



## 2024 LAND CONSERVATION TRENDS IN PERMANENCE

The Land Trust Alliance Conservation Defense Initiative offers support, guidance, resources, tools and leadership to land trusts across America to uphold conservation permanence. This starts with daily routine prevention and continues with skillful, timely dispute resolution and litigation when land trusts face more serious and sustained challenges. Identifying and triaging legal trends is an important aspect of this approach.

The [Land Trust Accreditation Commission](#) was incorporated in April 2006 as an independent program of the [Land Trust Alliance](#) to operate an innovative program to build and recognize strong land trusts, foster public confidence in land conservation and help ensure the long-term protection of land. The Commission's mission is to inspire excellence, promote public trust and ensure permanence in the conservation of open lands by recognizing land trust organizations that meet rigorous quality standards and strive for continuous improvement.

The Commission and the Conservation Defense Initiative staff monitor trends and act as sounding boards for land trust staff and volunteers and their advisors. This trend sheet distills current 2024 trends.

1. Turnover: Over the past three years, about 30% of land trusts applying for renewal of accreditation experienced turnover of one or more executive directors in a five-year period. Being accredited can help with the leadership transition, as the organization has the systems and processes in place. Land trusts have shared that the accreditation application process is one of the best ways for leadership to learn about every aspect of their organization and for board members to feel confident that their organization has an additional layer of external oversight.

Conservation Defense Initiative staff talk with more new staff, especially stewardship staff and board members looking for basic resources and help navigating resources. Many staff changes are people new to conservation and are looking for assistance with basics such as records and amendments. Many new board members are unfamiliar with important concepts such as impermissible private benefit. The Land Trust Alliance has ample resources to orient new staff, volunteers and board members to the many critical technical details essential to running a successful land trust.

2. Basics: Complexity in the land trust world is increasing (e.g., harder to get appraisals; uptick in public visits to land trust properties and how to continue to leverage that interest; projects are getting more complex and taking longer; electronic recordkeeping; remote monitoring; land division challenges; access and legal right of way demands, family partitions, bankruptcy and increasing boundary disputes, trespass and encroachments.) In that complexity and with staff and board turnover, basics need to be refreshed and reemphasized.

For example:

- Financial: Obtaining required evaluation of financial statements each year (i.e., audit, review or compilation) and contents of financial reports sent to the board.
- Tax: Documenting concerns with Form 8283 or landowner's appraisal while balancing not giving advice.
- Title update: Documenting the title was updated "at or just prior to" closing.
- Gift letters:
  - Understanding the fine line between getting a good deal (no charitable intent) and a gift.
  - Sending the letter: The "landowner said they weren't going to take a tax deduction" is not a good reason because landowners have been shown to change their minds.
  - Disclosing bargain sale component to any transaction, including paying something that benefits the landowner (like the appraisal they use for the tax deduction).
- Recordkeeping: Considering electronic recordkeeping, as cloud back-up alone is not sufficient, because it will over-write deletions and then your record is gone forever; billing disputes can cause the provider to block access to records; providers go out of business; sites may not be secure, etc.
- Sufficient board oversight: Having a board that provides sufficient oversight of the land trust's finances and operations. From the Commission side, some challenges with financial health include having adequate operating reserves; having adequate capacity; having funding and ability to provide adequate stewardship for the portfolio. Having a board appropriately and proactively developing transition plans to ensure continuity in the leadership and management of the land trust's functions. From a conservation defense perspective, boards will want to ensure perpetuity by engaging with stewardship staff at every board meeting and fully funding ample capacity and capability in stewardship to meet increasing demands and complexity.
- Violation documentation: Understanding what thorough and complete violation documentation is so that it withstands disputes is essential. Documentation includes a photo, description and map of every single tree cut, every inch of a linear violation, every rut and water erosion pool or stream, every side of a structure or improvement and the full extent and dimensions of grading or other topography change. This is not an exhaustive list but should be enough to guide violation documentation. If a land trust feels a violation is resolved, then it needs to show its work and its conclusions. Document how the resolution is consistent with the conservation values and will not result in impermissible private benefit.
- Refresher on basics: Basic concepts such as impermissible private benefit, records, title update, amendments, enforceable drafting, thorough documentation of problems, negotiation skills with landowners and neighbors, issue identification, problem-solving skills and location of basic resources should all be on every new staff, volunteer and board member orientation check list. The Conservation Defense Initiative sees much unfamiliarity with these critical concepts. The Land Trust Alliance has many resources to train and orient new staff and board members.

- Boundaries: Standards require that the land trust be able to locate boundaries of preserves and easements on the ground and enforce the integrity of those boundaries. About 53% of [Terraforma](#) claim coverage denials involve boundary problems and trespassers. Of those, 20% are more than two decades old and were unaddressed and often undiscovered despite documentary evidence possessed by the land trust. 82% of all coverage denials involve a problem that is older than a few years and unaddressed.
- Rights of way: Demands for legal access are increasing quickly. A methodical investigation of the legitimacy of the demand, litigation risk, avoiding impermissible private benefit, alternative routes and minimizing any unavoidable intrusion are essential to preventing conservation loss and future disputes.

The good news is that seeing and addressing these risks means that accreditation matters, and it works even if it requires more time and effort.

3. Stewardship: Stewardship is the part of a land trust that fulfills legal requirements and protects community perception to uphold lasting conservation. Mission fulfillment rests with sound stewardship. The trends we are seeing now related to stewardship point to a need for the whole community to begin a mindset and operational shift to stewardship. The expectation is that within the next decade land trusts will need to begin making this shift to becoming predominantly or fully stewardship-focused organizations over time. A full board commitment now, leading to a strong stewardship program, will position the land trust for success when dealing with the increased challenges of the future.

- Numbers: Various measures of increasing challenges show increases in defense of lasting conservation in multiple venues:
  - Conservation case law summaries number of cases: 105% increase in a decade.
  - Tax controversy conservation cases: Increase in three years of 114%.
  - Terraforma covered cases: 616% increase in nine years.
  - Terraforma all claims: 2284% increase in nine years.

These numbers continue to trend up in a steeper incline and in greater numbers than the creation of conservation easements. It suggests that land trusts need more investments in stewardship capacity, capability and compensation for on-the-ground stewardship staff and volunteers.

- Division: Faced with increasing economic and development pressure, owners of conserved land are challenging conservation easement division prohibitions more and more. Happily, we have seen a steady stream of cases where the court has upheld division restrictions.
  - This success in court is largely due to the Conservation Defense Initiative's participation in amicus briefs. One such example is [Dep't of Agriculture and Rural Development v. Engle, No. 359098 \(Mich. Ct. App. Nov. 10, 2022\)](#) where the original easement grantor, who had served on the board of a local land trust for several years, divided the conserved property, split the land ownership and sold half the land violating the easement. The Land Trust Alliance partnered with Grand Traverse Regional Land Conservancy, the Michigan state land trust association, Heart of the

Lakes and American Farmland Trust to defend against this threat to conservation permanence by submitting amicus briefing. The appellate court agreed that the easement prohibition on divided ownership was not an unreasonable limitation on the landowner's right to sell where the original easement grantor, who had served on the board of a local land trust for several years, divided the conserved property, split the land ownership and sold half the land, violating the easement. The Land Trust Alliance partnered with Grand Traverse Regional Land Conservancy, the Michigan state land trust association Heart of the Lakes, and American Farmland Trust to defend against this threat to conservation permanence by submitting an amicus brief. The appellate court agreed that the easement prohibition on divided ownership was not an unreasonable limitation on the landowner's right to sell.

- Access: Litigation pertaining to access rights in and to preserves and conservation easements is on the rise. This includes disputes related to public access, such as landowners seeking to re-route trail easements or prohibit trail maintenance. It also includes right-of-way litigation where third parties are seeking to expand existing rights-of-way that have vague or nonexistent written agreements or are attempting to create new paved and widened access to service lots around preserves and conservation easement land.
  - Rights-of-way shared among multiple owners also breed disputes that involve the land trust in bitterly fought litigation. These are expensive and protracted disputes. The Land Trust Alliance is responding to these trends by enhancing our guidance for Standards and Practices and developing additional resources to help land trusts prepare for and respond to such threats.
- Original grantors: Original grantor disputes have been on a steady rise since around 2017, dramatically increased during the pandemic (2019-2023) and are now 23% of all challenges. Successor owners remain the largest category of challengers with 47%. Original owner disputes cost 20% more to resolve than successor owner disputes.
  - This changes a decades-old trend of successor owners being the only risk category of any volume or cost. Original owner violations costing an average of \$33,000 to resolve were once unheard of, but no longer.
- Condemnation: These continue to rise as state actors seek to develop conserved land for various public utility uses such as energy generation and transmission infrastructure. The Land Trust Alliance is responding to this in many ways, including:
  - Submitting extensive public comments to federal agency requests for comments where we advocate for smart siting and the avoidance of conserved lands and lands of high conservation/agricultural value that have yet to be conserved (copies of which are available upon request).
  - Assisting land trusts in defending against condemnation by issuing letters of support or joining together with state associations to draft and collectively submit advocacy letters.
  - Preparing educational resources for the land trust community.
- Extreme weather: Escalating insurance losses have outpaced rate increases, primarily because of costs of catastrophes, severe weather and large fires. Expect carriers to

continue to raise rates. This trend is likely to continue with the increased severity and frequency of hurricanes, floods, wildfires, tornadoes, winter storms and other extreme events such as straight-line wind and extreme heat.

- The frequency and severity of major catastrophes continue to stress the insurance industry. In the last four years, these events have caused annual insured losses of more than \$100 billion globally. In 2023, total insured losses globally were an overwhelming \$118 billion. This is impacting insurance premiums with Texas seeing a 500% increase in Conserve-A-Nation premiums over the next three years as mandated by the Texas regulators.
  - Water rights: Land trust interests in restricting water diversion and improving water quality are increasing, but substantive in-house expertise is lacking. Terrafirma has spent more than \$300,000 litigating water rights issues. These issues are more legally and practically complex than traditional land conservation.
  - Heat severity: For stewardship staff and volunteers, [HeatRisk dashboard](#) is a practical tool for evaluating daily risks. Land trust leadership will want to take steps to manage outdoor workplace safety to prevent heat illness and death, conduct appropriate trainings and implement policies and procedures to ensure staff and public safety related to concerns specific to their service area and conditions on conservation lands. The Occupational Safety and Health Administration's [Heat Stress Prevention Training Program document](#) is a helpful resource for implementing overall policy or guidance.
  - Perpetuity: Term agreements are not conservation easements, even if the intended use is laudable. Avoiding term agreements helps to counter annual state legislative efforts to restrict perpetual easements.
  - Recognition: A promising trend is the Tax Court's recognition of and reliance on land trust expertise in determining the impacts of reservation of certain rights. The Tax Court has explicitly pushed back on IRS arguments by relying on the role of the land trust to monitor and to prevent inconsistent uses and by citing Section 170h of the Internal Revenue Code as its authority.
  - Terrafirma is winning cases: Terrafirma paid out more than \$7 million to support more than 278 lasting conservation defense challenges. Courts might be seeing a plateau on post-pandemic severe cases.
4. Legal: The U.S. Supreme Court changed the direction of regulatory law in its [Loper Bright](#) decision that negated 40 years of Chevron deference, which required federal courts to defer to a federal agency's regulatory interpretations of ambiguous statutory provisions. In [Corner Post](#), the U.S. Supreme Court substantially expanded how long agency regulations can be challenged.

We expect future litigation to challenge the validity and interpretation of IRS regulations. Federal agencies are likely to take longer in drafting and finalizing regulations due to these rulings. However, these decisions may also serve to slow other adverse changes such as sweeping changes in existing regulations when an administration changes. Precedent prior to Chevron still stands and limits the adverse impact of these decisions. Expect protracted litigation over many years as courts at all levels sort this out.

Regarding the proceeds clause legal basis, the Tax Court invalidated Treas. Reg. § 1.170A-14(g)(6)(ii) in [Valley Park Ranch v. Commissioner](#), leaving intact [Oakbrook Land Holdings v. Commissioner](#) that upheld the regulation but only for states in the Sixth Circuit Court of Appeals (Kentucky, Michigan, Ohio and Tennessee). The invalidation of the regulation reinforces the Tax Court's unwillingness to uphold IRS arguments about technical foot-faults but also creates uncertainty as to the treatment of extinguishment and proceeds. Taxpayer attorneys are eager to use Loper Bright to overturn the statutory perpetuity provision using the invalidation of the regulation as the basis for a finding of no perpetuity requirement. Undermining compliance with the Uniform Standards of Professional Appraisal Practice as the standard is another emerging trend.

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