

August 29, 2006

MEMORANDUM

TO: Oregon Watershed Enhancement Board

FROM: Melissa Leoni, Senior Policy Coordinator
Lori Warner-Dickason, Policy Specialist

**SUBJECT: Agenda Item O: Conservation Easements and Stewardship
September 19-20, 2006 OWEB Board Meeting**

I. Introduction

This staff report is a follow-up to a January 2005 Board meeting staff report and discussion about conservation easement management. In this report, staff provide information about why OWEB uses conservation easements, the legal basis for conservation easements in Oregon, and OWEB's easement provisions and management implications. Additional research and text has been provided by Kathryn Moore, OWEB's legal intern in 2005 who assisted in developing OWEB's preliminary easement stewardship protocols.

II. OWEB Land Acquisition Background

Under Article XV, Section 4b of the Oregon Constitution, the OWEB Board is directed to allocate funding for land acquisition projects that, in its judgment, further the goal of protecting and/or restoring wild salmonids, fish and wildlife habitat, watersheds, or water quality in Oregon. The Board may provide funding for interests in land to the following groups: local, state and federal agencies, tribes, nonprofit land conservation organizations and trusts, state institutions of higher education, independent nonprofit institutions of higher education or political subdivisions of this state, as long as the entity continues to use the land or water for the purposes specified under Section 4b, Article XV of the Oregon Constitution. OWEB does not hold fee title to property pursuant to Oregon Administrative Rules 695-045-0020.

Since 2000, OWEB has awarded 29 grants for land acquisition projects. These awards include both fee simple title and conservation easement projects. Whenever the OWEB Board funds an acquisition grant, the agency requires that the grant recipient provide OWEB with a property interest. When OWEB provides funding for the purchase of the entire property interest (fee simple title), OWEB holds a conservation easement on that property. When OWEB provides funding for the purchase of a conservation easement, OWEB receives a third party right of enforcement to the conservation easement that is held by the OWEB grant recipient.

OWEB holds a property interest (conservation easement) on all funded acquisitions because of the statutory requirement to ensure that the property will continue to be used for purposes specified under Article XV, Section 4b of the Oregon Constitution. More specifically, an easement is the tool by which OWEB ensures that the conservation purposes for which it

awarded a land acquisition grant are protected in perpetuity. The Oregon Attorney General's office has advised OWEB that conservation easements are the strongest legal tool available in Oregon for perpetual conservation protection. The main source of this strength is that conservation easements are statutorily defined. (ORS 271.715 to 271.795). In fact, the main reason for the development of statutory law authorizing conservation easements is to avoid the common law barriers to deed restrictions and other tools.

At the time of writing this staff report, the Oregon Watershed Enhancement Board is the primary holder of 17 conservation easements (fee simple title projects). OWEB has third party rights of enforcement in eight conservation easements where another entity, most often a local land trust, has the primary responsibility for monitoring and enforcing the easement (mostly conservation easement projects). However, in two of the easements with OWEB third party rights, OWEB provided funding for fee simple title acquisition, but jointly developed the easement with a funding partner to minimize duplication. Four funded projects are still in the process of closing and will result in at least three more OWEB held easements and one third party right of enforcement in an easement. As holder of a conservation easement OWEB gains some very important property rights, but it also takes on a responsibility to monitor the property and enforce the terms of the easement.

III. Conservation Easement Background

A conservation easement is a legal agreement between a landowner and an eligible organization that restricts certain activities on the property to protect important conservation values in perpetuity. The landowner retains title to the property and may use it for any purpose not inconsistent with the terms of the conservation easement. Most states have defined conservation easements statutorily. State statutes also define who can hold conservation easements. Entities that may hold conservation easements in Oregon include nonprofit land trusts, state, county, metropolitan service district, soil and water conservation district, city or park and recreation district acting alone or in cooperation with any federal or state agency, public corporation, political subdivision, or Indian tribe (ORS 271.715).

As defined by Oregon statute, a third party right of enforcement means a right provided in a conservation easement to enforce its terms. In Oregon, this right can be granted to a governmental body or land trust (ORS 271.715). The third party enforcer is qualified to hold the easement, but is not the *primary* holder. Generally, the language of the easement gives the third party the power to enforce the easement alongside the primary holder, or alone if the primary holder fails to enforce.

Conservation easements are flexible tools. The parties to the easement determine what activities are restricted by the easement and can craft language to meet their goals. Terms of an easement can be simple and straightforward or can be very complicated. For example, an easement may restrict all commercial activities, allow just the commercial sale of thinned trees for forest health, or allow unlimited commercial use within a specific zone on the property. The more complicated the provision, or the more flexibility allowed, the more complicated it may be to monitor and enforce the easement over time.

IV. OWEB Conservation Easements

When OWEB developed new grant materials in 2005 in response to its 2004 adopted land acquisition administrative rules, staff developed a template conservation easement.

(Attachment A) The template includes OWEB's statutory requirements to ensure that the property will continue to be used for purposes specified under Article XV, Section 4b of the Oregon Constitution; that the Board is given the authority to approve, approve with conditions, or deny future sales or transfers of the land; and that the Board does not allow a sale or transfer that results in any profit, as defined in rule, to any person.

The template also includes generic provisions that restrict division, commercial activities, construction, dumping, off-road vehicle use, certain vegetation removal, water course alteration, billboards, and other actions that may impact the conservation values. Each applicant is asked to review the list of generally permitted and prohibited uses, and identify specific provisions for their project that still protect the property's conservation or ecological values.

OWEB has also developed a guide for applicants who are proposing funding for a conservation easement to make OWEB's expectations and requirements more clear. The guide identifies that each easement submitted to OWEB for funding must provide specific legal protections for the habitat proposed for protection, restoration, and/or enhancement, and grant a third party right of enforcement to OWEB. The guide includes required language for OWEB's third party right of enforcement and its other statutory terms. (Attachment B)

Since conservation easements may be crafted to fit the goals of each project, each conservation easement OWEB holds may have different provisions. This isn't much of an issue when the total number of conservation easements remains small, but can become more difficult to track as the number of easements increases.

V. Conservation Easement Stewardship

Holding a conservation easement or a third party right of enforcement carries significant stewardship responsibilities. Conservation easement stewardship is the term used to describe an organization's ongoing commitment to monitor, defend, and enforce its conservation easements. Conservation easement stewardship broadly refers to all aspects of managing a conservation easement after OWEB makes a grant award payment to an acquisition grantee: monitoring, landowner relations, recordkeeping, processing amendments, landowner notices and requests for approval, and enforcement and defense.

In order to protect OWEB's right to enforce the terms of its easements, as well as ensure public funds are being used for perpetual conservation, OWEB needs to develop and engage in a consistent, regular easement stewardship program with the following elements.

A. Monitoring. How OWEB staff will monitor its easement properties regularly and in a manner appropriate to the size and easement restrictions of each property. How staff will collect and maintain documentation (such as reports, updated photographs and maps) of each monitoring activity.

B. Landowner Relations. How OWEB maintains regular contact with grantees and/or owners of easement properties and a process to track changes in land ownership, especially for funded conservation easements where OWEB isn't required to approve the sale of the underlying fee title interest.

C. Recordkeeping. How OWEB will keep and maintain written records for each acquisition project, including baseline documentation reports, legal agreements, critical correspondence and appraisals.

D. Amendments and Approvals. How OWEB will handle requests for approvals or easement amendments and develop a system to track notices, approvals and the landowner's exercise of any reserved or permitted rights. OWEB has adopted procedures related to the review and approval of the sale or transfer of the interest purchased in part with OWEB funds, consistent with ORS 541.376.

E. Enforcement and Defense. How OWEB will respond to a potential violation of an easement, and what the role the parties involved (Board members, staff, Department of Justice, and partners) play in any enforcement action.

VI. Recommendation

This is an informational item. No Board action is requested at this time. Staff wish to further engage the Board in more discussion on easement stewardship and return with a possible course of action to the January 2007 Board meeting.

Attachments

- A. OWEB Conservation Easement Template
- B. OWEB Easement Elements Guide