

Western Cave Conservancy

213 Elm Street, Santa Cruz, CA 95060

Incorporation Planning Meeting of June 8, 2002

This planning meeting of the Incorporators of the proposed Western Cave Conservancy was held on 8 June 2002 at the home of Rolf and Denise Aalbu at 18 Sea Lion Court, Sacramento, CA 95831. These minutes, when accompanied by the corrections or additions approved by the Incorporators, constitute the official record of the meeting. All positions and statements attributed to the Incorporators are paraphrased and are not to be regarded as direct quotes.

ATTENDEES

Rolf L. Aalbu, Incorporator
Jerald J. Johnson, Incorporator
Robert C. "Martin" Haye, Incorporator
Marianne L. Russo, Incorporator
Daniel S. Snyder, Incorporator

NEW BUSINESS

Binders

Dan has prepared binders for each of the directors, containing the agenda for the present meeting, a copy of the proposed Articles of Incorporation, proposed Bylaws of the Corporation, and blank paper for notes. These can be used by the directors for future meetings as well.

Meeting Chair

Martin offers to chair meeting. Approved by general consensus.

Minutes

Dan volunteers to take minutes. Approved by general consensus.

Why Incorporate as a 501(c)3 Public Benefit Corporation?

Martin enumerates reasons to incorporate the Conservancy:

1. donors may write contributions off their taxes
2. property tax exemption (provided the organization qualifies for the welfare exemption)
3. liability protection for corporate directors and officers (provided insurance is actively sought)

Discussed: The alternative to incorporation is to simply act as a private company. Disadvantages to incorporation as a 501(c)3 include IRS filing and reporting requirements, limitations on corporate activities outside the stated scope of the corporation, and certain rules regarding the makeup of donors and other funding sources. In addition, the corporation is required to purchase or to actively attempt to purchase liability insurance for its directors and officers. The Southeastern Cave Conservancy Inc. not only has obtained this insurance but in addition has liability policies on all its owned and leased properties. The insurance requirement to be addressed later in the meeting. Consensus is that benefits of incorporation as as 501(c)3 far outweigh the negatives.

Resources Available to the Conservancy

Among the resources available to the conservancy are the following:

Southeastern Cave Conservancy, Incorporated

The Southeastern Cave Conservancy has existed now for several years, owns or leases over 30 properties, has annual income around \$80,000, and is an excellent model for this conservancy. Dan

has prepared a binder of material downloaded from SCCi's website, including incorporation papers, bylaws, acts of the Board of Directors, meeting minutes, tax returns, and publicity and fundraising material, all of he suggests the directors study. The binder may be borrowed or the materials may be viewed online at: <http://www.scci.org>. Binder borrowed by Marianne.

The Land Trust Alliance, Inc.

The new conservancy can also draw heavily on the resources offered by the Land Trust Alliance. This organization's mission is to help other land trusts get started, primarily from an educational standpoint. A number of U.S. cave conservancies are members of LTA. The Alliance offers a large selection of books dealing with subjects of interest to land conservancies: fundraising, landowner negotiations, planned giving, property management, etc. LTA also offers seminars, and have contact information for CPAs, attorneys, insurance companies and others that work with nonprofit land trusts. Marianne volunteers to visit the Sacramento office to LTA's offerings first-hand. The Alliance website, including a catalog of books and seminars, is at <http://www.lta.org/>

Nolo Press guide: How to Form a Nonprofit Corporation in California

In preparing the incorporation documents, Martin has drawn almost entirely on Anthony Mancuso's thorough and indispensable guide, *How to Form a Nonprofit Corporation in California*, 9th edition (2000), published by Nolo Press.

Name of the Conservancy

Discussed: Dan had suggested the name Pacific Coast Cave Conservancy, but realizes that this name and its acronym PCCC are cumbersome. California Cave Conservancy was thought too narrow. Western Cave Conservancy adopted by general consensus as being the most specific that will still attract donations from a broad base.

NSS Pacific Slope Cave Acquisition Fund (NSS BOG Act 18-718)

Informational: This fund has been created by the NSS Board of Governors to hold Martin's \$70,000 donation until the funds are applied for by any cave conservancy established for the purpose of acquiring title or conservation easements to caves within the Pacific Seaboard (Washington, Oregon and California). This could be the conservancy now under discussion or another. The name of the fund and the language governing outlays from it were written by Dan.

Extra-Meeting Background

Martin found it was necessary to donate the money to an existing 501(c)3 before taxes came due on it at the end of 2001. Failing to do this would have dramatically reduced the amount he could give. Paul Stevens, Secretary-Treasurer of the NSS, very kindly set up a restricted account to which Martin could donate the funds. Since it was not possible for the NSS to create a fund dedicated to an organization that at the time did not yet exist, it was necessary to devise more general language to govern outlays from the fund. Paul invited Dan's assistance in drafting the language, which was also reviewed by Martin and Marianne in February or March 2002. Stevens submitted this language as a motion to the NSS BOG, which passed the measure unanimously on March 23, 2002.

The conservancy applying for moneys from this fund must be a 501(c)3 public benefit corporation and must be dedicated to the purpose of protecting caves within the area covered by the fund. Funds are to be requested for particular purchases of real estate or conservation easements. Proof of a pending purchase agreement is required, but no tests of significance are to be applied except in the case of competing applications for funds. The entire amount of the fund is available for a single purchase if it is required. See <http://www.caves.org/nss-business/bog/sec-18.html> (item 18-718) for the complete text.

In response to a question from Marianne, Dan states that he didn't intend that the conservancy continue to rely on the NSS fund after the initial donation is exhausted. Future fundraising efforts should be in-house, and in fact it isn't legally possible for all of our funding to come to us through the NSS due to

the public support requirements to be discussed later. Whether the NSS keeps the fund open after it is first exhausted is up to the BOG.

Marianne suggests that since the fund is already set up, we begin an awareness and fundraising campaign as soon as the NSS Western Regional Convention, perhaps via T-shirt sales and informational brochures. If we incorporate in time for the regional, we should set up accounts in order to receive donations directly. Dan points out that authorizing bank accounts will be on the agenda of the first meeting of the Board of Directors.

Membership vs. Nonmembership Structure

Refers to whether we have formal members. Legally speaking, members are individuals that the Articles or Bylaws give the right to vote for the election of directors, for the sale of the corporation's assets, or for a merger or dissolution of the corporation—whether just one or all three of these powers.

In a non-membership corporation, these powers are reserved to the directors, who act in the capacity of legal members at such times as those powers are exercised. The board of directors nominates and elects its own successor. However, even though such a corporation has no formal members, the term “members” can be and generally is used to refer informally to individuals who pay dues or are otherwise interested in the corporation.

A non-membership corporation can easily adopt formal membership in the future. In fact, provisions to enable the conversion can be built into the Bylaws.

Discussion: Formal membership offers the advantage that members may feel a greater sense of ownership the organization; thus, it may be easier to attract donations from the caving community and general public. A very serious disadvantage, experienced by at least one other U.S. cave conservancy in recent years when they converted to a membership structure, is that the cohesiveness of the Board can be destroyed and the organization rendered ineffectual by warring factions. We have seen something similar happen recently to the Western Region and one of its committees. On the other hand, the Southeastern Cave Conservancy is an example of a very successful membership conservancy. Less successful in the opinion of several of its former board members is the Northeastern Cave Conservancy, which formerly was non-membership. Dan believes the West Virginia Cave Conservancy is non-membership.

Marianne: Favors a middle ground wherein we are structured as a non-membership corporation, but we seriously solicit input from our non-voting members in formulating policies and goals.

Dan: In fact, as a 501(c)3 we will be required by law to have an annual meeting open to the public; this will be a good opportunity to obtain input. This could be done similarly to the Southeastern Cave Conservancy. They have four board meetings a year during which they transact most business. Their annual meeting is a banquet at which they have presentations and conduct relatively little business. Minutes for the quarterly board meetings can run 3-25 pages, while those from the annual meeting barely fill a single page. Martin: Also, the board can and probably should form various committees, which can be drawn from the non-voting membership rather than just from the board. So the members can have a large influence in day-to-day operations. But the board should be able to correct problems in those committees at any time. Rolf: Clarifies that these would all be volunteer positions.

A non-membership structure with provisions for simple conversion to a membership structure agreed upon by general consensus.

Size of Board of Directors

Martin suggests a board having a minimum of five and a maximum of nine directors, consisting initially of five directors. Adopted by consensus.

Selection of Initial Board Members

The individuals proposed for the initial Board of Directors are Rolf Aalbu, Joel Despain, Robert "Martin" Haye, Jerald Johnson and Marianne Russo. Joel has accepted an invitation to join the board.

Discussion: Board of Directors should be diverse but comprised largely of individuals credentialed in a field having relevance to caves or to the business of the conservancy. Examples include speleologists, geologists, archaeologists, biologists, hydrologists, public land managers, persons with experience developing cave management plans, proven leaders and administrators, persons with important contacts, etc. Directors should have work well together and have similar philosophies of cave conservation and management if the board is to remain cohesive. Suggested candidates for future directors include John Tinsley, Janet Sowers and a representative from the State Parks system.

Present slate of Directors elected by general consensus of the Incorporators.

Conservancy Philosophy [not on agenda]

As an outgrowth of the previous discussion regarding harmonious relations between Directors, Dan desires that the priorities of the conservancy be explicitly weighted toward conservation rather than access. He argues that among Western cavers likely to have information about sensitive caves needing protection, only an organization that exists primarily to conserve caves rather than provide cavers with access will gain their trust. This contrasts with the Southeastern Cave Conservancy, which places great emphasis on access except in the case of a few properties. Marianne agrees that for the Western Cave Conservancy conservation should be a higher priority than access, but not to a great degree; access is an important issue, one that a majority of cavers will respond to. All agree that the conservation vs. access issue must be evaluated on a cave-by-cave basis. Some threatened properties, such as the proposed Rippled Cave purchase, would be bought primarily to preserve access with relatively few restrictions, while others would be purchased to protect sensitive biota or other features requiring severe access restrictions. Martin notes that because the conservancy will be a public benefit corporation, some form of public access to the organization's properties is required, though it can be subject to reasonable restrictions. Rolf notes that from a scientific standpoint, the most interesting projects often originate from a random observation; he therefore opposes restricting access to persons working on a specific project. Martin: We'll lay out the corporation's philosophy in the Bylaws later in the meeting.

Corporate Office

For the initial incorporation the conservancy's agent must have a street address that accepts mail; a post office box is not permitted. By consensus, this address will be Dan and Martin's at 213 Elm Street, Santa Cruz, CA 95060.

In addition, we should have a corporate office where we keep the records and accounts of the conservancy. Public inspection requirements require that we maintain certain documents in a publicly accessible place during regular business hours, except if to do so imposes a financial hardship on the corporation. In the latter case, we must supply members of the public with those documents upon request within 48 hours, unless the requesting party has made us the target of a harassment campaign, for example by sending 50,000 requests for information in an effort to exhaust our resources.

It is relatively simple to change the location of the corporate office within a given county. However, to remove the office to a different county requires the Directors to amend the Bylaws.

After discussion, two options remain to be considered: the office space could be at the home or office of a Mother Lode Grotto member having a Sacramento area address, preferably Bill or Morley, or it could be at the home of Dan and Martin in Santa Cruz. Santa Cruz may require payment of parking deficiency fees of about \$50 annually even by nonprofits; Martin will inquire. Tabled for discussion with Bill and Morley and resolution between meetings.

Accounting System/Software

Martin puts his name forward as a nominee for Treasurer, and recommends a cash-based accounting system using QuickBooks software. General consensus is to allow the elected Treasurer to determine the system of accounting and software to be used.

Liability Insurance

In order to secure immunity from liability for our directors and officers under the nonprofit corporation law, the board must either procure liability insurance or show that we have been unable to procure it (see background information, not fully presented at the meeting).

Dan volunteers to obtain liability insurance quotes.

Background

Informational: Incorporating provides limited immunity to *volunteer* directors and officers, who would otherwise be held individually liable for monetary judgments against the corporation. However, the law only provides such immunity if the corporation procures either a general liability insurance policy or a directors' and officers' liability policy, or if the individual directors and officers have obtained personal liability policies. Furthermore, the act or omission that has caused the judgment to be brought against the corporation must have been within the scope of the director's or officer's duties, have been performed or omitted in good faith, and not have been reckless, wanton, intentional or grossly negligent.

The amount of insurance coverage required is at least \$500,000 for corporations having an annual budget under \$50,000, and at least \$1,000,000 if the annual budget is larger. The law makes an exception to the insurance requirement if the board of directors *and* the director or officer seeking personal immunity "had made all reasonable efforts in good faith to obtain available liability insurance," but were unable to do so. Unfortunately, what constitutes "unable" is not clearly defined except for corporations having an annual budget less than \$25,000, which qualification we are unlikely to meet after our first year. For such small nonprofits, the board must make at least one request per year for a premium quote for at least \$500,000 coverage, and the quote must be 5% or more of the nonprofit's annual budget from the previous year to be considered unaffordable. Larger corporations are advised to seek several quotes per year and to carefully document contacts with insurers, the amounts and types of coverage sought and received (if under the legal requirement), and any efforts by individual directors and officers to obtain personal liability policies.

The details of the insurance requirement changes often and board will need to consult a nonprofit attorney to be sure of complying.

Insurance is desirable not only because it protects the officers, but also because it protects the corporation's assets. The board of the Southeastern Cave Conservancy has been able to obtain a general liability policy that covers all of their properties.

In general, most nonprofits find that no underwriter will write a policy for any amount in the first year of corporate existence, so it may be advisable not to conclude any property purchases before insurance can be obtained. Such purchases might safely be initiated, however, provided the corporation avoids legal obligations prior to obtaining liability coverage.

501(c)3 Public Support Requirements and How to Meet Them

Informational: As a landowner, it is important that the conservancy be exempt from property taxes. However, 501(c)3 status only exempts a nonprofit from income taxes. In order to obtain the property tax exemption, called the California Welfare Exemption, the conservancy must meet the IRS public support requirement. This requires that over a four-year period, the corporation derive at least 33% of its income from public support; that is, from government agencies or contributions by the general public (including grants from private trusts). This proportion can be reduced to as low as 10% if an "attraction of public support test" is met, but this would be quite difficult for the conservancy.

Large donations can make it difficult to meet the one-third requirement, if the wrong test is used.

The simplest test requires only that one third of the corporation's income derives from public support; but if the total contributions of any one individual, trust or corporation exceeds 2% of the total, only the amount equal to 2% may be counted toward the one-third public support requirement. For instance, if total receipts over four years were \$300,000, then \$100,000 must derive from public support as defined above. Of that, only \$2,000 may be counted from any one donor. But, if five donors each gave \$50,000 in that period, then only \$10,000 may be counted from them as public support, and the corporation's total public support will then be only \$60,000, far short of the test. As a result, the welfare exemption would be denied for the current tax year and the next.

Fortunately, contributions from government agencies, such as grants, and donations from other publicly supported nonprofits, as long as they are not simply transferring donations earmarked for the corporation, are exempt from this 2% limit. Membership fees, so long as nothing valuable is given in return (newsletters are excepted), can be included as public support. Also, funds qualifying as "unusual grants" do not count toward the nonprofit's total support nor as public support over the four-year period.

Suppose that in a four-year period the conservancy receives 500 \$50 donations, 1,000 \$20 donations and one \$100,000 donation, all from the general public or private trusts. If the \$100,000 were not counted as an unusual grant, the conservancy's total support would be \$145,000. Of that, \$48,334 must be public support. However, since only \$2,900 of the large donation can be counted toward the requirement, the qualified public support is only \$47,900 and the corporation fails the test. In reality, however, the \$100,000 donation would qualify as an unusual grant and would not be counted toward either total or public support.

The two-thirds not required to derive from public support under this first test may come from rents, investments, the sale of capital assets, and other activities unrelated to exempt purposes.

The second test of public support, and the one Dan and Martin recommend (pending attorney review), is found in Revenue Code paragraph 509(a)2. It differs from the first test primarily in that it does not have a limit on how much of any one donation can be applied toward the one-third public support requirement. Another advantage is that subject to certain limitations, an organization can classify as public support admissions fees or fees for services related to its exempt purpose. However, under this test no more than one-third of the corporation's total income can be derived from rents for events unrelated to the organization's purpose, investments, unrelated trades etc.

Lastly, the IRS classifies certain individuals and entities as "disqualified persons," meaning that in some cases (such as when paragraph 509(a)2 is invoked as the test) their contributions cannot be counted as public support, but do count toward total support. Such persons include substantial contributors, directors and officers, an owner of more than 35% of any private corporation, enterprise or trust that is a substantial contributor to the nonprofit, the family (except siblings) of a disqualified person, and business entities in which a disqualified person has a 35% or greater interest. The most important class of disqualified person, the substantial contributor, is a person or entity that has donated more than \$5,000 to the nonprofit, if the amount donated exceeds 2% of the total contributions and bequests received by the nonprofit from the date of its creation through the end of the year in which the current contribution was made. Substantial contributors remain classified as such unless they make no contributions to the nonprofit for ten years and meet other conditions.

General consensus is to delegate to Dan and Martin the choice of test to indicate on the 501(c)3 application.

California Welfare Exemption

The exemption application is obtained from the State of California but filed with the assessor of the county in which the particular property is located.

Requirements:

- 1) The property must be used exclusively for religious, scientific or charitable purposes. Land trusts come under the charitable category. "Scientific purposes" refers almost exclusively to medical research.
- 2) The applicant must have 501(c)3 tax-exempt status.
- 3) The property must be used for the exempt purposes of the applicant.
- 4) The property must not exceed the amount of property reasonably necessary to carry out the exempt purpose of the applicant. Thus we may run into problems if we have a 100-acre property having on it one small cave, although it will often be possible to argue the necessity of preserving a relatively large surface tract in order to protect the cave-related resources. The county assessor or deputy personally inspects the property to make this determination.
- 5) The property cannot be used for fraternal or lodge purposes.
- 6) The applicant must meet the IRS public support requirement.

Seed Money

Needed in order to defray the costs of incorporation, such as filing fees and consultation with an attorney. Filing fees are expected to cost about \$200, attorney consultation perhaps another \$200. In addition, the Nolo Press reference recommends maintaining a bank balance as a demonstration of solvency and ability to meet obligations. By general consensus each household among the Directors will donate \$250 as seed money, giving a total of \$1,000; this donation will be tax-deductible upon receipt of 501(c)3 status. Since Joel is not present to agree, the remaining directors agree to absorb his share if he is unable to contribute.

An account can be opened after we receive the Articles back from the Secretary of State. Although suggested by Nolo Press, it is not necessary to wait until the first meeting of the Board of Directors to open an account. However, Martin prefers to front the incorporation money, deducting it from his share, and wait until after 501(c)3 status is obtained before opening an account. Agreed by general consensus.

Articles of Incorporation

See Attachment A for original text and revisions.

Title: Name changed to Western Cave Conservancy and title moved to left block to comply with law.

One: Name changed to Western Cave Conservancy.

Two: Language changed to broaden sphere of influence, grammar improved, cave conservation added to list of public education goals.

Three: no change

Four: no change

Five: Middle initials added to Rolf's and Marianne's names.

Six: no change

Signatures: Middle initials added to Rolf's and Marianne's names.

Bylaws

See attachment B for original text and revisions.

Title: Name changed to Western Cave Conservancy.

Art.1, Sec.1: Principal office changed to Santa Cruz County

Art.1, Sec.2: Initial street address filled in as 213 Elm Street, Santa Cruz, CA 95060

Art.1, Sec.3: no change

Art.2, Sec.1: (a-d) Reorganized and clarified. Principal purpose clearly separated from secondary purposes

Art.2, Sec.2: Western United States substituted for Pacific Seaboard states, etc.

Art.3, Sec.1: no change

Art.3, Sec.2: no change
Art.3, Sec.3: no change
Art.3, Sec.4: Directors' term of office changed from one year to three.
Art.3, Sec.5: no change
Art.3, Sec.6: no change
Art.3, Sec.7: no change
Art.3, Sec.8: Date of annual meetings changed to second Sunday in January.
Art.3, Sec.9: no change
Art.3, Sec.10-16: no change
Art.3, Sec.17: Changed to require unanimous vote of remaining directors to remove a director without cause. "Annual" deleted from "annual election of the Board of Directors..."
Art.3-12: no change
Signatures: Add middle initials to all.

Attorney Review of Incorporation Documents

General consensus to have an attorney review parts of the bylaws, particularly sections for which we have modified the Nolo Press boilerplate. Areas of possible concern include the provisions for election of the board of directors.

A former NSS Treasurer and CPA specializing in nonprofits, Kevin Smith, offered in December to review our tax documents, but whether as a volunteer or for a fee he didn't mention in his correspondence.

Next Steps

- 1) File Articles of Incorporation with California Secretary of State (up to one month);
- 2) Upon return of Articles, file state and federal tax exemption applications (2-6 months);
- 3) Upon receipt of favorable ruling from IRS, send IRS letter to State to finalize State exemption;
- 4) Apply to State for Welfare Exemption forms;
- 5) Hold first meeting of the Board of Directors;

Martin will type final draft of Articles and mail to Marianne, who will obtain signatures from Jerry and Rolf before mailing the package to Joel. Upon return of the Articles to Marianne, she will file them at the Secretary of State's office in person.

Fundraising

Ideas from the Southeastern Cave Conservancy:

- 1) Their most successful fundraising device the monthly automatic credit card payments
- 2) "Buy a piece of the pit"—naming mapped features of caves for large donors; Rolf suggests as a twist naming new endemic species for major donors.

Web site: Rolf an experienced web designer. The conservancy will need to buy a domain name.

Investments, so far as permitted by law.

Rippled Cave Acquisition

Tabled until the conservancy obtains 501(c)3 status.

Next Meeting Date

Second Incorporation Planning Meeting tentatively scheduled for Saturday, 17 August 2002, 2 p.m.
Location to be decided but Martin will suggest to Joel that it be at Sequoia National Park.

Incorporation Planning Meeting 8 June 2002

Proposed new business:

- 1) Debuting the conservancy at the Western Regional Convention.
- 2) Conservancy logo
- 3) Continue brainstorming fundraising
- 4) Planning for a 2003 Porterville convention presentation
- 5) Purchase of *Roberts Rules of Order* for each Director

Meeting adjourned 7:19 p.m.

Respectfully submitted to the Incorporators by

A handwritten signature in black ink, appearing to read "Daniel S. Snyder". The signature is fluid and cursive, with a prominent initial "D" and "S".

Daniel S. Snyder, Acting Secretary

2 attachments