

MITIGATION & ACCREDITATION

Application information for land trusts engaged in mitigation projects

If your organization engages in mitigation projects that are required by local, state, or federal government, this fact sheet contains important information about your application for accreditation that you should understand. Accredited land trusts must comply with the accreditation requirements outlined in the Commission's *Requirements Manual*. This fact sheet highlights some of those areas that are common issues for land trusts engaged in mitigation projects.



SECTION 1: FINANCE

Financial Records and Financial Health

THE REQUIREMENT

The Commission requires that every applicant, except for quasi-governmental entities, show it meets the public support test on its Form 990. The Internal Revenue Service (IRS) requires all organization's filing as a public charity to demonstrate that at least 33.3% of its total revenue and support come from public support.

THE ISSUE

It is sometimes challenging for an organization that relies exclusively on mitigation fees to be classified as a public charity by the Internal Revenue Service. Mitigation fees or other sources of revenue required as part of a mitigation agreement are normally classified as being gross receipts from services performed in keeping with the reporting rules for a 509(a)(2) organization. A land trust must be sure to properly segregate gross receipts from services performed apart from gifts, grants and contributions. If the organization does not have sufficient support to be classified as a public charity, then it is not eligible for accreditation. If your organization engages solely in mitigation activities, please review the [IRS instructions](#) regarding the public support calculation and consult with your accountant.

COMPLIANCE CONSIDERATIONS

If your land trust's Form 990 indicates that all or almost all of its mitigation income counts towards "public support", you can expect there will be questions about how the organization meets the public support test during the application process. It is likely you will be required to retain an independent certified public accountant that specializes in tax-exempt accounting to closely examine the organization's sources of income and recalculate its public support as part of the review process.

Donor Restrictions

THE REQUIREMENT

The Commission requires that every applicant have a business process for determining restrictions on gifts and ensuring donor-restricted moneys are appropriately tracked and used. Public charities need to acknowledge and honor donor restrictions at the time of the gift. Failure to establish and maintain accountability for donor restrictions poses legal, reputational and financial risks.

Understanding the difference between income from a donation versus a fee is important in properly classifying and tracking any donor restrictions. Determining how to classify and track these contributions according to Generally Accepted Accounting Principles can be difficult for an organization that does not have the capacity and policies to do so.

THE ISSUE

Mitigation funding flows to land trusts in two primary ways:

1. Some level of stewardship funding is normally required in the mitigation agreement. The industry commonly refers to these as stewardship or mitigation endowments. These required payments should not be acknowledged with a gift letter. The land trust will need to work with its accountant to ensure the payment is accurately classified based on the governing mitigation agreement or other similar document. If the agreements specify the funds can only be used for costs related to that specific property, the land trust's financial records should clearly reflect that restriction on the use of the funds.
2. Contributions gifted to the organization outside of any payments or contributions required by the governing mitigation agreement or other similar document. Depending on how these funds are solicited, the contributions could be unrestricted or donor-restricted and a gift acknowledgement letter issued.

COMPLIANCE CONSIDERATIONS

Mitigation land trusts should have financial systems and accounting policies and procedures and/or other internal controls in place to account for the financial complexities that are inherent in mitigation projects. Accreditation applicant documentation might include:

- Evidence of funding sources and type of revenue including clear descriptions of allowed uses and any restrictions on the funds
- Financial statements that clearly track individual projects, endowments and other restricted funds

Stewardship and Defense Funding

THE REQUIREMENT

The Commission requires that every applicant have the required amount of stewardship funds as described in the *Requirements Manual* and the amount specified by the Legal Defense Reserves Calculator in board-designated or restricted defense funding. When a land trust acquires an easement it is promising that it will uphold the easement terms forever. This requires annual monitoring visits, ongoing stewardship efforts, and potential legal action to defend the terms of the easement. These things all come at a cost to the land trust and it must ensure it has the financial resources to uphold the easement in perpetuity.

THE ISSUE

Mitigation projects normally require a stewardship fund, but the accreditation requirements are that a land trust have stewardship and defense funds.

COMPLIANCE CONSIDERATIONS

An accreditation applicant should be able to document that there is sufficient board-designated or restricted legal defense funding and stewardship funding. Note: the Commission does not require separate funds for stewardship and defense, but the land trust must be sure that if funds are co-mingled that those moneys are designated or restricted for both stewardship and defense.

SECTION 2: TRANSACTIONS

Conservation Easement Deeds

THE REQUIREMENT

The Commission requires that permitted rights in conservation easements do not significantly impair protected conservation values. Permitted rights refers to all of the rights to use the property that the landowner retains after conveying a conservation easement on their land. A land trust should carefully review all permitted rights especially rights that could impair protected conservation values of the easement.

THE ISSUE

Some mitigation easements allow the landowner to separate air, water, and mineral rights from the property with the land trust's consent. Severing these rights could significantly undermine the conservation values the conservation easement is intended to protect.

COMPLIANCE CONSIDERATIONS

If a mitigation easement allows the landowner to separate air, water, and mineral rights with the land trust's consent, the land trust should be prepared to show it documented these rights in a baseline and how it determined the ability to sever these rights is generally consistent with the conservation purposes and does not significantly impair the protected conservation values.

Conservation Easement Deeds

THE REQUIREMENT

The Commission requires that every conservation easement contain specific elements including extinguishment and proceeds clauses and reference to the baseline documentation report. Extinguishment provisions prevent the conservation easement from being mutually extinguished, thus protecting the public benefit and conservation values. The proceeds clause binds landowners to providing the proceeds and assures that the non-profit obtains the fair value of its interest in the property. Including a reference to the baseline documentation report in the easement ties the two documents together, which strengthens the ability of the baseline to be used to uphold the conservation easement.

THE ISSUE

The terms of the conservation easement are frequently dictated by the regulatory agency and may differ from a more traditional conservation easement. The easement must be reviewed by the land trust to ensure that it can monitor or enforce the restrictions and permitted rights. Mitigation easements commonly use the relevant agency's template, which in many cases lack a reference to the baseline documentation report and a termination and proceeds clause.

COMPLIANCE CONSIDERATIONS

An accreditation applicant should be able to document that there has been sufficient review of the final mitigation easement to ensure that the easement contains the basic elements as described in the *Requirements Manual*. If any provisions are missing, the land trust should work with the appropriate agency and request that the required elements be included and keep documentation of those efforts.

Baseline Documentation Report

THE REQUIREMENT

The Commission requires that every conservation easement must have a baseline documentation report that is complete and signed by the land trust and landowner prior to closing. Baselines must be completed and signed at closing to reflect the condition of the property as of the date of the easement. In the case where restoration might alter the property, a baseline update should be performed to capture the changes and new condition of the property.

THE ISSUE

Required at closing

In mitigation projects, baseline documentation reports, management plans, and other tools for long-term stewardship tend to be more complex and require more scientific and technical expertise than is generally needed for conventional conservation projects. In the case of a restored or constructed wetland or other habitat, the baseline might not be completed until the site work is completed and the project has begun to function as it was intended.

Signatures

Some types of mitigation easements have oversight by an external agency with specific requirements for extensive

related documentation (such as a mitigation banking instrument) that is functionally equivalent to a baseline documentation report. If the related document is specifically referenced in the mitigation easement deed and otherwise contains the required baseline elements, then a land trust signature is not needed to comply with the requirements; however, the landowner signature is required.

COMPLIANCE CONSIDERATIONS

Every mitigation easement should have a baseline documentation report (or interim baseline) completed prior to closing the easement that meets the minimum requirements of the practice including the required landowner and land trust signatures as needed.

SECTION 3: STEWARDSHIP

Conservation Easement Monitoring

THE REQUIREMENT

The accreditation requirements are that every conservation easement be monitored at least once per calendar year. Monitoring helps a land trust discover changes in land ownership, enables it to see if the easement is effective, helps uncover violations, saves time and money on enforcement actions, and establishes a record in case of court action. Annual monitoring allows the land trust to quickly identify and document changes to the property.

THE ISSUE

Mitigation projects often involve detailed and frequent biological monitoring which may be called “compliance monitoring”, “oversight monitoring”, or “biological monitoring”. Some land trusts may treat this biologic monitoring as annual easement monitoring.

COMPLIANCE CONSIDERATIONS

The land trust must ensure the monitoring and completed monitoring form meet the minimum requirements of the practice as described in the *Requirements Manual*. Annual monitoring should begin the year after closing the easement, even when the mitigation work may not yet be complete. Accreditation applicant documentation might include:

- Annual monitoring reports
- If using biological monitoring reports that do not meet minimum requirements, create an addendum that addresses those required elements not covered in main report.

About the Commission

The Land Trust Accreditation Commission was established as an independent program of the Land Trust Alliance in 2006. Today, there are over 450 accredited land trusts across the country. The Commission has eight staff members and 18 volunteer commissioners that act as board members as well as peer reviewers of land trust applications for accreditation.

Special Note

Additional resource from the Land Trust Alliance:

[Wetland and Stream Mitigation: A Handbook for Land Trusts](#)

Please note, the Land Trust Accreditation Commission does not provide tax, legal or accounting advice. This material has been prepared for informational purposes only.

Contact

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of the Land Trust Alliance

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