

How to Make the Best Difficult Decisions in Uncertainty

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I. Perpetual Calendar—Make Sure You Have Time for Reasoned Decisions

Stop trying to remember so much, reduce your stress, and avoid the risk of missing an important date. Every item that you can record onto a perpetual calendar is an item that you don't have to keep alert to and worry about remembering. What goes into a perpetual calendar? Every time-related event your land trust has in its future. The following list is a work in progress and is necessarily incomplete as to specific land trusts and varying state requirements.

Federal filings (also add tickle dates to send to, get from CPA, attorney, as needed)

<http://www.tax.gov/calendar/>

- Form 990 + extension dates (plus add time for board meeting to review)
- Form 8283 + extension dates
- Federal Unemployment Tax Return (FUTA)
- Form 941 Employer's Quarterly Federal Tax Return
- Form 945 Annual Return of Withheld Federal Income Tax
- 1096/1099 Forms for subcontractors, rents, raffle or game winners and others
- Copyright/trademark filings to protect land trust logo, trade name, etc.
- And whatever else your lands trust needs to or must file

State filings (State of principal place of business and incorporation) (add tickle dates)

- Annual report (officers and directors, agent for service of process)
- Tax/financial returns (may be as simple as a copy of the 990)
- Quarterly state employer's tax returns
- Sales tax filings, if any
- Charitable solicitation registration
- Raffle or other fundraising filing if required
- Tax exemption certificate filing (exemption from sales tax or property tax)
- Filings with the State Attorney General as to specific events
- And whatever else your State requires

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State Filings (other States) (also add tickle dates as needed)

- Charitable solicitation registration (if engaged in the level triggering required registration, varies from State to State; see <http://www.multistatefiling.org/>)
- Intrastate business registration (if doing **intrastate** business, instead of **interstate** business) (<http://www.nolo.com/legal-encyclopedia/qualifying-do-business-outside-state-29717.html>)
- Tax exemption certificate filing (exemption from sales tax)
- Anything else?

Local Filings (also add tickle dates as needed)

- Tax payment dates for all forms of local taxes
- Property tax exemption filings if applicable
- Dates to obtain any permits/licenses for events (liquor license, sales permit ...)
- Fictitious business name renewal (if using any name in addition to incorporated name)
- What else?

Routine Items (also add tickle dates as needed)

- Rent, utilities
- Payroll (paychecks, FICA, etc.), other employment filings
- Filing dates for grants and other fundraising and reporting
- Land trust meeting dates for board, committees, staff. • send meeting materials
- Next strategic plan • risk management plan • accreditation renewal
- Update bylaws, board manual, policies, formal delegations of authority
- Board and staff evaluations, committee member evaluations. For paid positions, also salary review
- Recruiting for new board members, term limit dates if any
- Audit preparation and review
- Dates for regional land trust conferences/meetings, Rally
- Newsletter and similar communications (solicit articles, edit, finish, publish)

Fee Lands

- Annual monitoring dates
- Full boundary check as needed depending on state law (4 years in California to avoid adverse possession/prescriptive easement, typically longer in other States)
- Photo update schedule (frequency based on nature of land, activities, changes)

- Tax payment dates (if applicable)
- Insurance payment dates (plus review of adequacy of insurance)
- Recheck property records for issues, slander of title (perhaps every 10 years)
- Preparation of annual work plan (trails, repairs, events, ...), plus four or six month checks on progress
- Caretaker evaluations
- Tickle reminders to invite search and rescue providers to train on fee lands, to ensure that they and police/fire know access codes or have keys as needed

Conservation Easements

- Annual monitoring dates (reminders to invite owner, thank owner)
- If any issue is discovered, dates for follow-up, committee and board consideration, next steps, final date within a year for resolution (or calendaring of additional dates)
- Photo update schedule (frequency based on nature of land, activities, changes)
- Dates to recheck property records for any issues (perhaps every 10 years)
- Dates to rerecord CE (perhaps every 30 to 40 years, depending on state Marketable Title Act and on title company routine look-back periods)
- Reminders for communications with CE landowners not related to monitoring
- Dates to review and improve the CE template

Events

- Volunteer appreciation event (calendar a date to plan the event, then the event)
- CE Owner event • Major donor event • Board retreat • Staff retreat
- Preserve or fee land events, picnics, hikes
- Schedule for other land related events (hikes, ice skating party, vernal pool visit, evening owl visit, whatever works on any land)
- Anniversaries of fee and CE donations, for thank you/solicitation letters
- Newsletters and preparation of text, layout, other dates
- Informational events for neighbors of CE lands
- Annual or bi-annual educational events for title company officers, real estate brokers, appraisers, estate planning/tax and real estate attorneys and others appropriate to land trust work
- Tickle reminders to do educational programs for Rotary, Elks, Lions, bar associations and similar groups
- All holidays and days of religious observance plus Mother's and Father's Day and any other days creating conflicts (e.g., high school graduation in the LT town)

II. Brainstorming Techniques

Several people struggling on an issue together will identify ideas that none of them individually could have developed. Especially if individuals are chosen for expertise in different aspects of the topics to be explored and are given freedom to express ideas, the effort to enable the brainstorming session will be repaid many times. One example is a project or lands committee of perhaps 20 members that meets once a month. The membership includes 7-8 attorneys, 3-4 real estate brokers, an appraiser or two, several scientific experts, and land trust land protection staff. The committee meets for lunch over about 2 hours, and the land trust staff provide a summary of all active land projects about a week before the meeting. Staff explains the status of each active project, and committee members speak up with questions and ideas, such as

Have you explored what the county is doing? I heard that

I heard the sellers were getting divorced, so they have motivation to move fast.

Where will the money come from to complete this deal?

Can we get the neighbors to kick in money?

Doesn't neighbor X need an easement across this parcel?

I appraised a parcel near there a month ago, and

An adjacent parcel may be going on the market soon.

We could lock that parcel up with an option and combine it with this parcel.

Committee members bring a lot of local knowledge relating to the land and the people to the table and ask questions freely. Committee members may serve on this type of committee for many years and become close friends, further motivating their efforts for the land trust. No stone is left unturned in the effort to structure the deal in the best way for the land trust. Avenues for additional/alternative funding can be explored. A committee member may know a funding source and be willing to assist with the ask. Staff members are likely to leave the meeting with new ideas and enthusiasm for a project thought to be unworkable. Staff members are also motivated to move projects forward to avoid having to report the next month that nothing has been accomplished.

These ideas are not limited to project committees or long term committees. An event committee may form and dissolve after a specific event or may reform each year that an event of that sort is done. A fundraising committee could be formed and disbanded or could continue as a standing committee, depending on the needs of the land trust. Excellent resources are available at

<http://www.mindtools.com/brainstm.html>

<http://www.nonprofit-champion.com/brainstorming.html>

<http://www.isixsigma.com/tools-templates/brainstorming/brainstorming-rules/>

<https://dschool.stanford.edu/blog/2009/10/12/rules-for-brainstorming/>

<http://www.forbes.com/2010/04/20/brainstorming-ideation-ideas-leadership-managing->

[innovation.html](#)

There are many questions without definitive answers. But land trusts need to act even absent definitive answers. The best difficult decision considers all available information, assesses the various risks and benefits from various points of view and determines how the land trust can proceed with a minimum of danger in the uncertainty.

At a minimum, the land trust process should be to identify all the requirements and how to satisfy them. Brainstorming can identify requirements and ways to ensure they are satisfied and perceived to be satisfied (recitals, due diligence, record keeping for future needs, and so on).

As uncertainty increases, the land trust needs to determine what it knows and where the gaps are specifically. When specific uncertainties are identified, brainstorming is needed on ways to reduce or eliminate them, ways to protect the land trust if uncertainty cannot be eliminated (use of alternative/backup provisions in CEs, inquiries to the Alliance, to experts). With what clarity is possible, the land trust can decide to act or not. If yes, then brainstorm as above.

Finally, when there is no certainty about how to proceed, (1) identify alternatives that achieve the goal (brainstorming again); (2) do the deal despite the unknown (brainstorm how best to do it; disclosure to deal participants, to land trust board, to others (who)); (3) don't do the deal without more clarity (seek AG, IRS opinion); or (4) don't do the deal. A land trust with a thoughtful process to address what and whether to act is more likely to reach a good conclusion at the end.

For the rest of the program, imagine that you are the brainstorming committee faced with the following variety of common but always changing problems land trusts face. If we apply these ideas to some specific problem areas, we can see how the collective effort makes it possible to develop the best solution for a difficult problem when there is uncertainty about aspects of the problem. For one example, take the following:

Greenacre Farms is a 140 acre dairy farm on rolling low hills and flat bottom lands bounded on two sides by public roads. Along one road, there are multiple vernal pools that delight those passing by in the spring. The conservation easement covering these acres was drafted specifically to protect the pools, and the land trust monitors with experts several times each spring to ensure that the pools are safe from harm. Greenacre Farms also willingly opens that part of the dairy farm to researchers. The land trust and Greenacre Farms have learned informally that the traffic on the road along the vernal pools is so heavy that the County and State are preparing to widen that road in the next year or so. The land trust places this subject on its next lands committee agenda with summaries of information on vernal pools and the state law on condemnation (the "take"), as well as the Alliance Practical Pointers and other materials.

The following table is intended to depict a free-flowing conversation among committee members. Staff would be taking minutes and joining in the conversation. Naturally, capturing a conversation in writing isn't perfect, but we will take the remaining examples and become the lands committee for the rest of the program so you can get the sense of the process.

Road Condemnation Brainstorming

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments
Can we fight the take?	usually impossible when there is a clear public purpose.	I live out that way and traffic is bad all day long.	We need to check into our options and the law a lot more.	
Is a take banned if the land is devoted to a public use?	Is the CE a prior public use?			Attorney will call condemnation expert in her firm to find out.
Can't we do something to protect the pools?	Are there any threatened or endangered species in the pools?	Are there agencies to help stop/change the take? Other nonprofits?	Investigate with researchers, agencies and report next meeting.	Check Internet for existing nonprofits focused on vernal pools and report.
Is there an alternative route?	Can we mount a political or public protest?			A political or public protest may backfire. The board will have to think carefully.
Is CE land specifically protected?	Other than Endangered Species, need to research and report back.	Some States protect CE land unless there is no alternative.	These laws may apply when the land is devoted to a prior public purpose.	Research the ESA, possible alternatives
Virtually nothing can be done to stop a condemnation.	A procedural defect improper notice, an illegal closed meeting works.	A procedural defect only postpones the take—will anger drivers using the road.	Yeah, what is the point?	
Will the LT get paid for its CE interest?	Yes, that is clear given CE terms and law, but some States differ.	But we need to inform County and State of LT interest	Also chat with CE LO on this so everyone is together on this.	Let's check the CE template to see if it can be improved.
Can we get County to take the other side of the road? No vernal pools there.	Let's explore. How far along are the plans? Is the route fixed or can we influence the design?	Who owns the other side? How would the change affect that owner?	Anyone know who to talk to? Let's try an informal approach to learn more on timing, status of the take.	The owner across the road? Ask our LO first. Let's be sure where we are before talking to anyone.
Do we have to have a court adjudication of the take?	Not totally clear. The IRS said at Rally that the law requires court extinguishment in all cases.	Negotiated settlement might be blessed by the court. We could include solid recitals in the settlement.	Would court approval of settlement satisfy IRS?	Check with Alliance regional and national for info on settlement; get legal advice.
What should we negotiate for in a settlement in lieu?	Smaller take. Adjustment of the route.	Mitigation of harm to the land.	More dollars.	Anything else? We need to watch how the proceeds are divided.

Can we negotiate to protect the pools on land not in the take during road construction?	Negotiated settlements can ask for anything. How about fencing to keep equipment out of the pool areas not taken?	What about asking for construction in the summer instead of winter or spring? Less impact on pools.	We should put bright colored flags around the pools so they are easy to see.	Or flag the fence. Let's ask the owner and County for permission to do these things.
What else can we do?	Let's ask for time to give construction workers some info on vernal pools, why they matter.	We could do bag lunches and walk the workers to the pools so they can see for themselves.	Yes, if they understand, they are less likely to cause harm.	

Additional Fact Patterns for Brainstorming

- (1) The Smiths have already donated a 40-acre conservation easement. Now they propose to donate an additional 60 CE acres that adjoin the existing CE.
- (2) Joe Newby has come to the Wine Country Land Trust proposing the donation of a conservation easement totaling 8 acres of riparian areas that wind through the middle of Newby's proposed 86-acre vineyard. Newby is clear that he does not intend to donate the remaining 78 acres that he plans to put into vineyard, and he is offering the riparian land only because the County required protection of that area as a condition to granting the vineyard permit.
- (3) Long-time land trust members and major donors, George and Helen Friend, have come to the land trust with a proposed amendment to change the placement of the building envelope on their conservation easement. Now that they have retired, they want to build their dream house. The firs have grown very tall in the years since the easement was written, and the envelope specified in the easement has no building site where a house would be safe if a tree fell in one of the frequent strong winds. The danger is real, as two large firs have fallen across the envelope in the last five years. A fire would present even greater danger. The Friends propose any of several alternative sites and suggest that the land trust select the site with the least impact on conservation values.
- (4) One of the early CEs done by the Wisser-Now Land Conservancy provides for a 14-foot wide road to the Yipes residence. The County has now enacted a requirement that all such roads be widened to 20 feet for fire and rescue vehicles. There is nothing in the Treasury Regs to address the situation, but Wisser-Now has to deal with this issue in some way that protects the land as much as possible without putting the owner into a criminal violation.
- (5) Harry Urbanite owns 120 acres of forest, small meadows and creek land with two beautiful waterfalls. He has had problems since he bought the land with trespassing and occasional camping. Most of the use has been gentle on the land. There are no local hiking areas open to the public, and people really enjoy hiking to the two waterfalls. Annoyed with trespassers, Urbanite proposes to donate 100 acres in fee, including the trespassed areas, subject to multiple restrictions including a flat prohibition on public use.

The following materials go at the end of the program materials for this program in the Learning Center but not the Rally Handouts

The Smiths have already donated a 40-acre conservation easement. Now they propose to donate an additional 60 CE acres that adjoin the existing CE.

Amendment/New CE to Add Acres

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments
Well, this is a no brainer. The 60 acres satisfy all our conservation purpose requirements.	A no-brainer that we accept, but should the new acres be added to the existing CE or is a separate CE better?	Amending the CE means another disclosure in the 990.	Yes, but we could upgrade to our new CE template for the full 100 acres.	Let's see how big an upgrade it would be and discuss at the next meeting.
Will the 60 acres remain a separate legal parcel?	We'll have to check with the Smiths. It's a separate legal parcel, but they may agree to prohibit separate sale.	If it can ever be sold separately in the future, better that its CE be separate.	Yes, but we can prohibit separate sale of the two parcels as a CE prohibition if we & Smiths want.	Well, we need to talk to the Smiths.
Separate or combined acres affect the deduction.	The Smiths might want it appraised both ways to see.	Yes, they can update the appraisal as needed at the end.		
Where is this land? Is it linked to the 40 acres biologically or scenically?	It's out on Chiles Road, past the old mill.	I monitored there last year. The serpentine soils appear only on the 40-acre parcel.	We should have Joe Botanist check both parcels.	
What's the stewardship contribution?	Depends. Separate parcels mean possible separate ownership.	Let's run two PARs so the Smiths will know the options.	Yes, do the 60 acres with and without residential.	Good. We can add a contribution at the building permit.

Joe Newby has come to the Wine Country Land Trust proposing the donation of a conservation easement totaling 8 acres of riparian areas that wind through the middle of Newby’s proposed 86-acre vineyard. Newby is clear that he does not intend to donate the remaining 78 acres that he plans to put into vineyard, and he is offering the riparian land only because the County required protection of that area as a condition to granting the vineyard permit.

Winding Riparian Areas in a New Vineyard

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments
Jeepers, we can’t monitor boundaries for an 8-acre CE.	No, it makes no sense and is not our mission.	We can deny on that basis alone.		
Newby is pretty steamed at having this requirement imposed by the County.	That’s not our issue.	I agree. We are setting up a meeting with the County to discuss how these requirements are set.	And what applicants are told! They insist we must do the CE because the County requires it.	Yes, and the County identifies us as the only land trust, so it ensures everyone is angry.
Let’s tell him we’ll do a CE on the full 86 acres or not at all.	There is a risk that he will go to Rogue LT if we demand all 86 acres.	Hasn’t Rogue LT been zapped by the IRS yet?	Not that I’ve heard, although it’s been reported for violations repeatedly.	Let’s report it again.
What stewardship contribution would we need to do this?	Huge, with the boundary that would have to be checked every year.	This is a quid pro quo CE, so we charge for everything.	Let’s run the PAR and discuss it next meeting.	Yeah, run it and then double it. [laughter]
Is he giving up enough to justify our effort?	He gives up a residence but wants to keep the winery entitlement.	Hardly seems enough.	I agree.	

Long-time land trust members and major donors, George and Helen Friend, have come to the land trust with a proposed amendment to change the placement of the building envelope on their 480-acre conservation easement. Now that they have retired, they want to build their dream house. The fir trees have grown very tall in the years since the easement was written, and the envelope specified in the easement has no building site where a house would be safe if a tree fell in one of the frequent strong winds. The danger is real, as two large firs have fallen across the envelope in the last five years. A fire would present even greater danger. The Friends propose any of several alternative sites and suggest that the land trust select the site with the least impact on conservation values.

Amendment to Alter the Building Envelope

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments	Caveats and Concerns
Can we send Joe Botanist to check the alternate sites?	We'll need a full report	I can go with Joe.	I'll go too. The more eyes the better.		
What are some of the factors for Joe to consider?	Plants and animals in both locations, plus scenic impact.	Length of the new road and its impacts.	Utilities, septic, leach field.	Scenic damage from the road and utilities.	
The Friends are major donors.	The land trust has extra obligations under the conflict of interest policy.	Yes, and disclosures to everyone along the way including the IRS.	We'll need appraisals of the old and new sites – private benefit prevention.	Joe's report could help the appraiser.	
Is amendment justified here?	Arguably it's an impossibility situation.	Nah, lots of houses are where trees can fall on them or burn.	Those trees grew up after the houses were built usually.	The point is, none of us would live in a house on that site.	
Here again we can upgrade to the current template.	That's a plus. And we delete the old building site.	Let's fully protect the spotted owl nesting area too.	Sure thing. The Smiths would like that.		

One of the early CEs done by the Wiser-Now Land Conservancy provides for a 14-foot wide road to the Yipes residence. The County has now enacted a requirement that all such roads be widened to 20 feet for fire and rescue vehicles. There is nothing in the Treasury Regs to address the situation, but Wiser-Now has to deal with this issue in some way that protects the land as much as possible without putting the owner into a criminal violation.

Amendment to Widen Road

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments
The next issue is amendment of the CE to comply with the County's 20-foot ordinance. Do we have to amend?	Like many things, there is no clear law. The Yipes face criminal liability if they don't widen the road, so we assume they will do so.	They could defend if we sued, but the CE is no defense to criminal charges.		
Isn't this a case of impossible or impracticable so amendment is OK?	Likely so. I found no clear statement of law when I searched, however.	If anyone has a concern, we can ask the State AG or the IRS for an opinion.	That may take too long.	We can call the State AG. I've gotten help over the phone sometimes.
Widening that steep road will be a huge expense for the Yipes.	Yes, and we may make it even more expensive to address issues like erosion, drainage, plants, visibility from public roads or parks, and so on.	Won't they just widen the road by 3 feet on either side?	Contractors do what is easy and cheap unless told otherwise. But we must identify trees and areas not to be touched.	Given threatened lilies near the road, we need to protect the south side after the turn.
Does the CE give the right to impose this expense?	It ought to, but we need to check the language.	Are there other CEs in this situation? We need to know.	I'm doing scheduling for monitoring, so I will check.	

Harry Urbanite owns 120 acres of forest, small meadows and creek land with two beautiful waterfalls. He has had problems since he bought the land with trespassing and occasional camping. Most of the use has been gentle on the land. There are no local hiking areas open to the public, and people really enjoy hiking to the two waterfalls. Annoyed with trespassers, Urbanite proposes to donate 100 acres in fee, including the trespassed areas, subject to multiple restrictions including a flat prohibition on public use.

Donation of Heavily Restricted Fee Land

Initial Ideas	Further Discussion	Still Further Discussion	Next Steps	Next Steps and Assignments	Caveats and Concerns
I'd love to get this land in fee, but	Yes, but. A prohibition on public use would make us his police.	And we'd be enemies of all the hikers.	We can't offend our natural members.	Plus, this could be a private benefit. Pretty risky.	
There must be prescriptive easements over his land anyway.	Definitely on all the principal trails; they've been in use over 50 years.	I've hiked that land since I was in high school. Others add: Me too. Yup.	Let's map the main trails, roads, house so we can talk to the guy intelligently.	Attorney: I can also summarize prescriptive easement law for LT use.	We can't give legal advice as such, but we could give your memo with a caveat. He needs his own attorney.
The restrictions he wants would defeat any tax deduction.	How important is the deduction to Urbanite?	He didn't say.	Small's book shows no deduction can be had on these facts.		We can copy those pages for him to see.
How about a bargain sale so he gets some money but restricts use of the land less.	That could be a win-win if he would go for it.	We can design trails away from the house plus good signage showing where folks are welcome.	And where not. Even fencing if needed.	I can help with the mapping.	I'll ask permission to walk there so we can map the land and come up with a plan.
We'll need stewardship funds	Yes, that on top of the bargain sale money.	The neighbors might contribute some.	And the hiking and bird groups.	Let's do a PAR and see how it looks.	Have to get everything into the PAR.

