The first is merger. In the event a land trust takes possession of land it also holds a conservation easement on, the conservation easement would cease to exist as a result of merger; a landowner cannot hold an easement against itself. This can occur when a landowner wills her land to a land trust already holding an easement on the property (Mayo 2000). The second potential threat is eminent domain. The UCEA and Arizona statute allows the government to use eminent domain to extinguish an easement (ARS §33-271 to 276, NCCUSL 1981).

Conclusion

It is important to understand the origins of conservation easements from common law because it is likely that the majority of challenges to easements in the future will stem from this foundation. While the UCEA and the enabling legislation in the State of Arizona provide some defense for conservation easements by giving them a statutorily defined status, the enabling

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legislation also specifically allows conservation easements to be challenged using traditional common law arguments.

The most important common law doctrines for land trusts to consider when developing a conservation easement stewardship program are the doctrine of changed conditions, *cy pres*, abandonment, and adverse possession. While most challenges are likely to stem from the doctrine of changed conditions, neglecting any of these issues could lead to the loss of a conservation easement.

Fortunately, baseline documentation and annual monitoring of easements provide an effective safeguard against challenges based on common law doctrines.

Considering only legal issues, baseline documents should include:

- A statement of intent from both the landowner and the land trust to defend against termination by changed conditions and aid in the favorable application of *cy pres*.
- Information about all of the resources the easement is intended to protect; the more things noted in the baseline the better. However, documentation of resources not explicitly tied to the purposes and restrictions of the conservation easement document will not aid in defending the easement against changed conditions arguments.
- An explicit statement that cost-benefit analysis should not be used in determination of termination by changed conditions.
- A professional property survey to provide a basis for monitoring to prevent future adverse possession claims.
- A statement of how the public interest is served by the conservation easement.

Monitoring should be conducted as a regular check-up of what is contained in the baseline documentation and serve as first line of enforcement of the negative provisions of the easement. At minimum, to guard against legal challenges, monitoring should be conducted on a regular basis and:

- Document the continued existence of the resources

the easement was intended to protect. In addition, as urban encroachment inevitable occurs around the easement, monitoring reports should note the public benefit provided by the open space, scenic vistas, etc.

- Ensure that no encroachment has occurred at the property boundaries
- Ensure the landowner has not violated the easement restrictions. If a violation has occurred the land trust should immediately begin efforts to address it in order to prevent claims of abandonment or adverse possession.

CHAPTER 4: FEDERAL INCOME AND ESTATE TAXES

Landowners who donate a conservation easement have two significant federal tax breaks they can take advantage of. The first, §170(h) of the Internal Revenue Code, is an income tax break. It allows the grantor of the easement to take a deduction from their income taxes equivalent to the value of the conservation easement over a number of years. The second, §2031(c) of the Internal Revenue Code, allows an additional reduction in the estate tax value of the property upon the death of the grantor.

Each of these tax breaks can only be taken advantage of by the landowner under certain conditions. This chapter outlines those conditions as they relate to baseline documentation and conservation easement monitoring. The intention is to inform the Rincon Institute of the standards it must meet in order to confidently tell potential donors that they *may* be eligible for a tax deduction. This chapter is not a comprehensive review of the tax code or the requirements that must be met in order to claim an income or estate tax deduction. The tax code is extremely complicated; land trusts should encourage property owners to consult with their own tax attorney to determine their eligibility for a tax deduction. In addition, not all conservation easements that are consistent with the mission of the Rincon Institute will qualify for a tax deduction. The requirements discussed in this chapter are only relevant in cases where a land owner donating an easement wishes to receive a tax deduction. If the landowner does not wish to pursue a tax deduction, the Rincon Institute does not need to take the extra step of ensuring they meet the specific standards set forth in the regulations.

The basic requirements for claiming an income and/or an estate tax deduction under §170(h) and/or §2031(c), as they relate to baseline documentation and moni-

toring, are identical. In order to claim an estate tax deduction under §2031(c) the requirements of §170(h) must be met along with additional requirements that go beyond the scope of baseline documentation and monitoring. For this reason, this chapter will focus on the regulations and interpretive guidance provided by §170(h) of the Internal Revenue Code (IRC) and the corresponding section of the United States Treasury Regulations. The IRC provides the actual text of the rules that must be following to receive a tax deduction; the Treasury Regulations interpret the rules of the IRC in order to clarify their meaning.

The basic standards for receiving a federal tax deduction for a conservation easement are: a qualified conservation contribution is the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity.

This standard has four basic components that must be defined to understand whether a conservation easement meets the IRS requirements: qualified real property interest, qualified organization, exclusive conservation purpose, and perpetuity. A qualified organization is a non-profit organization whose mission is to accept conservation easements or a government (local, state, federal). In the event the conservation easement is conveyed to another organization, the new organization must also be a qualifying organization in order for the easement to retain its tax deductible status. Perpetuity is an interest that lasts forever. In the case of the donation of a mortgaged property, the mortgagee must be subordinated to the conservation easement holder to ensure enforcement of the easement in the event of repossession.

The two most complex of these standards are the exclusive conservation purpose and the qualified real

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property interest. The qualified property interest is defined as the entire interest in a property (except for mineral rights) or a conservation easement or conservation restriction that grants a partial interest in a property in order to serve a conservation purpose.

The conservation purpose requirement is the heart of the regulations. There are a number of ways to show that a donation is exclusively for a conservation purpose, each of which will be touched on here. The regulations also provide a number of suggested inclusions for baseline documentation to aid in the demonstration of the conservation purpose of a given easement. It is essential that the Rincon Institute understands the conservation purpose clause of the regulations if it intends to promote the potential tax benefits of conservation easements in the future. In addition, baseline documentation is required in order for conservation easements (but not grants of an entire real property interest) to qualify for a tax deduction and is an ideal place to show the IRS conservation purpose requirements have been met.

The purpose of baseline documentation is to document the conservation values of a given easement. In doing so, the IRS standards will often be explicitly addressed without any additional work. If additional work is required to explicitly address the IRS requirements, it will likely be of the same nature as the work already being done to meet the internal policies established for the Rincon Institute by this report.

At the highest level, a conservation purpose, according to the Treasury Regulations is: preservation for outdoor recreation or education, protection of habitat, preservation of open space, and/or preservation of historic lands or structures. Each of these categories has detailed definitions. For the purposes of this report, the last category, historic lands or structures, will

not be considered because historic preservation is not central to the Rincon Institute's mission.

Preservation for recreation or education is the reservation of land for those purposes for the use of the public. If this clause is used to meet the conservation purposes test, there must be public access to the easement.

The habitat protection test is met by the protection of "significant relatively natural habitat." Significant habitat refers to habitat for rare, threatened, or endangered species; a high quality example of a particular habitat or natural community type, or land contributing to the "ecological viability" of an existing conservation area. If this test is used to establish the deductibility of an easement, public access is not required. It is enough just to preserve the habitat in perpetuity.

The third test, preservation for open space is the most complex of the four. An open space donation must be consistent with a clearly delineated government policy (any level of government) or for the scenic enjoyment of the general public and yield a significant public benefit. Each of the three components of the test must be considered separately.

First, what does the IRS consider to be a clearly delineated government policy for open space conservation? The intention of the inclusion of this criterion, according to the Treasury Regulations is to encourage the preservation of open space that a community has determined to be of significant value. Therefore, this standard cannot be met by reliance upon general statements of overarching conservation goals by elected officials or government officials. On the other hand, there does not need to be a policy in place designating specific parcels for conservation. Generally stated, a government policy "must involve a significant commitment by the government with respect to the con-

conservation project”(Treasury Regulations §1.170A-14). This test is best understood through examples.

The Sonoran Desert Conservation Plan meets the criteria for a clearly delineated government policy. It is a plan produced by Pima County for the express purpose of protecting important wildlife habitat within the county. It specifically designates land for conservation, limited development, and land with no development restrictions. The Plan has been published by Pima County, is available on the Pima County website, and has been incorporated into the Comprehensive Plan of the Pima County. A conservation easement on a parcel within areas designated as biological core or priority species habitat by the Sonoran Desert Conservation Plan is likely to meet the clearly delineated government policy standard. In contrast, a statement by a member of the Board of Supervisors of Pima County that, “This is a beautiful parcel and I would like to see it preserved as open space,” would clearly not qualify as a clearly delineated government policy.

The scenic enjoyment standard is difficult to specifically articulate. The Treasury Regulations provide only examples, but not specific criteria of what will or will not qualify; the regulations go as far as to say that individual situations vary enough as to make a specific standard impractical. In general, however, to qualify under the scenic enjoyment standard, “it must be shown that the development of the land would result either in an impairment of the scenic character of the landscape, or would interfere with a scenic view that can be enjoyed from a public place”(Miller 2005). Somewhat more illuminating are the eight factors will use to judge scenic enjoyment provided in the Treasury Regulations, though the application of these factors is flexible and on a case-by-case basis.

1. The compatibility of the land use with other land in the vicinity;
2. The degree of contrast and variety provided by

the visual scene;

3. The openness of the land (which would be a more significant factor in an urban or densely populated setting or in a heavily wooded area);
4. Relief from urban closeness
5. The harmonious variety of shapes and textures;
6. The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;
7. The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory program; and
8. The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency (Treasury Regulations §1.170A-14).

Most of these factors provide little comfort to a land trust and/or land owner attempting to determine if a conservation easement qualifies for a tax deduction under the scenic enjoyment test. More specifically, the Treasury Regulations note the preservation of views from publicly accessible existing conservation areas will qualify (Treasury Regulations §1.170A-14). Public access to conservation easements under the scenic enjoyment criteria is not required, though visual access is required. While the scenic enjoyment standard is available to land trusts and land owners seeking to establish the tax deductibility of an easement, the standards of application in almost all cases are ambiguous.

In all cases where preservation of open space is used to justify the tax deductibility of a conservation easement, the conservation easement must yield a significant public benefit. There is no one thing used

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to determine if a conservation easement results in a significant public benefit. The factors that lead to the determination of significant public benefit are likely to be different for each conservation easement. The Treasury Regulations offer 11 potential criteria for determining the significance of the public benefit of a conservation easement. Many of these criteria resemble the criteria for qualification as an easement for scenic enjoyment or consistency with a government policy. Therefore, it is likely that if these criteria are met, significant public benefit will have been established.

Importantly, conservation easements may qualify for a tax deduction under more than one test. This fact is important for relating the tax code to baseline documentation and monitoring and will be discussed in the recommendations section of this chapter.

Application to Baseline Documentation and Monitoring

The tax code and Treasury regulations themselves say little about baseline documentation and monitoring of conservation easements. Baseline documentation is required for cases when less than the entire property interest is donated to a qualifying organization; this requirement incorporates conservation easements and any other type of conservation restriction. This documentation must be provided by the grantor to the grantee – the land owner must provide baseline documentation to the land trust. The baseline documentation must be provided at the time of donation and should document the condition of the property at the time of donation so any adverse impacts from the exercise of reserved rights can be determined.

The actual IRS requirements for baseline documentation are vague. The Treasury Regulations provide a number of examples of what a baseline document may contain, but does not specifically require anything.

The Treasury Regulations suggest that documentation include a survey map, a map of improvements, an aerial photograph, and site photographs of the property.

The monitoring requirements of the tax code are even less strict than the baseline documentation rules. All that is required is that a landowner notify the easement holder when a reserved right is going to be exercised so the easement holder can verify the intended use is allowed under the easement. In addition, the Treasury Regulations state that the donee must have the resources to monitor the conservation easement, but does not specifically define what this means (Shay 2006).

Because of the vagueness of the requirements for baseline documentation and monitoring in the Treasury Regulations themselves, land trusts and landowners are left to decide for themselves what to do in order to show they are meeting the requirements for tax deductibility. The remainder of this chapter will provide recommendations for baseline documentation and monitoring to help meet the tax code requirements and aid in establishing the validity of a conservation easement as a tax deductible gift.

Prior to articulating specific recommendations, however, a word of caution is needed. Recently, the IRS has started to step up enforcement actions against improper use of the conservation easement tax incentive. While enforcement had traditionally been lax, a perception that abuse of the tax incentives for conservation easements was increasing resulted in an increase in audits beginning in the mid-2000s (McCullum and Thrasher 2004, Miller 2005, Shay 2006). Enforcement actions have included both audits of taxpayers claiming conservation easement related deductions and actions against organizations facilitating abuse of the tax incentive. Actions have been focused specifically on taxpayers claiming deductions for, and

organizations accepting, open space easements (Miller 2005).

The increase in enforcement actions was a hot topic of discussion at the 2007 Rally, the national conference for land trusts hosted by the Land Trust Alliance. The general consensus from Rally and from articles in *Exchange*, the trade journal for land trusts, is that organizations should be following the Treasury Regulations exactly, including all suggested baseline documentation elements in all baseline reports, conducting regular monitoring, and asking for enforcement endowments to prove-up capacity for monitoring (Shay 2006). This approach is reflected in the subsequent recommendations.

Recommendations: Baseline Documentation

The tax code and Treasury Regulations provide suggestions of what baseline documentation reports may include, but no requirements. Nevertheless, as a result of the recent increase in enforcement action by the IRS against taxpayers claiming a tax deduction as a result of a conservation easement donation and conservation organizations that accept easements of questionable conservation value, it is advisable that the Rincon Institute include at minimum in their baseline reports all of the elements suggested in the Treasury Regulations. These include:

- A survey map,
- A site map showing structures and improvements,
- An aerial photo, and
- Photos of the site showing important conservation features

While this minimum standard, especially the site photos, will go a long way to documenting the condition of the easement property, it does not go far enough. Because it is necessary to establish a conservation purpose in order for a landowner to claim a tax deduction, the baseline documentation should speak directly to the intended conservation purpose of the easement.

In addition, the baseline report should state how the conservation purpose served by the easement is a public benefit, not just a private benefit to the landowner. Because the conservation purposes of an easement as defined by the Treasury Regulations will also likely need to be documented because of the legal considerations discussed in Chapter 3 and the practical consideration discussed in the next chapter, it is unlikely any extra work will be required to address the regulations. When a landowner intends to take a tax deduction as a result of an easement donation the qualifying conservation purposes of the easement should be specifically called out in the documentation to ensure the regulations are clearly met. If a tax deduction will not be sought by the land owner, this extra text is not required in the baseline report.

When preparing a baseline document for an easement to be used for a tax deduction it is also important to include as many conservation purposes as possible in the documentation, even if the original intent of the easement was only to fulfill a single purpose. This is especially true if the primary conservation purpose is open space conservation; the IRS has been aggressive in auditing taxpayers claiming a deduction as a result of open space preservation. Because the IRS regulations are broad, it is generally not difficult to find more than one conservation purpose for an easement in keeping with the mission of a responsible conservation organization. However, the broad nature of the regulations are also the reason for including more than one conservation purpose – a land trust and the donor can have more confidence in the tax deductibility of the donation if they have multiple justifications for it.

It is also necessary to clearly state any government policies supporting the conservation easement if protection of open space is used to establish the conservation purpose of the easement. Government policies change over time; the baseline documentation report is

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an opportunity to state the policies that were in place at the time the easement was conveyed to the land trust. If this is not documented in the baseline report, it is unlikely that it will be documented anywhere.

Finally, it is important to remember that, under the tax code, it is the landowner's responsibility to prepare the baseline documentation report. The land trust receiving the donation need not create the report on behalf of the landowner. Because the report is required, the land trust can require the landowner pay for its creation. Such a requirement helps to defray the land trust's costs in receiving the easement donation.

Summary of Recommendations:

- Include a survey map, map of improvements, aerial photo, and site photos in all baseline reports.
- Specifically address the conservation purpose of the easement as it relates to the tax code.
- One conservation purpose is the minimum; it is desirable to meet the standards for at least two conservation purposes in case one fails under IRS scrutiny.
- State any government policies, local, state, or federal, that support the conservation easement.
- Obligate landowners seeking a tax deduction to pay for their own baseline report.
- Do not provide tax advice to landowners.

Recommendations: Monitoring

The tax code requires little of land trusts when it comes to monitoring of conservation easements. The monitoring work needed to meet the requirements of the tax code are far less rigorous than what is required for a land trust to meet its general legal obligations as outlined in Chapter 3. What is required is a clause in the easement document itself requiring notification by the landowner to the land trust when any reserved rights are to be acted upon (e.g. constructing a new home in a building envelop), and that the land trust have the resources required to monitor the easement. The former is not as much a monitoring issue as it is

an easement drafting issue. The latter is a source of difficulty for many land trusts.

At Rally 2007, several tax law related sessions discussed the need to request and receive adequate monitoring endowments from conservation easement donors. Donors clearly have an incentive to give such an endowment – it contributes to ensuring the tax deductibility of the donation. However, many land trust representatives at the conference noted that it is difficult to ask for cash from a easement donor when they are already giving a significant donation in the form of valuable development rights. While it is understandable that land trusts have difficulty asking for anything beyond the initial donation of the conservation restriction, it is essential both to maintain their status as an eligible organization to receive tax deductible easement donations and to meet their ongoing easement stewardship obligations. Recommendations for methods of calculating stewardship endowment amounts is beyond the scope of this report.

Summary of Recommendations:

- Include a notification clause in the easement when it is drafted.
- Request a monitoring endowment from each landowner donating a conservation easement. Endowments are needed to ensure the land trust has the means to carryout ongoing stewardship obligations.

CHAPTER 5: STEWARDSHIP IN ACTION: BEST PRACTICES

The previous chapters provide an outline of what should be included in the baseline documentation report of a conservation easement and the major monitoring obligations of a land trust from the perspective of meeting basic legal and tax regulation standards. What they do not provide is any guidance on how to integrate this information into a functioning conservation easement stewardship program. This chapter will provide the Rincon Institute with the information it needs to take this next step. In addition, included in Appendix A and B to this report are templates for baseline documentation and monitoring and guides for using these templates.

Determining what makes up sound baseline documentation and monitoring policies is not a simple task. There are a number of issues to consider. First, the legal and tax information from the previous chapters must be integrated into these policies. Without addressing these issues directly, it is less likely the conservation easements held by a land trust will withstand legal challenge by a future landowner or the Internal Revenue Service (IRS). However, simply addressing each of the recommendations from the legal and tax chapters in a step by step fashion would be burdensome, repetitive, and inefficient. It is also unlikely the staff members conducting the baseline documentation or monitoring would fully understand why they are going through the steps. Second, the Land Trust Alliance, the national membership organization of land trusts, provides a set of Standards and Practices for easement documentation and monitoring. This set of standards attempts to integrate the legal and tax considerations, but also tends to be rather general in order to be broadly applicable. Third, it is important to consider what is happening on the ground in the land trust community. How are land trusts approach-

ing the challenge of creating baseline documentation and carrying out monitoring programs? Many land trusts make their policies and templates for documentation and monitoring available to other trusts to facilitate collective learning. This information will be drawn upon heavily to determine best practices for easement monitoring and documentation. Finally, any stewardship policy must consider institutional capacity. Large organizations have the resources to do more than small organizations. A clear minimum standard will be presented here. In addition, the strengths and weaknesses of participatory monitoring – using community volunteers to conduct easement monitoring – will be considered and basic recommendations on the use of participatory monitoring provided.

Baseline Documentation

Standards and Practices

The 2004 edition of the Land Trust Alliance's (LTA) Standards and Practices Guidebook contains an outline of the key components of baseline documentation and standards for completion of the documentation. The prior version of the Standards and Practices Guidebook, published in 1993 did not contain this information. Therefore, the standardization of baseline documentation is still in its early stages and much variety still exists in the actual policies of various land trusts. Nevertheless, the Standards and Practices are a useful guide for establishing a starting point for a baseline documentation policy. They also form the basis from the recently established Land Trust Accreditation process. The Standards and Practices must be met in order to become an accredited land trust (Campopiano 2006).

The Standards and Practices provide basic information on what to include and when to conduct a baseline report. The standards are driven by the recognition that there are certain requirements to receive a tax de-

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duction and that a land trust must have a record of the conservation values of a property in order to properly monitor it and defend the trust's interests. Accordingly, baseline documentation should include:

- Date of preparation;
- Authorship and qualifications of the preparer;
- Acknowledgement statement;
- Background information on the property and the easement;
- Property description;
- Easement summary;
- Any additional legal information;
- Conservation values;
- Maps and surveys;
- Site photos (LTA 2004).

Documentation should be completed in concert with the preparation of the easement itself and should be signed at the same time the easement is signed. The baseline should be signed by the landowner and the land trust. Subsequently, the documentation should be stored according to a clearly articulated organizational records keeping policy (LTA 2004).

Unfortunately, while information on what should be included and when a baseline report should be completed is addressed by the Standards and Practices, no information on how to develop a baseline report is provided. This is addressed in the next section through a survey of the literature on baseline documentation and existing land trust's documentation policies.

Real World Approaches

This section will have three components. First, there will be a brief discussion of what the practical literature on conservation easement stewardship indicates should be included in a baseline documentation program. This information is drawn from articles in *Exchange*, the journal of the Land Trust Alliance, and presentations from past Rallies hosted by the Land Trust Alliance. These sources largely mirror and

reaffirm the Standards and Practices discussed above. Second, the results of a review of existing baseline documentation templates will be considered. Sources for templates include the Land Trust Alliance website and templates obtained during informal discussions with practitioners at Rally 2007. This review will offer basic statistics on what practices are most and least common and direct application of practices to the legal and tax considerations presented in previous chapters. Finally, there will be a brief discussion of procedures for implementing baseline documentation templates and important policies to support their long-term utility. This discussion will be general and not include a step by step procedure for producing a baseline documentation report. An implementation guide and template is provided in Appendix A to this report. Collectively, the three parts of this section represent the Best Practices for baseline documentation.

There is surprisingly little information available in *Exchange* and from past Rallies about what should be included in baseline documentation reports. This is likely because most of the articles and presentations from these venues focus on more specific issues of conducting baseline surveys. This information will be presented as needed during the review of existing baseline templates. In addition, there are several articles that have a general "follow the rules," theme without getting too much into specifics about what that means beyond referring to the Standards and Practices and the Treasury Regulations (Small 1999, Wentworth 2002, Shay 2006).

Rebecca Thronton and Judy Anderson's (1998) article is the most detailed treatment available in the literature. Their arguments generally support LTA's Standards and Practices and are specifically targeted at developing procedures that are legally defensible. They call for inclusion of an easement map and survey, photo documentation, signatures of all the par-

ties involved, a copy of the original easement, and a baseline data sheet – a standard template that includes basic information about the easement for ease reference. Interestingly, while the elements they propose are all consistent with the Standards and Practices, they do not include all of the elements required by the Standards and Practices. The focus of the article was specifically legal defense of easements, so the authors may have focused only on those elements that were critical to fending off a legal challenge. However, even when allowing for such a narrow focus, there are elements missing from their approach. For example, basic information of the property features relative to the conservation restrictions should be provided in order to explicitly monitor for changes over time.

Elizabeth L. Wroblicka (2005), focusing on the same issue as Thronton and Anderson – easement defense – addresses some of the issues overlooked by the latter authors, but does not provide the same level of detail about preparation of baseline documents. Wroblicka does suggest documenting property characteristics in the baseline report and, wherever possible, doing so using publicly available government records (e.g. natural heritage program reports or reports generated through the Sonoran Desert Conservation Plan process). Using public records to document easement conditions is a good idea because such records are exempt from hearsay rules, simplifying easement defense. Taken together, these two articles provide an approach to baseline documentation that is roughly consistent with LTA's Standards and Practices.

Sessions on the basics of baseline documentation are staples of the LTA Rally held each year. These presentations generally cover implementation of the LTA Standards and Practices. However, they are most useful for the opportunity they provide for discussion with other land trust practitioners about on-the-ground application of the Standards and Practices and the

questions raised by them. For example, discussions at baseline documentation sessions at the 2007 Rally specifically addressed issues with digital photography and detailed biological assessment of individual easements. These issues are important to land trusts, especially small trusts, because they have a dramatic effect on the amount of resources needed to complete a baseline assessment. If film photography is used instead of digital photography, a significant amount of time and money will be spent on taking, developing, and potentially retaking photos that did not turn out. With digital photography there are no film costs so extra pictures may be taken during the initial visit to the property. Biological assessments require significant time and expertise that many small land trusts do not have in-house. Specific approaches to these issues will be discussed in the next section.

Review of Templates

A total of eleven baseline documentation templates were reviewed for this report. Each template was analyzed to determine the baseline documentation practices if each land trust. The LTA Standards and Practices was used to generate an initial list of practices and additional items were added to the list if a template contained a practice that did not fit into any of the initial categories. Each template was reviewed to determine only what practices were or were not conducted, not the degree of importance ascribed to each practice. It is impossible to know how important an individual element of a baseline report will be for a given easement. The relative importance of a specific element may change from one easement to the next depending on the nature of the conservation restrictions of a given easement. In addition, if an easement is ever faced with a legal challenge, only the elements of the baseline relevant to the specific nature of that challenge will be of particular importance at that time.

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Most baseline reports contain information sufficient to aid in defense against a number of different types of legal challenge. If a given template contained a practice, that template was given a score of one for that practice. If the template did not contain a practice, a score of zero was assigned. The total score for each template was summed and the total number and percentage of trusts including each practice in their template was calculated. The maximum number of practices included in a single template was 16 out of a possible 24. The average number of practices was 11.6. All practices were carried out by at least one land trust. Only one practice was specifically carried out by all land trusts, but it is likely that other practices are carried out universally but not included in the template forms (e.g. not all trusts include a signature page in their template, but without a signature from the landowner and trust acknowledging the validity of the baseline report it is worthless). The following sections will discuss the elements of the baseline templates and how they relate to the legal and tax considerations presented in previous chapters. In some cases, related practices are combined to allow for a more holistic discussion.

The Basics

There are a number of components that should be included in any baseline document, regardless of the purpose of the conservation easement. Most of these items seem obvious; they are things any reasonable person would think to include in a baseline. Included in this category are:

- The date of preparation of the baseline document,
- The location of the conservation easement,
- The author of the baseline document and his or her qualifications,
- An acknowledgement statement with signatures of the parties to the conservation easement.

Including the date in the baseline document establishes when the report was prepared. A baseline reports

the condition of an easement property at a specific moment in time. Surprisingly, only 73% of the baseline templates reviewed for this study include the date of preparation as a specific item.

The location of the easement is also an obvious item for inclusion. When working with conservation easements, it is important to remember that they are intended to be perpetual. Over time, land trust staff will come and go. Institutional memory will be lost. Including the location, and ideally directions to the property, will allow future generations of land trust staff to continue monitoring of easements received years in the past. About 82% of the reviewed templates included the location, and in some cases directions to, the property.

Inclusion of the author and the author's qualifications is somewhat less common. Only 45% of the templates reviewed included authorship. As such, this seems to be a less critical component. Its importance likely depends on a number of factors. If the baseline includes complex ecological data, it may be important to include authorship to reinforce its validity. If the baseline was prepared by a third party, it may be important for the land trust to know who prepared it at some point in the future. If the report is prepared internally according to the standard procedures of the trust, it is probably less important to include authorship.

Acknowledgement statements are found in 73% of the templates reviewed. An acknowledgement statement is required by the IRS to qualify for a tax deduction. It is also common sense to include one. The assent of the landowner that a baseline document is accurate can only help to strengthen the land trust's case in the event of future legal proceedings.

Legal and Tax Considerations

From a legal perspective, it is a good idea to include all of the basic components discussed above. The date of preparation provides a clear basis for showing changed conditions between the baseline and future monitoring reports. Without a date, there would be no way to establish when the baseline was actually conducted and thus no clear definition of pre-easement conditions. Ideally, the baseline should be notarized at the time the acknowledgement statement is signed. The acknowledgement statement is a required element by the IRS and also makes good sense even if the landowner does not intend to claim a tax deduction. It establishes a record that the parties to the easement agreed that the baseline report was accurate. A notarized statement to that effect, which will include the date of notarization, can be used as evidence in any legal proceedings regarding the easement, even after the original parties to the easement have moved on.

From a legal perspective, including the location of the easement helps to clarify what exactly is being documented. It also makes good administrative sense, however, as noted above. Without the location, it is left ambiguous what parcel of land is actually being documented. In many cases, this component will be superseded by a survey map, which will be discussed in the next section.

Finally, authorship and qualifications may be important in the event of a legal proceeding or audit by the IRS. Including authorship allows the land trust and landowner to locate the author at a future date to provide first hand testimony in the event of a legal dispute. In addition, especially in cases when complex ecological data is included in the baseline, the qualifications of the preparer may be important to a court. Information generated by a trained ecologist is likely to carry more weight than data developed by

a layman. When detailed ecological data is not included in the baseline documentation, which is likely to be the case more often than not (more discussion on this will follow), the qualifications of the preparer are less important. Most baseline reports are simply a compilation of existing information supplemented by site specific photos and maps. Beyond training in the organizational policies of the land trust, no particular expertise is required.

Recommendations

All of the components in this category should be included in any baseline document and are components of the template found in Appendix A. They are included in a high percentage of the baseline templates reviewed for this study. While they have varying levels of utility from a legal and tax perspective, they all make good administrative sense.

Maps

Maps make up one of the core components for a baseline document. All of the baseline templates reviewed included multiple types of maps. Some map types are more common than others, and some are clearly more important than others. Types of maps included in various baseline templates include:

- Photo point maps,
- Aerial photos,
- Topographic maps,
- Survey maps,
- Soils maps,
- Tax maps/area maps.

The only practice included in all of the baseline templates, the photo point map, is a critical component of any baseline documentation report. The photo point map indicates the location of sites on the property where photos for the baseline report were taken and serves as a reference for regular monitoring visits. Photo point maps may be georeferenced – accurately

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depicting the exact location from which photos of the property were taken – or not; georeferencing is not critical to fulfill the purpose of the photo point map (Byers and Ponte 2005). The actual photo points themselves will be recorded with GPS coordinates in the baseline document. The map is a handy reference to get a monitor started walking in the right direction and to provide people looking at the photos perspective on what portion of the property the photos represent. The map also helps the baseline preparer identify any potential gaps in photo coverage of the conservation values of the property.

Aerial photos, while not a map per se, logically fall into this category. They are used to document the condition of the entire property at the time the baseline was prepared. They show the entire property, including roads, structures, and the conservation values the easement seeks to protect. The most recent aerial photo available should be used in the baseline document. Ideally, the property boundaries will be drawn onto the aerial photo (Byers and Ponte 2005). Nearly 82% of the baseline templates reviewed call for inclusion of an aerial photo, as do LTA's Standards and Practices and the Treasury Regulations.

A topographic map is a less common element of baseline templates, but is still contained in slightly more than 50%. The purpose of a topographic map is to show the property in its regional context. This purpose is also served by a tax map, which shows the neighboring parcels and is a common component of baseline templates of northeastern land trusts. As an alternative to a topographic map, a map of the area can be copied from a road atlas or a gazetteer or a map can be generated using Geographic Information System (GIS) software. The advantage of a GIS map is that it will accurately show property boundaries and as much or as little additional information as is desired (Byers and Ponte 2005). The downside is that

GIS software is very expensive and most small land trusts do not have the resources to purchase it. When GIS software is not used, the location of the property should be indicated on the topographic or other type of area map.

Survey maps are also included in about 50% of the baseline templates reviewed. A survey shows the exact boundaries of the property. An official property survey is registered with the county recorder, making it a public record and easing its admissibility in a legal proceeding. Also included on the survey map are the exact locations of any buildings in existence at the time of the survey and building envelopes allowed under the conservation easement.

Soils maps are a relatively uncommon component of baseline documents, based on the sample reviewed for the report. Those that did include soils information were from trusts that had significant agricultural or forestry easements. Land trusts not receiving these types of easements did not include soils maps or soils information.

Legal and Tax Considerations

From a legal perspective, the most important element in this category is the survey map. Because a survey map is a legal document showing the exact boundaries of a property, it is the best defense against adverse possession claims. Similarly, it will aid in future monitoring visits because the survey denotes exactly where structures and building envelopes are located. A survey map can be used in concert with the photo point map to ensure no violations have occurred between monitoring visits. Similarly, an aerial photo provides a convenient, easy to understand method of verifying that there is no encroachment at the property boundaries and will be useful for future comparison with monitoring photos and new aerials that become

Narrative Components

available over time. In most cases, publicly available aerial photographs were taken and are maintained by a government entity, making them admissible in court as a public record. The other map types – topographic, area, tax, and soil – are not necessary for legal defense of an easement.

Aerial photos are suggested in the Treasury Regulations. While not required, there is no good reason not to follow the suggestion given the ready availability of aerial photos and their generally low cost.

The other map items are not as important from a legal or tax perspective. While LTA's Standards and Practices and various presentations at Rally 2007 call for inclusion of an area map, the reason is largely to set the easement in context with its surroundings. Soil maps are only needed in circumstances where the soils of a property play an important role in preserving the conservation values of the easement, e.g. in the case of an agricultural easement aimed at preserving farmland. While soils maps are relatively easy to obtain, they are of little utility to a standard scenic or open space easement. A photo point map is an important reference for future monitors of an easement, but are not an essential component of a baseline from the perspective of legal defense or tax deduction qualification.

Recommendations

A photo point map and aerial photo should be included in all baseline documents. A professionally prepared and recorded property survey should also be included. To set an easement in context with its surroundings, an area map is helpful. I recommend a topographic map because they are accurate, cheap, and easy to obtain. All of these components are included in the baseline template found in Appendix A.

The majority of the information contained in a baseline document is in narrative form. The survey of templates yielded a wide variety of potential information to incorporate into a baseline, including:

- Background information about the property,
- A property description,
- A summary of the conservation easement itself,
- The conditions of the property relative to the easement restrictions,
- The conservation values of the property,
- Detailed ecological data,
- History of the easement,
- Relevant government policies, and
- IRS qualifications for a tax deduction.

In practice, many of these elements overlap. For example the conditions of the property relative to the easement restrictions and the conservation values of the property are likely to contain similar information and probably do not need to be included as separate items in the baseline. Qualifications for a tax deduction are also likely to overlap the discussion of conservation values and should be included in that portion of the narrative when the landowner is intending to seek a tax deduction. Background info about the property includes things like the size of the property, the type of structures present, etc. and is largely redundant to the property description. These items can be combined.

The purpose of the conservation values components of the baseline report is to document only the conservation values of the property relative to the purpose of the easement and the restrictions contained in the easement to meet that purpose. There was a strong consensus at Rally 2007 as well as in the literature (Thornton and Anderson 1998, LTA 2004, Byers and Ponte 2005) that the baseline should be narrowly focused so as not to confuse and to ensure the relevant points were covered. Focusing on just the conservation restriction also aids in showing that the easement

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was put in place with a particular purpose in mind. Examples of what to include in the conservation values narrative include information on endangered species habitat, viewshed from a public road, or important ecosystems. Anything explicitly noted in the conservation easement document as a conservation value of the property should be addressed.

There is a question of specificity when documenting conservation values. If the reason for the easement is to protect endangered species habitat, is it necessary to conduct a detailed on-site ecological survey to document that habitat? Few land trusts go to such lengths (27%). Generally, publicly available information from natural heritage programs or local government programs like the Sonoran Desert Conservation Plan is sufficient (Byers and Ponte 2005). Not only is using public sources that generally designate habitat types on the landscape easier initially, it is also simpler in the long run and makes more sense for a land trust with limited resources. No specialized expertise is required if existing ecological data is used. Monitoring can rely on evidence of clear human induced changes to the landscape, e.g. road building or evidence of off highway vehicle use. One of the challenges of ecological monitoring and documentation of conservation values is that the condition and types of habitat will change over time as a result of the natural evolution of the ecosystem. By conducting detailed monitoring, these changes will be clear presenting both opportunities and challenges. Regular in-depth surveys may contribute to scientific knowledge, but if it documents a clear loss of habitat, it may also threaten the viability of the easement due to changed conditions. Regardless, such in-depth survey work is unnecessary and should be avoided unless there is a compelling reason (for example, if the purpose of the easement was for education about habitat and ecological monitoring). An additional benefit to using government sources is

that they will be admissible in legal proceedings as public records (Wroblecka 2005).

History of the easement is included in slightly more than half of the templates considered. The information contained in this component ranges from basic information about when the easement was signed to more detailed information on the original intent of the easement. The purpose is to provide additional information that may not fit elsewhere in the baseline document.

One of the areas of debate in the land trust community is whether or not to include a summary of the conservation easement in the baseline documentation. Many land trusts do – 63% of the baseline templates reviewed for this report included a summary of the easement. However, the general sentiment of conservation easement lawyers at Rally 2007 was to not include a summary of the easement in the baseline documentation. They felt that doing so opens a land trust to having an easement misinterpreted because the landowner was relying on the baseline's description of a conservation restriction and not the easement's legal description of the same restriction. Similarly, summaries may include some conservation restrictions but not all, potentially resulting in ignorance of landowners to everything they are obligated to do or not do per the easement. One approach to overcoming this problem is to clearly state in the introduction to the easement summary that it is only a summary and encouraging the reader to consult the actual easement if questions arise. Regardless, the complete easement should be included in the baseline document as an appendix.

Lastly, some templates (45%) include information about government policies supporting the purpose of the conservation easement. This information is easily located through local, state, and federal government websites.

Legal and Tax Considerations

Most of the elements covered in this section are obvious for inclusion from a common sense perspective. One needs to know what one is protecting in order to protect it. Much of this common sense approach carries over to the legal and tax issues considered in earlier chapters. It is clearly important to document conservation values. These are the primary purpose of the easement and are needed to show a court what the intention of the conservation easement was when originally put in place. Being sure to address all of the conservation values the easement seeks to protect provides for multiple defense strategies in the face of a changed conditions argument. Documenting the conservation values is also required to meet the IRS tax deductibility requirements.

To qualify for a tax deduction, the taxpayer also must be able to prove that the conservation easement is in the public interest. The easiest way to do this is to show that it is consistent with a government conservation policy. Not all easements will be consistent with such a policy, but when they are, this should be clearly stated along with a description of how they fit with the mission of the government policy.

Including information on the history of the easement and especially on the landowner's and land trust's intent in placing the easement on the property is also helpful from a legal perspective. This information is implicit in the characterization of the conservation values in most cases. However, an explicit statement of why the original landowner wanted to preserve a parcel could only serve to help the land trust in the event of a legal conflict. This is not necessary to qualify for a tax deduction.

There are pluses and minuses to including summary information about the conservation easement in the

baseline document. As noted earlier, the best approach is likely to include a summary that is explicitly labeled as such and to also include the full easement as an appendix. This allows for a quick reference in the baseline for use in monitoring, but also makes the full text available for points of confusion.

Recommendations

All of the elements described in this section should be included in a baseline documentation report.

Photographs

The bulk of a baseline document is made up of site photographs. These are also perhaps the most important element of the baseline. The photos build on the narrative descriptions of the property structures, conservation restrictions, and conservation values. They are the visual record of what the property looked like at the time the easement was put in place and are the basis for comparison for future monitoring visits. Photos should be taken of everything of import on the easement property. All of the structures subject to easement restrictions, other easement restricted areas such as roads and trails, conservation values, property lines, building envelopes, and general landscapes of the property (Byers and Ponte 2005). Photos should be taken at specific points on the property and locations should be tracked using a Geographic Positioning System (GPS) receiver (Thronton and Anderson 1998, LTA 2004, Byers and Ponte 2005). This allows for the development of a photo point map.

Currently the most significant area of uncertainty in the land trust community relative to baseline documentation is whether digital photography should be used for baseline documentation. There are arguments on both sides. The current literature suggests that digital photography is acceptable as long as certain rules are followed (Erler 2000, Thompson 2004).

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Presenters on baseline photography at Rally 2007 supported the literature. But there was still significant skepticism for the practitioner audience at the Rally. Because digital photos can be easily manipulated using modern photo editing software, courts may not accept them as evidence of easement monitoring and violations. There is no indication that a case involving an easement and digital photos has been litigated, so there is no definitive way to know how the courts will decide. However, the literature and expert presentations at Rally 2007 recommend the following scheme for the use of digital photos: implement and follow a records keeping policy, maintain the digital files over time, print the photos for the baseline report and each monitoring visit and have the landowner initial acknowledging they are an accurate representation of the property (Erler 2000, Thompson 2004). The hope is that together these measures will ensure digital photos are allowed as evidence in a legal proceeding.

The use of digital versus traditional photography certainly has its benefits. There are no film costs with digital photos. Most baselines involve tens to hundreds of photos. There are no film or development costs with digital photography and many extra photos can be taken to ensure all the needed shots are captured and of good quality. Digital photos also allow the ability to easily zoom in on a particular feature. When using digital cameras it is important to use a camera with as high of resolution as possible to allow for clear pictures even after they have been blown up to a larger size.

Legal and Tax Considerations

Photographs are the most effective means of documenting the condition of a property at a specific point in time. A thorough set of site photos could make the difference between a successful violation proceeding and an unsuccessful one. Site photos are potentially

the most important element of the baseline in this respect. The narratives say what is present, but the ability to show it with pictures is much more powerful. Site photos are also recommended for inclusion by the Treasury Regulations.

Recommendations

Site photos are the most important element of the baseline document. A thorough set of photos providing coverage of all important conservation features, conservation restrictions, and buildings should be included. Photo points should be established for photo sets of each of the important property features so repeat photos can be taken with each monitoring visit and evaluated for changes and potential violations. Photos should be acknowledged by the landowner and the land trust as accurate by initialing each photo. Digital files should be maintained according to the organizationally mandated records keeping policy.

Odds and Ends

There are a number of things included in some templates that do not fit readily in any of the other categories. They are also much less common than the other baseline components. Only one item appeared in more than 50% of the templates reviewed and only because it is a catch all category – additional legal information. The other items are method of acquisition and environmental hazards.

The additional legal information category includes such items as title reports, mortgage subordination documentation, and severed mineral rights, or other items that cause there to be a less than clear title on an easement property. This information can be obtained through a title search, which should be conducted before the easement is in place. Once the title search is completed and any issues identified, it is up to the landowner to address them before the land trust

accepts the easement. The most common issue is mortgages. When a property owner with a mortgage wants to place an easement on their property, they must obtain permission to subordinate the mortgage to the conservation easement. If this is not done, in the event of a foreclosure, the easement could be removed before the property is sold. Because a land trust should already have a title report for any property on which they have or are planning on accepting an easement, there is no additional expense or effort required to append the title report to the baseline document.

Only one template included an environmental hazard element. This is a relatively minor, specialized component that land trusts may want to include for some specific reason. Environmental hazards are a significant area of concern for land trusts. If a trust is considering an easement where any type of environmental contamination is a possibility, an assessment should be conducted well before the easement acceptance and baseline documentation stage. Waiting until the baseline documentation is being prepared to do an environmental hazards assessment would simply be a waste of time for both the land trust and the landowner because a land trust is unlikely to accept an easement on a property with a history of environmental contamination. Although the baseline should be completed before the formal acceptance of the easement, essentially all the work on the easement has been completed by the time the baseline assessment is conducted. Land trusts should have a policy in place for addressing environmental hazards issues. Discussion of what such a policy should entail is beyond the scope of this paper.

Legal and Tax Considerations

While seemingly a small item, mortgage subordination is important from both an easement defense and tax deductibility perspective. If a mortgage is not

subordinated at the time an easement is accepted, the chances are much higher that the easement will be lost in the event of foreclosure. The Treasury Regulations also require subordination in order to receive a tax deduction. Land trusts should make an effort to be aware of anything that could cause a landowner to have less than fee ownership of their land. A title search should be sufficient to achieve this goal.

As noted above, land trusts should have an environmental hazards policy in place. Noting the method of acquisition was not mentioned as important in any of the legal or tax literature.

Recommendations

A title search should be conducted for all easements. The results of the title search should be included as an appendix to the baseline documentation. All land trusts should have a policy in place dictating what actions to take to determine the level of scrutiny a potential easement property receives relative to environmental hazards.

Easement Monitoring

While the requirements and procedures for conservation easement monitoring are less intensive than those for baseline documentation, monitoring is no less important. In fact, easement monitoring is the backbone of a sound stewardship program. Only through monitoring can a land trust ensure that no easement violations have occurred year after year and maintain its responsibility to the easement donor and the public. The *LTA Standards and Practices* state:

The land trust monitors its easement properties regularly, at least annually, in a manner appropriate to the size and restrictions of each property, and keeps docu

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mentation (such as reports, updated photographs and maps) of each monitoring activity (2004).

These basic elements are all that is required of a land trust in the mind of LTA. This section will provide detailed information fleshing out exactly what is meant by the LTA standards through reference to the literature and a review of actual land trust monitoring policies. In addition, legal and tax concerns from previous chapters are reviewed and correlated to specific policies. Finally, a brief discussion of the merits and drawbacks of the use of volunteers in regular monitoring activist is provided.

Literature on the practical considerations of conservation easement monitoring is limited. Much of what is available considers actual monitoring practices only tangentially in a larger context of legal defense of conservation easements. There are a few important sources, however. The *LTA Standards and Practices* (2004) and *The Conservation Easement Handbook* (Byers and Ponte 2005) provide complimentary, comprehensive procedures for easement monitoring programs. Generally, monitoring should begin with a review of basic information about the easement (e.g. the easement document itself, the baseline report, previous site photos, etc.). Actual monitoring can take the form of aerial monitoring using recent orthophotos or a fly over or a visit to the property (LTA 2004, Byers and Ponte 2005). In most cases, the latter is done because it allows closer inspection of the easement restrictions. If aerial monitoring is conducted and a violation is suspected, a site visit must be conducted (LTA 2004, Byers and Ponte 2005). For the purposes of the Rincon Institute, aerial monitoring is neither practical nor needed, so detailed information about aerial monitoring is not included here. While Byers and Ponte provide little specific information on what should actually be done during a monitoring visit, the *LTA Standards and Practices* provide significant de-

tail. This may be an acknowledgement of the importance of monitoring to easement defense.

As with baseline documentation, the *Standards and Practices* provide a list of components that should be included in a monitoring program. Note that monitoring is more than a report. In fact, the report is somewhat secondary in the process and is primarily useful as a reference for monitors in future years so any trends in property conditions can be established. Of greatest importance is visiting the property and observing the conservation restrictions according to a standard procedure so consistent information is available from year to year. As such, a summary of the easement restrictions for each easement should be prepared for easy reference during monitoring visits. Monitoring site visit forms should specifically require notes on each of the easement restrictions. Other elements of site visit forms include:

- Name of inspector, affiliation, address, and signature;
- Date;
- Property owner and location;
- Presence or absence of the owner; and
- Comment area for condition of the property (LTA 2004).

Unlike baseline documentation templates, where there was a good deal of variety in the specific components included, there is a great deal of consistency between monitoring templates. Again, this may be in response to the acknowledged importance of easement monitoring to successful legal defense (Hocker 2000, LTA 2004, Byers and Ponte 2005). A review of monitoring templates was conducted to determine their consistency with LTA's *Standards and Practices* and to determine if any additional components should be included that are not referenced in the standards and practices. A smaller number of templates were available for review than were available for baseline documentation (seven). While this may be somewhat limiting, because of the consistency between

the templates reviewed it is unlikely that significant differences would have been seen if a larger review was conducted. A total of 14 practices were included in at least one template, though a maximum of 11 was included in any one template. The average number of practices was eight.

Core Practices

The *LTA Standards and Practices* specifically call for the inclusion of seven elements in any monitoring report. All but two of these seven practices were included in each of the templates reviewed. A notation of whether the property owner was present during the monitoring site visit was absent from two of the monitoring reports, while three did not have mandatory inclusion of photographs. Importantly, those templates that did not require photographs in all cases did require them whenever a violation was suspected. While this approach captures significant violations by allowing comparison of monitoring photos with baseline photos, it fails to effectively track subtle changes over time. When photos are taken each year, the monitor can compare the entire group of photos for a given easement over time and identify areas that have been slowly changing and focus on those areas during the monitoring site visit.

Core practices found in all monitoring templates include:

- The date of inspection,
- The monitor's name and signature,
- Basic info on the property (location, owner, etc.),
- The general condition of the property as a whole, and
- The condition of the property specific to the conservation restrictions.

The first three practices are utilitarian. They are useful for administrative recordkeeping. Noting the condition of the property in general is useful for monitoring long-term conditions and important features with a

large aerial extent or unclear boundaries. For example, a monitor may not have the knowledge to determine exactly where one habitat type ends and another begins, but a general account of the property as a whole could indicate to reviewers of the monitoring report if there are any ecosystem health issues on the property. In the case of scenic easements the general condition of the property is important because it is protected in order to maintain its visual appeal for the general public. The condition of the property to the conservation restrictions is of obvious importance. Each of the conservation restrictions of a property should be checked in on and compliance noted. If the monitor believes there is a violation of a specific restriction, additional information on what is happening to cause the violation should be included.

Legal and Tax Considerations

The core components called for by the *LTA Standards and Practices* and included in nearly all of the templates reviewed for this study are generally consistent with the legal recommendations found in Chapter 3. Focus on the condition of the property as a whole increases in importance as urban encroachment fills in open space surrounding an easement property. Doing so allows a land trust to focus on the public benefit provided by the easement as open space and for scenic vistas. In fact, the Treasury Regulations note "relief of urban closeness" as a significant public benefit (Treasury Regulations §1.170A-14). Land trusts can use the public benefit provided by the open space and views to defend against changed conditions arguments. Monitoring of the general condition of the property should also catch any encroachments on the fringes of a property, defending against adverse possession. Finally, it is a land trust's legal responsibility to monitor and maintain the easement restrictions. Without consistent monitoring a land trust will not have the ability to bring a suit – or even the knowledge that it

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should bring one – against a landowner for violating the conditions of an easement. Consistent monitoring of easement restrictions is also needed to ensure no violations are allowed to stand for multiple years without disruption. If monitoring is not conducted, even if a violation is identified, it is possible a land trust may lose its rights to enforcement due to abandonment or adverse possession.

As was noted in Chapter 4, the Treasury Regulations tax requirements are very limited. These requirements relate to issues of easement drafting and stewardship funding and are not relevant to the present discussion.

Recommendations

All core components discussed above should be included in all monitoring reports. Performing site visits to collect the information called for is essential to ensuring easement violations are either prevented or caught at an early stage. Monitoring reports documenting site visits strengthen the legal position of the land trust.

Other Components

Of the remaining components found in at least one of the templates reviewed, only one is found in more than 50%. Others were more often than not found in only one template. Therefore, it is likely that the majority are elements tailored to the specific needs of the land trust. Nevertheless, there are a few important insights gained from reviewing these components.

They include:

- Change of ownership,
- Changes to structures on the property,
- If the costs of the monitoring visit had been paid by the landowner,
- Summary of the conservation easement,
- Recommendations for restoration,
- Any landowner relations notes,
- Wildlife sited.

Many of these are quickly eliminated from consideration for inclusion in this report's recommendations. The costs of monitoring is not an essential component by any means. It is rare for land trusts to pay for monitoring costs through a yearly cost to the landowner. Because the Treasury Regulations require financial capacity for monitoring, it is wise to establish an endowment and require landowner contributions at the time of easement donation/purchase. It is also unnecessary to include a summary of the conservation easement with each monitoring report. A summary of the easement restrictions is a useful tool for the monitor, but it is unnecessary to re-invent the wheel each year with each monitoring visit. The easement is static. Preparing a summary at the time an easement is received as a component of the baseline documentation process is a much better approach. This summary can then be used each year for monitoring. Recommendations for site restoration are only needed if the trust makes a practice of accepting easements that require restoration and management. This is not currently the case for the Rincon Institute. Finally, unless wildlife is specifically noted in the easements as one of the primary purposes of the easement, it is unnecessary to list all wildlife cited. This may be an optional component of a monitoring template for special cases where wildlife is a primary concern. Where it is not, listing all wildlife could significantly add to the burden of the monitor's site visit responsibilities.

The other components listed have merit, but may be included in the core components of the monitoring template and not need to be specifically called out. The most common optional component was information of structural changes. This is indeed important because most easements place restrictions on the built environment. However, these restrictions should be monitored during the site inspection of the easement restrictions and should not need to be included as a separate component. Changes in ownership was the

second most popular, but perhaps the most important. Most easement violations occur after the original owner has moved on (Nudel 1999). Monitoring visits provide an opportunity to engage new landowners and make them aware of the conservation easement and its restrictions (LTA 2004, Byers and Ponte 2005). Similarly, including notes on landowner relations may be helpful for keeping track of which owners a trust has the friendliest and worst relations with.

Legal and Tax Considerations

The components reviewed in this section are not specifically called for by any of the legal or tax issues discussed in previous chapters. However, maintaining good landowner relations is important for preventing the need for legal action. Landowners who are aware of their conservation restrictions and comfortable with the land trust are less likely to violate the easements provisions (LTA 2004, Byers and Ponte 2005).

Recommendations

Information on ownership changes and landowner relations should be included in monitoring reports. These elements emphasize the importance of maintaining strong relationships with landowners to aid in the stewardship of easements. The other elements mentioned in this section are unnecessary and should not be included.

Detailed Ecological Monitoring

One important question for both monitoring and baseline documentation is whether to perform detailed ecological monitoring. There are advantages and disadvantages to performing such monitoring. By conducting detailed monitoring, a land trust can track ecological changes over time and observe how an ecosystem naturally evolves and responds to chang-

es. Detailed ecological surveys require a significant investment of time and resources, however. Regular land trust staff, especially at small land trusts often do not have the expertise to conduct a survey on their own and require the assistance of outside consultants. This can be costly. In addition, it is unclear whether detailed surveys are required to meet the needs of a land trust. Land trusts are most interested in the condition of a property when an easement is placed on it and how the conditions of the property change over time relative to the restrictions of the easement. Conservation easement restrictions relate to how humans modify the environment of a particular parcel of land, not how the environment changes over time independent of human impacts. Therefore, ecological monitoring is not necessary to fulfill the purpose of easement baseline documentation and monitoring. This view was generally supported by speakers and breakout session discussions at Rally 2007. In addition, neither the *LTA Standards and Practices* nor *The Conservation Easement Handbook* call for inclusion of detailed ecological surveys in baseline or monitoring reports.

While detailed ecological monitoring is not needed, documentation of the resources present on a property is required. This can be accomplished by consulting publicly available assessments of ecosystems, soil types, climate zones, etc. In Pima County, Arizona habitat types on any parcel within the unincorporated portion of the county can be generally determined by using the Sonoran Desert Conservation Plan. In addition, state natural history inventories are an important source of information for general habitat and ecosystem types. In conjunction with a general description of an easement property and site photographs, this general information is adequate for fulfilling the need for ecological information in baseline documentation and monitoring reports.

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Participatory Monitoring

When this project was initiated, it was anticipated that it would include recommendations for the development of a participatory program for easement monitoring. The thought was that by using volunteers, the monitoring burden of the Rincon Institute would be reduced and the Institute could also engage the public in its work. Participatory monitoring would increase the name recognition of the institute and allow it to engage in hands on environmental education. There are good reasons, however, to not use volunteers for standard yearly easement monitoring activities. The literature (Sellers 1999, Hocker 2000, Ratley-Beach et. al. 2002, LTA 2004, Byers and Ponte 2005) and practitioners at Rally 2007 emphasized the importance of monitoring as a landowner relations tool. Monitoring is often times the only opportunity a land trust has to interact with a landowner over the course of the year. It is important for land trust's to take advantage of this opportunity by conducting monitoring with regular staff who can also represent the land trust and sit down with landowners and discuss what the trust has been doing over the past year, any concerns the trust has, and address any questions the landowner may have. This becomes especially important with secondary landowners who may be less familiar with the trust, its mission and role in stewarding the easement, and the provisions of the easement. Monitoring is also of legal importance to the trust and it is important for it to have confidence in the quality of monitoring conducted from year to year.

There are foreseeable situations when participatory monitoring may become a reasonable approach for the Rincon Institute. While the Institute should always conduct yearly monitoring of easements as a part of its Stewardship Program internally, there are opportunities for the use of participatory monitoring as an environmental education project of the Institute on

the horizon. Such a project would be apart from its Stewardship Program.

Participatory monitoring is a useful tool for engaging communities of interest in the stewardship of common pool resources. It can be especially useful for managing conservation areas held by a land trust that have public access (Slee 2002). Participatory monitoring engages the community in the management of the conservation areas that they use for recreation and scenic enjoyment. By engaging the community, people may begin to feel a sense of ownership over the conservation area and become more concerned about its condition and management. Harmful activities legal unauthorized trail building and littering are less likely (Slee 2002). As Slee puts it, "Positive use keeps abuse at bay" (2002). As the service area of the Rincon Institute continues to urbanize, it is foreseeable that it will hold easements on areas adjacent to and associated with residential development. If these easements have open public access, as will likely be the case with Rocking K Ranch, engagement of the community in monitoring and stewardship of the conservation areas could ultimately ease the stewardship burden of the Institute.

**CHAPTER 6: CONCLUSION AND NEXT STEPS
– TOWARDS A COMPLETE STEWARDSHIP
PROGRAM**

This report has covered a lot of ground, from an introduction to conservation easements and their purposes, to legal and tax issues with easements, to practical considerations for developing baseline documentation and monitoring policies. Appendix A provides a Baseline Documentation Policy and Template. Appendix B provides a Monitoring Policy and Template. Recommendations have been provided in each chapter and are summarized in Appendix C. The purpose of this report is to provide the Rincon Institute with the information and recommendations to formulate a baseline documentation and monitoring policy that are consistent with its obligations to maintain its conservation easements from both the legal and tax regulations perspective. The report itself does not go the next step and actually formulate these policies. Instead, baseline documentation and monitoring policies are provided as free standing documents in Appendix A and B to this report. They were developed as free standing policies so they could be easily understood and implemented without reference to this report. However, this report has significant utility for the Rincon Institute as a source for information about why the policies include what they do. It also is useful for future reference if there is a need to modify the policies found in Appendix A and B.

The research conducted for this report also raised several additional issues related to stewardship of conservation easements. While baseline documentation and monitoring policies are essential to any legally defensible conservation easement program, there are other policies the Rincon Institute should also consider developing in order to have a truly functioning, comprehensive stewardship program. These issues will be discussed briefly in turn.

First and foremost, the Institute needs to develop a records keeping policy. Such a policy is essential and not optional. Only through a clearly defined and consistently implemented records keeping policy can the Institute be confident that the baseline documents and monitoring reports it develops will be admissible in court as business records. Without a record keeping policy establishing a pattern of business records keeping, admissibility is not ensured (Guenzler 2000).

There are three other policies the Institute should strongly consider. Their adoption is highly recommended, but not doing so is not fatal to a stewardship program. The first is an enforcement and violations policy. The purpose of such a policy is to establish step by step what the Institute will do in the event of a violation of a conservation restriction of one of its easements. Such a policy is useful to prevent delays in addressing the violation and to encourage consistency across easements; the Institute does not want to be seen as playing favorites between landowners. An enforcement policy also aids staff in deciding at what point they should engage legal council (van Doren 2005). Second, the institute should consider adopting a well considered amendment policy. Amending conservation easements is tricky business. After all, they are intended to be permanent. Most trusts hold that allowing amendments should be allowed only in unique and exceptional circumstances and that the amendments need to be evaluated carefully to ensure they do not confer personal gain on the landowner at the expense of the easement. If the landowner does gain, the amendment should be refused or in rare cases, may go forward with compensation to the land trust, monetary or otherwise (O’Conner 1999). Accepting compensation at the expense of conservation has potentially harmful implications for community perceptions of a land trust and is likely to be counter to the mission of the trust. Third, the Rincon Institute must have a stewardship endowment policy in place that is

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followed with the acceptance of every easement. The Treasury Regulations require that the Institute have the financial capacity to maintain its easements. The best way to ensure financial capacity is through donation by easement grantees to a stewardship endowment.

Beyond these policies, the Rincon Institute should consider taking a serious look at its planning efforts. Conservation planning is critical to the success of a land trust and helps prevent haphazard land conservation (Moore 1996). The conservation plan currently under development should be adopted and updated on a regular basis. As the Institute grows and accepts additional easements, it should consider the development of a landowner relations plan. While landowner relations are easy when there are only a few easements to deal with, they are quickly complicated by the addition of new easements and the turnover of primary landowners to secondary and tertiary owners.

Baseline documentation and monitoring are the cornerstones of a meaningful and legally sound stewardship program. This report contains a series of recommendations about what should be included in baseline documents and monitoring reports, as well as templates for conducting documentation and monitoring. These materials put the recommendations of this report into action. Together with the recommendations for additional policies and planning in this concluding chapter, they place the Rincon Institute in a strong legal position for defending its conservation easements well into the future.

APPENDIX A: BASELINE DOCUMENTATION POLICY AND TEMPLATE

BASELINE DOCUMENTATION POLICY AND TEMPLATE

Purpose:

The purpose of this policy is to provide consistent guidelines for the production of Baseline Documentation for all Rincon Institute conservation easements. A Baseline Documentation Report must be prepared prior to acceptance of any conservation easement by the Rincon Institute. One of the benefits of preparing a report prior to acceptance of an easement is that it can help the Rincon Institute evaluate the conservation value of a given parcel. In addition, it is generally required for tax deductions and important for legal defense of easements. All Baseline Documentation Reports should be prepared according to these policy guidelines and using the accompanying template. Unless specifically noted, the individual components of the Baseline Documentation Report called for in this policy are not optional. Each component is important in ensuring the values of an easement are properly documented for future monitoring and enforcement of a conservation easement.

Procedure:

Step 1: Data Assembly

Prior to a site visit of the property, the following data should be compiled and examined:

- The physical location of the conservation easement. Acceptable forms of location include the properties street address in urban areas or for smaller properties or the Public Lands Survey System coordinates for rural or larger properties. Ideally, both should be provided.
- A recent aerial photo of the site. For Pima County, up to date aerial photos are available for a nominal fee from the Pima Association of Governments: <http://www.pagnet.org/RegionalData/Orthophotos/tabid/103/Default.aspx>
- A professional survey of the property. The survey should be provided by the landowner to the Rincon Institute.
- A topographic map including the property and the surrounding area. Topographic maps are available at Summit Hut or similar stores in the area.
- Publicly available information on the habitat types present on the property. This information is available from:
 - The Sonoran Desert Conservation Plan: <http://www.pima.gov/CMO/SDCP/> Provides thorough data about species and habitats within Pima County. The best resource.
 - Arizona Natural Heritage Program: http://www.azgfd.gov/w_c/edits/species_concern.shtml Note that the State requires at least one month to prepare an environmental review report. Good watershed level information. Maps by species.
 - Pima County MapGuide: <http://www.dot.pima.gov/gis/maps/mapguide/> Provides maps of species habitats for Pima County. Note there is a separate MapGuide section for the Sonoran Desert Conservation Plan.
- Local, state, and federal conservation policies relevant to the property. Information on federal policies can be found by contacting the administrative offices for Coronado National Forest or Saguaro National Park. If habitat for listed species was identified in the previous step, it is worth noting here. State and local policies are reflected on Pima County MapGuide maps. The strongest local conservation policy is the Conservation Lands System, which covers much of the rural land in Pima County.

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- A Title Report for the property. This must be provided by the landowner. Pay particular attention to any liens on the property and ensuring there is not a divided estate with respect to mineral rights.

Step 2: Site Visit

The site visit is the most important step of the Baseline Documentation Process. It is best conducted by two people – one to take notes and one to take pictures and establish GPS points for the photo points. An initial site visit can be lengthy, so staff should be prepared to spend the entire day on site, outside. It is best to conduct site visits in the late fall, winter, or early spring.

Prior to the site visit staff should do the following:

- Review the materials compiled in Step 1 above.
- Review the draft Conservation Easement. Staff conducting the site visit must know the specific provisions of the easement in order to properly document the property
- Using the aerial photo and topographic map, determine approximately where photo points should be established. While the site visit team does not need to stick to the predetermined points exactly, pre-selecting points helps to ensure the property is well documented and speeds up the site visit.
- Contact the landowner. Because the easement is not in place yet, permission to enter the property is required. Also, schedule a time during the site visit to sit down with the landowner and talk with them about the easement.

The following equipment is required for the site visit:

- Handheld GPS
- Compass
- Map of the area with pre-selected photo points marked
- A copy of the draft easement
- A digital camera and an extra memory card and battery
- Pad of paper and a pen
- Backpack
- First Aid kit
- Lots of water
- Snacks, energy bars, etc.
- Hiking boots and long pants (to fend off cactus)
- Hat
- Sun block

During the site visit, the team should do the following:

- Establish photo points. When establishing photo points, follow the following guidelines:
 - One photo point should be established at each corner of the property. Pictures should be taken down the property line in each direction.
 - If the property is large, it may be necessary to establish photo points along the property line between the corners of the property. Generally if a property is one section or larger, an intermediate photo point should be established to aid in future monitoring of encroachment.
 - Photo points should be established to provide photo coverage of all structures on the property to provide documentation of their extent at the time the easement was established.

- If the landowner will retain any reserved development rights, the area encompassed by the reserved rights should be documented by photo points. Special attention should be paid to the edges of the building envelop.
- General photo points to capture the conservation values of the property should be established. While it is not necessary to have photos of all parts of the property, an effort should be made to establish photo points that provide good vistas of the property so the majority of it is documented in photos.
- Photo points should be established to document any existing disturbance.
- Record the GPS coordinates for each photo point.
- Take site photos
 - All of the above noted elements should be documented by photos.
 - When documenting property lines, photos should be taken down the property line.
 - When documenting structures, disturbed areas, or reserved rights, enough photos of the structure should be taken to document size and extent.
 - Photos at general photo points documenting undeveloped portions of the property should be taken in at least four directions, North, South, East, and West.
 - For all photos, the compass bearing of the photo should be recorded.
- Take notes on the general condition of the property and any natural features that stand out.
- Speak with the landowner about why they elected to grant a conservation easement.

Step 3: Prepare the Baseline Documentation Report

The final step is preparing the Baseline Documentation Report. At this point, all the information gathered to this point is combined and synthesized to provide a comprehensive report on the condition of the property at the time the easement was donated. A template and basic guidelines for preparing the report are included on the next page. Once complete, the report must be signed by the preparer of the report, the executive director of the Rincon Institute, and the land owner donating the easement. In addition, each photo of the property included in the report must be initialed by the landowner and the executive director of the Rincon Institute to verify its authenticity. Finally, the Baseline Documentation Report must be notarized. Three notarized copies should be produced: one for the landowner, one for the Rincon Institute's permanent records, and one for the Rincon Institute to use on a regular basis for monitoring.

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BASELINE DOCUMENTATION REPORT TEMPLATE

I. Owner Acknowledgment Statement

The following statement should be included in the baseline documentation for all tax deductible donated easements:

“In support of the conservation easement donated by _____ to the Rincon Institute on _____. This document is intended to aid in meeting the requirements for the enforcement of this conservation easement under Section 170(h) of the Internal Revenue Code”

In addition, this section will include the following:

- *Date of Preparation of the Baseline Document*
- *Grantor Name*
- *Grantor Address*
- *Grantee Name*
- *Grantee Address*
- *Third Party Name and Address if Applicable*
- *Property Location (PLSS coordinates, parcel number and brief description of location)*
- *Property Size*
- *Description of existing improvements on the property*
- *Signatures from the landowner, executive director, and documentation preparer*

II. Background Information

A. Purpose of Easement

This section has two parts. First, a summary of the “whereas” clauses of the easement. Second, a summary of the restrictions of the easement. It is critical that the document note that this section provides only a summary and that the complete easement is available in an attachment to the documentation.

B. Conservation Purpose (Optional)

This section is required when the grantor will be seeking a tax deduction as a result of donating an easement. The text should refer directly to the qualifying conservation purposes under the Treasury Regulations (see Chapter 4 of this report).

C. Existing Physical and Natural Features

This section should provide general information at the conservation values of the property. The emphasis should be on documenting the conservation values of the property relative to the purpose of the easement as noted in the “whereas” clauses and restrictions summarized in section A.

D. Existing Man-made Features

Provides a summary of the existing structures, roads, trails, etc. in existence on the property. This section may refer to specific photo points as exhibits of the described features. When possible, provide the square footage of existing structures and the widths of roads. Describe where specifically each feature is located on the property.

E. Government Policy

Summarize how the easement is in support of clearly articulated government policies. The more policies the easement supports the better.

III. Significance of Protected Property

A. Significant Natural Habitat and Ecological Features (Optional)

Provides any information about natural features of the easement not covered in previous sections. For example, if endangered species habitat or rare riparian areas exist on the property, but were not noted in previous sections, they can be described here. This section may be redundant with previous sections; if that is the case it is may be eliminated.

B. Scenic and Agricultural Features (Optional)

If the property provides significant scenic value to the community, note it here. Examples include vistas from highways, trails, or national parks. In addition, this is a convenient place to note the regional context of the easement, e.g. it provides a buffer between growth and natural areas or it provides open space in a rapidly developing matrix of land.

IV. Landowner and Land Trust Intent

Provide a brief statement of the landowners conservation intent by donating the easement. Also state that if the easement is challenged in the future, it is not the intent of the original parties to the easement that cost/benefit analysis be used in whole or part in determining the disposition of the easement.

Appendices:

Exhibit A: Map of Conservation Easement Area

Topographic Map.

Exhibit B: Conservation Easement Agreement

Complete conservation easement document

Exhibit C: Survey Map

The professional survey of the property.

Exhibit D: Aerial Photo

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Exhibit E: Site Photo point Map

Ideally, the photo point map is created using GIS so the photo points are accurately located on the map. However, an illustration showing the approximate location of the photo points is permissible.

Exhibit F: Site Inspection Photos with GPS Coordinates

The GPS coordinates and a description of the photo point must be provided before the first photo for each photo point. For each individual photo, the following must be included:

- *The compass bearing of the photo*
- *The date of the photo*
- *A space for initials of the Rincon Institute executive director and the landowner*

Generally, photos should be sized two to a page.

Exhibit G: Title Report

If the Title Report shows anything unusual, it should be dealt with prior to the finalization of the conservation easement agreement.

APPENDIX B: MONITORING POLICY AND TEMPLATE

MONITORING POLICY AND TEMPLATE

Purpose:

The purpose of this monitoring policy is to ensure that the conservation easements of the Rincon Institute are maintained; no ongoing violations of existing conservation easements occur; and, in the event that a violation does occur, that it is recognized quickly. This policy consists of monitoring guidelines and a site visit template.

Guidelines:

At minimum, each conservation easement held by the Rincon Institute must be monitored once every 12 months. Monitoring is best conducted in winter or early spring when the weather is cool and leaves are off the trees. While monitoring visits may be conducted by one person, it is best to have two people – one to take notes and a second to take pictures and manage the GPS. If possible, the same staff person(s) should conduct monitoring visits year after year to cultivate good relationships with landowners. Staff should budget about three hours to conduct a thorough monitoring visit.

Prior to the site visit staff should do the following:

- Review the Baseline Documentation for the property. Pay special attention to the conservation restrictions.
- Review the previous year's monitoring report, if any. Pay special attention to the site photos.
- Familiarize themselves with the photo point map.
- Program a hand held GPS unit with the coordinates for each of the photo points established in the Baseline Documentation
- Contact the landowner. Permission from the landowner is not needed to enter the property, but they should be made aware of when you are coming and given an opportunity to be there. Ideally, monitoring visits will be scheduled when the landowner is present so a yearly check-in with the landowner can be conducted at the same time as the monitoring visit.

The following equipment is required for the site visit:

- Handheld GPS
- Compass
- Map of the area with photo points marked
- A copy of the previous years monitoring report, including photos
- A digital camera and an extra memory card and battery
- Pad of paper and a pen
- Backpack
- First Aid kit
- Lots of water
- Snacks, energy bars, etc.
- Hiking boots and long pants (to fend off cactus)
- Hat
- Sun block

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During the site visit, the team should do the following:

- Visit each of the photo points and take photos at the same compass bearing as the previous years photos. Make notes of any clearly visible, significant changes (e.g. one dead cactus is not significant, but a new shed is or cleared path is significant).
- Take notes on the general condition of the property, with specific emphasis on any changes from the previous year's monitoring notes. If no changes have occurred, a note should be made to that effect. If changes have occurred, take photos.
- Take notes on the condition of the property relative to the conservation restrictions. For example, has the disturbed area around the structures increased relative to the previous year's monitoring notes and photos. If no changes have occurred, a note should be made to that effect. If changes have occurred, take photos.
- Note if there has been a change of ownership of the property. If the landowner has changed in the last year, additional landowner outreach may be required
- Talk with the landowner, if possible. Take notes on any concerns the landowner has about the property or the Rincon Institute and any follow-up that needs to be conducted with the landowner.

Following the site visit, the monitor compiles a monitoring report for the easement. The report includes a completed monitoring form and site photos. Site photos are formatted two to a page. Prior to the photos for each photo point, the photo point number, description, and GPS coordinates are provided. For each photo, the date and compass bearing are provided. Upon completion of the monitoring report, the monitor compares the current visit's photos with those from previous years. Any changes that may constitute a violation and/or ownership changes are noted and brought to the attention of the executive director. If no changes are noted, the monitor prepares a letter to the landowner stating yearly monitoring was conducted and no violations were *observed*. The monitor should not state unequivocally that there were no violations on the property to avoid absolving the landowner of a violation that was not observed during the site visit, but may be observed in the future.

MONITORING REPORT TEMPLATE

Monitor's Name: _____ Date: _____

Landowner's Name: _____ Easement Name: _____

Property Address: _____

General notes on the condition of the property:

Notes on the condition of the property relative to the conservation restrictions:

Were any violations observed during the site visit? Yes ___ No ___

If yes, describe:

Was the landowner present during the site visit? Yes ___ No ___

If yes, describe any concerns the landowner expressed:

Has the property owner changed since the last site visit? Yes ___ No ___

Names of people present at the monitoring visit:

Signature of Monitor

APPENDIX C: SUMMARY OF RECOMMENDATIONS

Legal Recommendations:

1. A statement of intent from both the landowner and the land trust to defend against termination by changed conditions and aid in the favorable application of *cy pres*.
2. Information about all of the resources the easement is intended to protect; the more things noted in the baseline the better. However, documentation of resources not explicitly tied to the purposes and restrictions of the conservation easement document will not aid in defending the easement against changed conditions arguments.
3. An explicit statement that cost-benefit analysis should not be used in determination of termination by changed conditions.
4. A professional property survey to provide a basis for monitoring to prevent future adverse possession claims.
5. A statement of how the public interest is served by the conservation easement.

Tax Recommendations:

1. Include a survey map, map of improvements, aerial photo, and site photos in all baseline reports.
2. Specifically address the conservation purpose of the easement as it relates to the tax code.
3. One conservation purpose is the minimum; it is desirable to have met the standards for at least two conservation purposes in case one fails under IRS scrutiny.
4. State any government policies, local, state, or federal, that support the conservation easement.
5. Obligate landowners seeking a tax deduction to pay for their own baseline report.
6. Do not provide tax advice to landowners.
7. Include a clause in the easement requiring the landowner to notify the land trust whenever changes are made on the property when the easement is drafted.
8. Request a monitoring endowment from each landowner donating a conservation easement. Endowments are need to ensure the land trust has the means to carryout ongoing stewardship obligations.

Best Practices Recommendations:

1. All baseline documents should include:
 - The date of preparation of the baseline document,
 - The location of the conservation easement,
 - The author of the baseline document and his or her qualifications,
 - An acknowledgement statement with signatures of the parties to the conservation easement,
 - A photo point map showing the locations of individual photo points and providing GPS coordinates for photo points,
 - An aerial photo of the easement property,
 - A professionally prepared survey map of the easement property,
 - A topographic map of the area around the easement property,
 - A description of the easement property,
 - A summary of the conservation easement,

- Condition of the property relative to the conservation restrictions
 - Specific reference to qualifying elements of the easement for an federal tax deduction (only in cases where a tax deduction will be sought by the landowner),
 - Basic ecological data based on information contained in publicly available sources,
 - Local, state, and federal policies that support the conservation easement,
 - Relevant information about the original intent of the easement grantors.
 - Thorough site photos documenting the conservation values and conservation restrictions of the easement property
 - A title report for the easement property.
2. Some of these elements may be combined. See template in Appendix A.
 3. Monitoring Templates should include:
 - The date of inspection;
 - The monitor's name and signature;
 - Basic info on the property (location, owner, etc.);
 - The general condition of the property as a whole;
 - The condition of the property specific to the conservation restrictions;
 - Change of ownership, if any;
 - Any notes on landowner relations.

Recommendations for Additional Stewardship Policies:

1. Develop a records keeping policy to ensure documentation and monitoring reports are legally admissible in the event litigation in the defense of an easement is required.
2. Develop an enforcement and violations policy to ensure consistent and well reasoned disposition of future conservation easement violations.
3. Adopt an easement amendment policy so requests for easement amendments can be handled in a consistent, unbiased manner.
4. Establish a stewardship endowment and a policy for receiving contributions from easement donors to the endowment to support ongoing easement stewardship and enforcement obligations.
5. Adopt a landowner relations plan to ensure consistent contact with easement grantees.

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