

## **Baseline Report Thoughts – EHG**

**1/31/2017**

### *Summary points:*

- Baseline reports can and should serve a bigger function than just a “diligence checkbox.” By thinking ahead, the report can lay groundwork for future stewardship and management of the conservation property. As the nature of land trust work inevitably changes over time, having effective and thorough baseline reports will be essential to combat threats to conservation.
- Building relationships is the most important thing that will maximize conservation success, and baseline report preparation is a critical first step in the relationship between land trusts and landowners.

At the most basic level, conservation easement baseline reports describe current conditions of a property, and are a legal requirement of a conservation transaction. However, the reports can provide much more information and can help create the framework for long-term conservation success if done correctly. These comments are intended to extend the conversation beyond the standard IRS, LTA and Accreditation requirements of baseline reports, since these can be looked up by anyone at any time. These comments are also my opinion, based on working for LREP, Inc., EVLT, TNC, and collaborating with private landowners in other settings.

-Baseline report data collection and writing are some of the first steps to building relationships early on, not only with property owner, but (perhaps more importantly) with the property manager, who often has the most details about any issues, plans, or problems with the property and its infrastructure. As most people in the private land conservation world are aware, building effective and long-term relationships with landowners is critical for conservation success. Sharing a completed baseline report, along with the collected geospatial data, can be of good use to the land manager.

-A baseline preparer can act as a liaison between a land trust and landowners, can often play a role in negotiations, and can tactfully represent interests of either party to the other. It has been my experience that property owners and managers may open up more about the property to someone who does not directly represent the land trust. Although I recognize my own bias here, I believe that having a contractor do baseline work if possible is the best option for this reason.

-With current technology, the baseline report field work is an opportunity to digitally document the ranch in a way that it may never have been otherwise, and to collate this information into one place. This is useful for both the land trust and for the land owner, and is “value-added” and a relationship-builder between the land trust and the land owner.

-Baseline reports must be defensible in court, as they will be a significant document in any dispute. Thoroughness within the report is therefore important to protect both parties. As the

nature of private land protection evolves, and sustains critical attention, this will be increasingly important.

-If tax credits are involved, then a thorough baseline prepared by well-qualified individuals is essential, since the conservation values documented within the report are the basis for any public interest in the property, and must be thoroughly justified. A baseline preparer should be ready to defend anything written in the report in court.

-A baseline report can identify future stewardship issues or places where the land trust should pay special attention, prior to and after the conservation transaction closes.

-Beyond setting up information for future stewardship and compliance monitoring, the baseline report can also lay the groundwork for any ecological monitoring that may (and should!) happen. In addition, baseline preparers can provide documentation of and early monitoring of any statutory species, something which land trusts often do not have the capacity to do in-house.

-Although there is no LTA requirement for comprehensive biological inventories, the more this information can be documented in the baseline report, the better. Ecological monitoring over time is one of the best ways to quantitatively track conservation success and justify more projects and more funding.

-Generally, conservation transactions involve many moving parts and multiple organizations working together. The baseline report thus is as an opportunity to bring all information together and check for congruence or mistakes (i.e. title reports, county assessors' boundaries, what's happening on the ground, future management decisions, government agency input, funding agencies or sources, etc.).

-If the property shall be owned by the land trust for any length of time in fee title, a thorough baseline is even more important, as the land trust's liability depends on a thorough understanding of the conservation values, infrastructure, and trends on the property.

-The baseline report preparer should double-check real estate diligence, which often is so complicated that having more eyes on it is better. In addition, many diligence concerns must be field-verified, and the baseline report preparer often has the most extensive knowledge of the property outside of property ownership and management. Examples of diligence issues that must be field-verified include boundaries, management trade-outs, access easements and issues, water availability/rights/use, and utility corridors.

-On ranches, thoroughly documenting infrastructure, especially water systems, is critical to stewardship and future management of the property. Having the ranch manager's assistance with this portion is needed, and they may appreciate having the documentation as well.

-Arguably the most essential component of any baseline report is the photo points with corresponding GPS coordinates. These can prove the current condition of the property and are

critical to good documentation. The photos need to be re-creatable for the sake of long-term stewardship. Land trusts should re-take the same photos, especially where changes have occurred, from time to time.

-As third-party issues become more and more common, a good baseline report will be important to dealing with them. Examples: utility right-of-ways, boundary threats, disputes with neighbors.

-Any threats to conservation values should be thoroughly documented and vetted, and by doing so early in the process, may save land trust and landowner money and headaches.

Therefore, effective baseline reports not only document current conditions, but set the stage for stronger relationships, facilitate more effective stewardship and management for the land trust, and protect the landowner and future landowners from third-party violations and other potential threats.

Although we will not be discussing the definitions of each of the conservation purposes in this session, it is critical for you to understand the conservation purposes listed in Section 170(h) of the Internal Revenue Code and § 1.170A-14 of the Treasury Regulations. We've included a handout that extracts the sections on conservation purposes from the Treasury Regulations and we're happy to answer any questions you have about the conservation purposes in our question and answer portion at the end of the session.

Timing of the baseline report – In any conservation easement transaction, it is important for all team members in the transaction to be aware of the basic facts about a property. The landowner has all of these facts, but not every landowner knows what information needs to be shared in order for the team members to be able to do their jobs efficiently and competently. One of the team members needs to be responsible for coordinating the team members and for the sharing of information.

The one piece of information that every team member needs is the legal description. The creation of an accurate legal description should always be the first step in any transaction. Once you have the legal description, the second step is to obtain a current title commitment for the property so that you know what legal encumbrances affect the property. After you have these two pieces of vital information, you can start the baseline report. Without a valid legal description and title work, the baseline consultant cannot accurately describe the property in its current state.

The baseline report needs to provide a detailed discussion of the characteristics of the property, including the improvements on the property and how the property is currently used by the landowner. What are the grazing practices? How is wildlife managed? How are weeds managed? What type of water rights are appurtenant to the property and how are they operated by the landowner? It is extremely helpful to the land trust and to all other team members for this information to be included in the baseline report.

The baseline consultant also needs to know what the terms of the conservation easement will be so that the consultant can trouble shoot issues or suggest additional provisions to be included in the conservation easement based on the findings in the baseline report. In a perfect world, the baseline consultant will provide detailed conservation purposes to the team member tasked with preparing the conservation easement, so that the conservation easement can be drafted and shared with the baseline consultant at the same time it is shared with the landowner. Of course, it is important for a draft of the baseline to be reviewed by all team members prior to the conservation easement being finalized, so the two documents should be prepared in coordination with each other.

After the baseline report is drafted, it is important for a copy of the baseline to be shared with all team members, including the appraiser. The descriptions in the baseline report could influence the value of the property as determined by the appraiser. Also, if the landowner is seeking a Colorado state tax credit, the State Division of Real Estate will be reviewing all of the documents in the transaction at the same time, and therefore, all of the documents need to be consistent with each other. The baseline, the conservation easement, the appraisal, and any mineral report all need to be consistent with each other.

A good baseline report is also extremely helpful to ward off a potential IRS audit if the conservation easement is a charitable donation. The landowner can attach a good baseline report to the Form 8283 that is submitted to the IRS for documentation of a landowner's charitable deduction. When the tax return is reviewed by the IRS, and a good baseline report is attached to the return, we like to think there

is a better chance that the IRS will not audit the return because a good baseline report can make it obvious, even to someone who is not familiar with the property, that the property has valid conservation purposes and is worthy of protection.

If you are not lucky enough to avoid an audit, the baseline report can provide excellent support for the conservation purposes.

Separately from the initial transaction, the baseline report provides an excellent source for the land trust for a variety of legal challenges to the conservation easement. The detailed descriptions of the vegetation, wildlife, quality of the scenic views, improvements and the overall condition of the property, together with the photos of these various characteristics provide a thorough source of data and proof for the attorney representing the land trust.

For example, if the landowner cuts down an entire area of trees on the property in violation of the conservation easement, how do you prove that the trees were cut down? You obviously have the testimony of the landowner and of the land trust, but that could be conflicting. With the baseline report, you may have photos and a vegetation map as additional evidence to prove the trees were there at the time the conservation easement was granted.

Examples of other instances where an attorney for a land trust might rely on a baseline report are discretionary approvals or requests for amendment. For example, a landowner asks to be able to use the property in a manner not addressed by the conservation easement. Reviewing the baseline can help the land trust determine whether the proposed use would harm the conservation values. The baseline report could support the acceptance or denial of such requests.

Finally, the baseline report can be helpful in addressing requests of third parties for voluntary easements or the condemnation of easements. The independent information provided by the baseline report could be persuasive to a third party to locate an easement in a desirable location to mitigate damage to the conservation values or could assist the land trust or landowner in fighting to keep an easement away from the property.