



Frequently Asked Questions

Supporting Indigenous Land Relationships – A Legal Analysis

Below, we present perceived barriers to land back and repatriation efforts that we hear invoked by some in the land trust/land holding community. These perceived challenges drive us to questions about the legal underpinnings of these barriers and opportunities to work around them, rather than accepting them as reasons not to take actions to support land back and repatriation. First Light reached out to Rob Levin, a Maine attorney who specializes in land conservation and nonprofit organizations, to help address some of these questions. While the review is focused specifically on laws related to land trusts as 501(c)(3) public charities and nonprofit corporations, we also believe this review may be useful to other types of organizations that are part of the First Light community. Furthermore, although this FAQ is especially tailored to Maine-based organizations, much of the analysis will apply to organizations in other states as well.

Finally, we recognize the tension in addressing Indigenous land sovereignty while still operating within a colonized legal system. We see a need for more creative and legally-defensible approaches to land return, and hope this document serves as a starting place for re-examining our current practices and expanding what we see as possible.

1. **Perceived Barrier:** Land back centers around current landholders returning (not selling) their land to Indigenous groups, but sometimes land trusts claim they are legally restricted from reducing their assets through this type of donation.

Question: Does federal or state nonprofit law forbid a nonprofit from donating land or other assets to an Indigenous group?

Rob Levin Reply: Although there may be a few rare exceptions, just about every land trust is a 501(c)(3) public charity and a nonprofit corporation under state law (as opposed to a 501(c)(3) private foundation or a non-501(c)(3) nonprofit). As such, various federal and state laws and regulations apply to ensure that charitable dollars are remaining true to charitable missions. The Internal Revenue Service (IRS) enforces these laws at the federal level, while for the most part state Attorneys General enforce any state laws.

As a general matter, these state and federal charitable laws do not prevent land back projects. It is true that a land trust must be faithful to its charitable purposes, but a typical organization's purpose statement (as articulated in its Articles of Incorporation and Bylaws) includes a specific purpose of land conservation, accompanied by a broad reference to general charitable purposes.¹ The broad reference to charitable purposes provides a great deal of flexibility, and is enough to provide legal authority for a typical land back project.

The term "charitable" has been defined and interpreted by the IRS in many different ways. In particular, the applicable Regulation provides that the word "charitable" includes "relief of the poor and distressed or of the underprivileged," as well as eliminating "prejudice and discrimination."² Although we can't generalize and say that every Indigenous organization or government is poor or distressed or underprivileged, unfortunately those terms do accurately describe many of the conditions faced by these groups. Likewise, virtually all such Indigenous governments or nonprofit organizations face varying levels of prejudice and discrimination. Thus, a typical land back project does achieve one or more of these recognized charitable goals.

¹ Note that many nonprofits craft an outward facing "Mission Statement" that is posted on websites and in various other publications. The Mission Statement is sometimes similar or identical to the purpose statement found in the Articles and Bylaws, and sometimes varies quite a bit. In the event of any substantive discrepancy, the applicable legal language for determining an organization's purposes is the purpose statement in the Articles and Bylaws, not the Mission Statement.

² [Treasury Regulation §1.501\(c\)\(3\)-1\(d\)\(2\)](#).

Furthermore, in recent years, some land trusts have amended their official purpose statement to include cultural and historic Indigenous-related concerns. By engaging the organization's Board and members (assuming the land trust is a membership organization) in the broader discussion of historic and ongoing inequities around Indigenous peoples, considering a change to the purpose statement can be a meaningful and healthy step. Sometimes a change in purpose statement is done expressly in order to better connect a land back project or program (or similar initiatives focused on social justice) to the organization's stated purposes. That said, a change to the purpose statement is not a prerequisite to participating in a land back project.

On rare occasion, a member of a nonprofit brings an *ultra vires* claim against the organization, claiming that a specific action was in violation of its charitable purposes. *Ultra vires* actions are usually grounded in each state's nonprofit corporation statute. However, these kinds of claims rarely succeed, and when they do the circumstances are usually grounded in fraud. It is difficult to see a land back project unwound by an *ultra vires* claim. But again, if a land trust Board wants to eliminate any uncertainty in this respect, it can amend its purpose statement to add a cultural and historic plank.

In many ways, it is instructive to compare a land back project to the return of Indigenous objects by museums. Congress enacted the [Native American Graves and Protection and Repatriation Act](#) (NAGPRA) in 1990 to encourage and in some cases require the repatriation of certain Indigenous human remains and sacred and cultural objects. By enacting NAGPRA, Congress acknowledged that human remains and other cultural items removed from Federal or Tribal lands belong, in the first instance, to lineal descendants and Indigenous Tribes. Although NAGPRA does not extend to real property, the same theory of redressing past dispossession undergirds any land back and repatriation project. If the return of certain cultural items that was removed from a parcel of land is not only allowed but *required* under NAGPRA, it would be inconsistent and somewhat audacious for the IRS or any state regulatory authority to claim that the return of land itself is a violation of a 501(c)(3) organization's charitable purposes.

Comparisons to the return of stolen or looted art by art museums are also on point. Many if not most American art museums are 501(c)(3) nonprofit

organizations and subject to the same federal and state laws as land trusts. In recent decades, concerns grew in the art world about the provenance of works of art, with increasing evidence that many items had been looted from museums or private collections by Nazis before and during World War II. In response to these concerns, the American Alliance of Museums (the umbrella group that represents American art museums, the equivalent of the land trust world's Land Trust Alliance), along with an international counterpart, undertook a study of the issue and in 2001 published a comprehensive [Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era](#). Despite these very prominent and public “art back” programs, I am not aware of the IRS or any state Attorneys General expressing any concerns about whether art museums are acting beyond the scope of their charitable purposes.

To be clear, a typical land back project entails the return of land to an Indigenous entity of some sort, whether that is a formal Tribal government or a nonprofit 501(c)(3) corporation. For example, the 2021 return of Kuwesuwí Monihq/Pine Island to the Passamaquoddy Tribe was a case where a conservation organization transferred land from a private landowner to a Tribal government³. Land trusts are permitted to transfer land to other nonprofit 501(c)(3) organizations and to any governmental entities, and these sorts of transactions occur all the time. For example, a land trust will often pre-acquire an important parcel and then convey it to a municipality or the state for long-term ownership. There are valid questions as to whether any given parcel of returned land should be protected through a conservation easement or some other formal mechanism, but those are programmatic questions, not legal requirements.

Concerns about a land trust acting outside the scope of its charitable purposes would be enhanced if the project involves the granting of land to a specific individual or family. That said, even a return of land to an individual or family could be justified if there is evidence that such land was acquired by illegal, deceptive, or coercive means. In analogous situations, many art museums have returned works of art to the descendants of previous owners, even when the art

³ Specifically, the conservation organization, in conversation with the seller and the Tribe, signed an assignable purchase option agreement to purchase the property. After due diligence was completed, the purchase option was assigned to the Passamaquoddy Tribe who exercised the option and completed the acquisition.

had changed hands several times and was acquired by the museums with no knowledge of past wrongdoing.

One other important caveat: Many land trusts have a provision in their Articles or Bylaws that requires a supermajority vote of the Board and/or the Members in order to transfer any interest in real property. A land trust that is considering a land back project should make sure that it checks for such a provision and complies with it.

Even if no such member-approval provision exists, a land trust Board may choose to seek the approval of its Members to engage in a land back project. Bringing such a topic before the Members would be a delicate undertaking, but it could be a wonderful way for the community to become a part of the discussion. Furthermore, such a step may be helpful in giving the Board Directors (or a portion of the Board) more comfort in proceeding with a land back project.

2. **Perceived Barrier:** Oftentimes, land trust staff invoke “private inurement” or “private benefit” as reasons why they cannot promote access to their sites any particular group (e.g. Indigenous groups, schoolteachers, clambers, etc.).

Question: Does private benefit or private inurement apply to a transaction or an activity between a land trust and an Indigenous entity? How does the definition of private benefit vary based on whether an Indigenous group is federally-recognized, state-acknowledged, part of another formally organized entity (like an Indigenous 501(c)(3)), or unrecognized?

Rob Levin Reply:

As noted above, every 501(c)(3) organization, including land trusts, must comply with the so-called “private benefit” doctrine to ensure that it is operating for the benefit of the public and not for the benefit of any private individuals or businesses.⁴ In a nutshell, the private benefit doctrine generally

⁴ There are three related but distinct sets of rules, “private benefit,” “private inurement,” and “excess benefit transactions.” The latter two apply only with respect to transactions between a 501(c)(3) organization and an “insider” such

prohibits a tax-exempt organization from using its assets to significantly benefit an individual or business. The private benefit doctrine is not expressly codified in the Internal Revenue Code or the regulations, but is derived from the requirement that a tax-exempt charitable organization operate exclusively for exempt purposes. Reg. § 1.501(c)(3)-1(c)(1).

A 501(c)(3) organization that violates the private benefit prohibition risks monetary penalties, voiding of the transaction, and, in egregious circumstances, loss of its tax-exempt status. That said, in my experience many attorneys and laypersons are not familiar with the nuances of the doctrine and how it has been applied by the IRS and the courts, and it is often referred to casually as an objection to activities and transactions that are perfectly acceptable. In other words, the fear of violating the private benefit doctrine is often more magnified than is warranted by how the courts and the IRS have interpreted it. In virtually every instance in which the courts or the IRS have found private benefit to exist, the scenarios involve attempts to benefit partisan entities⁵, businesses or employees in a particular industry⁶, or a specific individual or family.⁷ In none of these cases has there been a significant nexus to a traditional charitable purpose or activity. To be sure, the private benefit doctrine is to be taken seriously, but it is often not the impediment that some fear it to be.

Along the same lines, it's important to recognize that the private benefit doctrine applies only to transactions with individuals, businesses, or other private entities (e.g. non-charitable trusts, LLCs, etc.). It never applies to transactions with other 501(c)(3) organizations or municipal, state, or federal governmental entities. Thus, if a land trust is engaged in a land back project with an Indigenous organization that is recognized as a 501(c)(3), there is no private benefit. Moreover, Federally Recognized Tribal governments are treated as states for most federal tax purposes under I.R.C. §7871, including being

as a Board director, major donor, or staff member. Because the typical land back project does not involve such insiders, I will focus this discussion on the private benefit doctrine. Along these lines, land trusts should be very wary of any land back project that does involve an insider.

⁵ *American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989).

⁶ *Quality Auditing Co. v. Comm'r*, 114 T.C. 498 (2000).

⁷ IRS Rev. Rul. 80-302.

eligible to receive tax-deductible charitable donations.⁸ Although not expressly stated in the statute, it would be very surprising and counterintuitive if this treatment did not extend to exemption from the private benefit doctrine. Because all four of Maine’s Indigenous Tribes are federally recognized, any land back project or other transaction with the Tribes cannot give rise to private benefit.

In addition, even non-recognized Indigenous Tribes or other Tribal entities should not be subject to the private benefit doctrine so long as their members are numerous enough to constitute a “charitable class” under a longstanding IRS framework for determining whether a particular activity benefits the public at large.⁹ Thus, allowing members of a Tribe to sustainably harvest sweetgrass or other plants from a land trust property would not give rise to private benefit. The same is true for allowing schoolteachers to access a preserve for educational purposes or for clambers to access a property for commercial harvest. These are simply not private benefit scenarios in any reasonable understanding of the term as interpreted by the courts and the IRS.

Another important limitation to the doctrine is that for any private benefit to be impermissible, it must be more than *incidental*. An *incidental* private benefit must be incidental to the public benefit in both a qualitative and quantitative sense. A *qualitatively incidental* private benefit occurs as a necessary concomitant of the activity that benefits the public at large; in other words, the benefit to the insider is insubstantial when viewed in relation to the public benefit conferred by the activity. As stated in response to the first question, supporting an Indigenous government or nonprofit is a valid charitable activity in the first place. Thus, the public benefit inherent in a typical land back project would outweigh and render incidental any possible private benefit. It is only where a land trust would be conveying land or special access to a specific

⁸ <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-2-answer-are-federally-recognized-tribes-considered-organizations-to-which-charitable-contributions-are-tax-deductible>

⁹ For a discussion of the “charitable class” concept in the disaster-relief context, see <https://www.irs.gov/charities-non-profits/charitable-organizations/disaster-relief-meaning-of-charitable-class>. The same analysis applies more generally to any type of grant or assistance provided by a 501(c)(3) organization.

individual or family that the private benefit might be viewed as outweighing the public benefit.

- 3. Perceived Barrier:** As a specific example of the private inurement barrier: land trusts deny boat trips to Indigenous families seeking to visit ancestral islands on the basis of private benefit.

Question: Is there any legal barrier to a land trust giving a boat ride to a Wabanaki family to visit an island?

Rob Levin Reply: Scope and scale are important when determining whether an activity constitutes impermissible private benefit. If a land trust were to undertake a major program entailing substantial expenditures of time and funds to regularly ferry an Indigenous family to particular sites, that could rise to the level of private benefit. But if a land trust, as part of an effort to build connections to the Indigenous community, and to support Indigenous people having access to culturally important lands, provides the occasional ride to an individual or family, that would be quantitatively incidental (*de minimis*) and would not rise to the level of private benefit. The land trust as an organization or a land trust employee as an individual might have valid reasons for not offering such a service, but they should not use the private benefit doctrine as an excuse.

- 4. Perceived Barrier:** Current land trust practices and conservation easements require strict monitoring and enforcement around Indigenous use of land, which we are told by Indigenous people is culturally inappropriate and harmful.

Question: Does the law actually require monitoring and enforcement at land trust sites? What alternatives to monitoring and enforcement exist for land trusts?

Rob Levin Reply: Maine's conservation easement enabling statute requires that easement holders monitor the protected property at least once every three years.¹⁰ In addition, the Land Trust Standards and Practices, which every

¹⁰ [33 M.R.S. 477-A\(3\)](#). Maine's statute is unique in this respect, as most if not all other state statutes do not contain such a requirement.

member of the Land Trust Alliance has pledged to follow, requires at least annual monitoring.¹¹

I do not recommend that land trusts waive their annual monitoring practices for conservation easements on Indigenous-owned land. That said, land trusts can engage with Tribal representatives when discussing the possibility of an easement to contemplate ways in which the monitoring can be done in a culturally sensitive and respectful manner.

In addition, land trusts might consider alternatives to conservation easements when participating in a land back project. For example, the land trust Board might include a statement of intent as part of the transaction, and ask the receiving Tribal entity's governing body to do the same.

Furthermore, the legal and philosophical nature of conservation easements presumes that landowners are not to be trusted as stewards of their own property. This approach, focused on monitoring and enforcement, suggests that the tool itself may be fundamentally incompatible for collaboration with Indigenous nations and organizations for whom sovereignty and trust are paramount issues.

5. **Perceived Barrier:** First Light organizations use various terms to describe the legal tools for encouraging access to and protection of land. We have talked about “conservation easements,” “cultural easements,” and “cultural use agreements,” to name the most common tools. But there is some confusion among our participants and among land trusts on what these different tools can achieve, and how they are treated under the law.

Question: What is the difference between a “conservation easement,” a “cultural easement,” and a “cultural use agreement”? What laws guide these different tools?

Rob Levin Reply: Yes, there are different terms and various tools floating around in these discussions, so let's break them down one by one.

¹¹ [Standards and Practices](#), §11.C.2.

A “conservation easement” is a statutorily defined instrument that has a focus on protecting a parcel of land from uses that are seen as incompatible with conservation, recreation, and/or historic preservation. A conservation easement perpetually extinguishes certain usage rights, such as constructing buildings, mining the surface, or clearcutting trees. A historic preservation easement is a form of conservation easement that extinguishes rights to alter the exterior of a historic building or other structure. A governmental entity or a nonprofit conservation or historic preservation organization must hold these easements, and they are governed by specific state enabling statutes. Maine’s enabling statute¹² was enacted in 1985 and was amended in 2007 to provide additional guidance, especially for amendment and termination. The term “conservation easement” also has a federal context, because if a conservation easement is donated and meets certain standards set forth in I.R.C. § 170(h) and accompanying regulations, the donor is eligible for a federal income tax charitable deduction.

A “cultural easement”, or “cultural conservation easement,” is a term used for a conservation easement that includes the protection of cultural features as one of its purposes. Most state conservation easement enabling statutes follow the Uniform Conservation Easement Act (UCEA) and include the preservation of “historical, architectural, archaeological, or cultural aspects of real property” as an authorized purpose of a conservation easement. Maine’s conservation easement enabling statute preceded the development of the UCEA and does not include this text. Thus, a cultural easement or cultural conservation easement is not a creature of statute in Maine. (At least not yet, as First Light or other interested organizations could seek an amendment to the enabling statute to add this language as an authorized purpose.) However, a conservation easement could be used in Maine to protect land that has important Indigenous-related historic or cultural values from development.

A “cultural use agreement” or “cultural access agreement” or “cultural respect agreement” is a somewhat different tool, with a focus on access and not protection.¹³ The general thrust of a cultural use agreement is to allow access

¹² [33 M.R.S. §476 et seq.](#)

¹³ This instrument could also be called a “cultural use easement” or “cultural access easement.” What’s important isn’t what the document is titled, but what

by Indigenous Tribal members or organizations for sustainable harvesting (of sweetgrass or ash bark, for example) or for cultural or religious ceremonies. A cultural use agreement could be for a term of years, or it could be perpetual. It could be irrevocable or revocable, depending on the desires of the parties. A cultural use agreement is not statutorily defined in Maine, or in any state to my knowledge. Rather, it is similar to a license or a permit, and is guided by the law of contracts. There is no federal or state statutory impediment to land trusts entering into cultural use agreements with Indigenous Tribes or nonprofits.

A cultural use agreement is a good tool for a land trust that wants to continue to own a parcel of land, but wishes to open it up for access for Indigenous-related uses. On Cape Cod, the Dennis Conservation Trust has used the cultural use agreement tool as a way of guaranteeing access to some of its preserves to the Native Land Conservancy, another Massachusetts nonprofit organization. Similarly, a Maine affiliate of the Appalachian Mountain Club has created a Brown Ash Permit to authorize Tribal individuals or groups to engage in the sustainable harvesting of brown ash. Both of these examples are posted on the [First Light website](#). First Light is also working on a cultural use template and hopes to have it posted soon.

Now that I have broken down the nomenclature and separately categorized these different terms, it's important to recognize that there can be some blending of the concepts and tools. For example, in recent years, conservation easements are being drafted so as to expressly allow certain Indigenous-related access uses. Maine Coast Heritage Trust's conservation easement template, updated regularly and posted on the [MLTN website](#), includes such language. Another step up from *allowing* cultural harvesting uses in a conservation easement would be to *guarantee* access for such uses, similar to a conservation easement that guarantees access for recreational uses, either along a trail or on the entire protected property. I'm not aware of any conservation easement that has taken this step, although there's no reason it couldn't be done. Conversely, although the focus of a cultural use agreement is on access to a specific cultural resource or parcel of land, the document may also include

its text allows or prohibits. For simplicity, I'll refer to this tool as a "cultural use agreement" throughout the rest of the FAQ.

certain protections of the resource, and in this sense would have elements of a conservation easement, even if it's not styled or defined as such.

6. **Perceived Barrier:** Some land trusts worry that if their activities do not directly increase the number or acreage of conservation easements, they are in violation of their mission (e.g. if they buy land that *already* has a conservation easement to give to Tribes; if they buy land to give to Tribes without instating a conservation easement).

Question: Is there a legal mandate for land trusts to increase the overall number or acreage of conservation easements? Are land trusts acting against their bylaws or mission when they don't use fundraising to directly add more conservation easements to more land area? And: is there any legal reason why a land trust cannot convey land to a Tribe when it does not have a conservation easement?

Rob Levin Reply: As stated above, most if not all land trusts have Articles and Bylaws that set forth a general charitable purpose and a more specific purpose centered around some combination of conservation, education, and recreation. Even with this more specific purpose in mind, it is not the case that every activity or project must increase the number of acres under conservation protection. That is an unduly narrow understanding of a purpose statement. That said, if a land trust did want to engage in a land back project but was concerned about its purposes being too narrow, it is a relatively simple step to amend the purpose statement in the Articles and Bylaws to add a purpose around social justice for Indigenous communities.

7. **Perceived Barrier:** Land trusts have contacts that could be leveraged for community-led or Indigenous-led fundraising around land return and repatriation projects, but worry about the legal issues around leveraging these contacts for projects outside of the land trust's own work.

Question: Can land trusts financially participate in land repatriation projects that the land trust is not directly facilitating– such as community-led fundraising or Indigenous-led fundraising? What are the legal issues around doing that?

Rob Levin Reply: Yes, land trusts can help with fundraising or technical advice or other means of support for projects that are not housed within the land trust itself. Land trusts provide this kind of assistance all the time in a variety of contexts, and Indigenous-focused projects are no exception. The land trust will want to be careful to make sure it is honoring any confidentiality obligations with respect to its donors. That said, there is no general prohibition against a 501(c)(3) land trust offering assistance outside of its core functions. I suppose there could be a scenario where if a land trust’s programming evolved so that it was exclusively or mostly working in this support role, there would be a mismatch between its purposes and its activities. But even then, a simple change to the purpose statement would resolve that mismatch as a legal matter, and then it’s just a question of what kinds of projects the land trust’s members, staff, and directors want to focus their energy on.

8. **Perceived Barrier:** When land trusts dissolve, they transfer their land holdings to other land trusts or private agencies and claim they cannot transfer to Indigenous entities on the basis of private inurement.

Question: If a land trust ceases to exist, are there any legal obstacles to transferring its land to a Tribal government or Indigenous 501(c)3?

Rob Levin Reply: Under longstanding IRS requirement, a 501(c)(3) organization’s Articles and Bylaws must include a specific provision addressing what happens to the organization’s assets in the event of a dissolution.¹⁴ The typical formulation reads as follows:

“Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose.”

The good news is that under I.R.C. §7871, any Federally Recognized Tribe is treated as a state government for most income tax purposes, and that treatment extends to being eligible to serve as a grantee of a dissolving 501(c)(3)

¹⁴ <https://www.irs.gov/charities-non-profits/charitable-organizations/organizational-test-internal-revenue-code-section-501c3>

organization's assets in the event of dissolution. Likewise, any 501(c)(3) organization established by a Tribal government, or a Tribal entity of any kind will also be eligible under this language. Thus, as long as a land trust is using the standard dissolution provision or a close version of it, then no changes to Articles or Bylaws are needed in order to allow for the transfer of assets to a Federally Recognized Tribe or to an Indigenous-affiliated 501(c)(3) organization.

Then again, if a land trust wanted to be more specific or suggestive on this issue, it could certainly amend its Articles and Bylaws to expressly mention Federally Recognized Tribes as eligible grantees. In that case, the provision could read as follows:

“Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a Federally Recognized Tribal government or state or local government, for a public purpose.”

I generally don't recommend identifying specific transferees in the dissolution provision, because circumstances might be quite different 50 or 100 years down the road when a dissolution might occur. Thus, an organization or governmental entity that seems like a natural transferee now might no longer be so in the distant future. In order to balance commitment to land return with uncertainty around which entities may exist in the future, land trusts could consider specifying that asset distribution choices will be made in consultation with and advisement from Federally Recognized Tribal governments or Indigenous-affiliated 501(c)(3)s, with the intention to distribute assets to governments or nonprofits in alignment with the needs and recommendations of these advisors. For example, land-holding groups in Maine could offer that opportunity for review upon dissolution to the Wabanaki Commission on Land, which was specifically created to be a central place where five Tribal communities will regularly meet to make decisions about land in Maine.

9. **Perceived Barrier:** Land trusts are interested in developing Indigenous advisory councils to guide decision-making around cultural use, land back, and repatriation.

Question: What would the development of an advisory council mean for the definition of “insider” in these spaces, and thus concerns about private inurement?

Rob Levin Reply: Conflict of interest issues are determined by state and federal law, as well as an organization’s Conflict of Interest Policy. Just because a conflict exists does not mean that the transaction at issue cannot proceed. However, conflicts have to be recognized and addressed with transparency and fairness depending on the kind of transaction at issue.

There are two general kinds of conflict of interest: financial conflicts and commitment conflicts. A financial conflict is when the conflicted individual stands to receive some sort of financial benefit from a transaction. A commitment conflict, in contrast, is one where an individual has a legal commitment to both sides of the transaction, e.g., serving as a land trust Board Director and a representative of an organization with which the land trust is proposing to purchase or convey a parcel of land. As long as they are handled with transparency, most commitment conflicts are manageable ones that can result in win-win outcomes for the land trust and the other organization to which the individual has a commitment.

Federal law provides that a 501(c)(3) organization must not engage in “private inurement” or “excess benefit transactions.” These are transactions in which an “insider” (also known as a “disqualified person” or “DQP”) receives some undue financial benefit and are mostly aimed toward financial conflicts. A DQP is defined by federal statute “as any person who was, at any time during 5-year period preceding [an excess benefit] transaction in a position to exercise substantial influence over affairs of the organization.”¹⁵ But neither the statute nor the regulations specify whether an advisory council member would be deemed a DQP, and in practice it will probably depend on the facts and circumstances of the situation.

That said, even if an advisory council member were deemed to be a DQP, there is a world of difference between a land trust conducting a transaction with an individual who is an advisory council member, where a financial conflict exists, and an Indigenous nonprofit or governmental entity of which the advisory

¹⁵ [I.R.S § 4958\(f\)\(1\)\(A\)](#)

council member is a representative, where the conflict is mostly of a commitment nature. The financial benefit derived by the individual from the latter kind of transaction is typically incidental, and thus much more manageable. Thus, as a general matter there is no problem with having an Indigenous advisory council or having a representative of a Tribal government or Indigenous nonprofit organization serve on the land trust's advisory council or even its Board of Directors. State and local governmental elected officials serve in these roles with some frequency, and there's no reason Indigenous members couldn't do so as well, so long as any commitment conflicts are acknowledged and addressed with transparency as per the organization's Conflict of Interest Policy.