

**Concept Framework language for a limited ESRF 3rd Party right of legal review
(accountability and enforcement of ESRF management commitments)**

Intended approach to adoption: The intent is to translate the following concept language and objectives into statutory language to be adopted by the Oregon Legislature as part of any broader statute speaking to the creation on an Elliott State Research Forest, unless already covered by current legal authority and legally-binding direction.

1. The limited 3rd party right of action is predicated on the completion of the following **ESRF foundational documents** prior to OSU's implementation of the ESRF research design and management activities.
 - a. A specific **Elliott State Research Forest Proposal** advanced by OSU and accepted / adopted by the State Land Board that contains specific, citable content including:
 - i. The **ESRF Research Design**, containing related maps and description of research and management treatment approaches.
 - ii. OSU's **Commitments to the Public**, describing OSU's commitments to actions, approaches and outcomes relevant to conservation, local community and economic development, recreation, education, and tribal engagement.
 - b. **Habitat Conservation Plan** and related Incidental Take Permit covering federal Endangered Species Act compliance approved by relevant federal regulatory agencies, the State Land Board, and OSU.
 - c. A **Forest Management Plan** (FMP) with terms and provisions consistent with the other documents in this section and that binds and guides annual ESRF operations planning.
 - d. An easement, deed restriction or other protective covenant that attaches to the ESRF and reflects key attributes of the ESRF Proposal

CAVEAT: The intent is an FMP will have been crafted (by OSU) and adopted (by the State Land Board, with Advisory Committee buy-in) prior to the transfer of the ESRF to OSU. Until an FMP is approved and adopted, the following limitations on forest management activities will apply:

- Management activities undertaken prior to final transfer of the Elliott Forest from the Common School Fund will be the responsibility of DSL and will be undertaken in collaboration with the ESRF Advisory Committee and OSU consistent with preserving the integrity of the research design and terms of Section 1 (a) and (b) above.
- Activity would be subject to review and comment by the ESRF Advisory Committee.
- Management would be limited to partial watersheds identified in the ESRF Proposal and Research Design outside of the ESRF research watershed replicates, unless otherwise approved by the ESRF Advisory Committee, DSL and OSU.

2. Scope and Subject Matter of the Limited Right of Action:

- a. As part of its annual management of the ESRF, OSU shall produce:
- i. A biennial “**Forest Operations Plan**” (FOP) that delineates active forest management actions to be conducted on the ESRF in the 2-year period following the FOP’s finalization. FOPs shall be completed with advance public review and comment, as well as input from and adoption by the Advisory Committee. FOPs shall be finalized and made public 160 days in advance of the first FOP-scheduled activity in order to allow adequate opportunity for input and resolution of any disputes. The FOP shall at a minimum describe the:
 - Description of overall research initiatives and activities planned to be undertaken during the period of the FOP.
 - nature and purpose of on-the-ground activity (harvest, road / trail work, herbicide use, mountain beaver, etc.), including the type of silvicultural prescription to be implemented, if any, and the research effort with which it is associated, if any;
 - size and location of individual project areas--reference ESRF Research Design / map;
 - Description of any significant construction-related activities, including road or trail building / removal or additions / subtractions from existing infrastructure.
 - anticipated restrictions (type and duration), if any, to public access from any activity;
 - current condition of area to be impacted (including forest age) as well as expected condition and outcomes of implementation (not just research or ecological objectives but anticipated jobs, harvest volume, etc.);
 - whether the activity is likely to impact (positively or negatively) threatened or endangered species, water sources, steep or landslide-prone slopes, recreational or educational opportunities, public access (e.g., restrictions during the project or after), tribal partnerships, local community partnerships, workforce and jobs;
 - a budget reflecting projected revenue and expenses associated with operations, administration, and research treatments and related projects on the ESRF over the relevant FOP period; and
 - any other information reasonably necessary for the Advisory Committee and public to evaluate whether forest management activity is consistent with the FMP and HCP.
 - ii. An “**Annual Forest Management Report**” (AFMR)—that documents, FOP implementation over its covered period of time, including the following:
 - Location and particulars of forest management and research activities undertaken;
 - Description of any activity undertaken (including research) that was not covered in the AOP, and if any deviation from the FMP, the reasons therefor;
 - Restrictions on public access, and whether those restrictions were observed;
 - what was achieved by the annual work (not just research, but objectives re. conservation, jobs / economy, recreation, education, partnership objectives);
 - Financial components related to costs, expenses, revenue generated (from harvest or otherwise) related to ESRF operational viability; and
 - Any other activities associated with advancing public accountability, engagement, and transparency objectives.
- b. As with Section 1 (a)-(d) documents, OSU shall provide the AOP and AFMR to the Advisory Committee and make them publicly available at the time of their completion.

- c. **Subject matter of a 3rd Party Right of Action:** a right of action and related judicial review of actions conducted or authorized by OSU is available in the following limited circumstances, and subject to the additional requirements in Sections 3-5 below.
- i. Alteration of or changes to the Section 1 foundational documents without prior public engagement and review as well as Advisory Committee collaboration and consent that the changes are consistent with the intent of the ESRF Research Proposal approved by the State Land Board.
 - ii. Adoption of an FMP or amendments thereto with provisions contrary to the foundational documents in Sec. 1(a), (b), and (d).
 - iii. Planned (e.g., as set forth in the FOP) or actual (e.g., revealed in the FMR or otherwise discovered) implementation of actions that are, by clear and convincing evidence, in substantial non-compliance with the FMP. The right of action attaches to non-compliance resulting from matters within OSU's knowledge and responsibility (i.e., not force majeure), as opposed to disagreements over the degree or manner in which an otherwise allowable activity is conducted. The following situations are examples of some but not all actions that would trigger the right of action:
 - Harvest treatments or other activities (e.g., road work, herbicide use, etc.) of a nature and type inconsistent with the designation of the watershed within which the treatments occur, or that are contrary to the treatment descriptions contained for that designation in the Research Design.
 - Violation of provisions of the HCP, recorded easement, deed restrictions, etc.
 - Harvest in full watershed replicates identified in foundational documents as "Managed Research Watersheds" that is unrelated to a) research, b) maintaining forest conditions in support of future research activities, or c) the funding of research and monitoring-related operational efforts on the ESRF.
 - Creation of additional reserve acreage (designation or de-facto) beyond what is in the Research Design without the Advisory Committee's engagement and consent.
 - Creation of harvest volume targets or requirements.
 - iv. Abandonment of the HCP during its term for reasons other than force majeure, without having first incorporated HCP conservation provisions into the FMP or another document to which the 3rd party cause of action attaches.
 - v. Failure to implement or adopt elements of the Sec. 1 foundational documents, including adoption of recreation and educational plans.
- d. **Exclusionary Clause:** While a 3rd party / public may voice its opinions or objections to OSU and/or the Advisory Committee over OSU's AOP or the adequacy, nature, or extent of matters consistent with the FMP and the spirit of Foundational documents (examples including but not limited to intensive management practices, harvest of large trees or trees that were eligible for harvest in 2020 but have since aged to be over 65 years, choice of logging systems, or miscellaneous matters related to forest health, timber volume, or employment related issues attached to the ESRF. Such opinions may be

submitted and documented as an articulated grievance to the Advisory Committee seeking committee consideration.

- i. Notwithstanding such a grievance as above, **no third party right to judicial review will attach to such grievance, nor will any legal remedies be available including but not limited to** preliminary or permanent injunction, or declaratory relief preventing forest management activities that are otherwise consistent with the FMP and Section 2 provisions above.
- ii. Furthermore, for grievances relating to activities disclosed in the FOP, a party must have raised the concerns underlying the grievance during the public comment and review process associated with the FOP. Claim preclusion shall apply if they have not.

3. Standing to assert a 3rd party claim: a person seeking to bring a legal cause of action against OSU must demonstrate actual harm to their interests in the use and enjoyment of the ESRF resulting from OSU's actions or failure thereof.

4. Procedure—Efficient resolution of Disagreements, Exhaustion and Statute of Limitations: In order to incent and focus any 3rd party cause of action on matters of actual non-compliance with the FMP and Section 2 provisions, and in order to promote the efficient resolution of causes of action so as not to impede the ESRF's advancement of public objectives, the following actions must be demonstrated to have occurred in order to render a 3rd party claim valid:

- a. *Notice:* Presentation of the grievance to the ESRF Executive Director and COF Dean in the form of a Notice of Formal Dispute relevant to the 3rd party right of action, providing written evidence and documentation of facts giving rise to the alleged violations as well as the specific Sec. 2 provisions alleged to have been violated, and the relief requested.
- b. The COF Dean shall notify the Advisory Committee of any filed Notice of Formal Dispute and its claimed violation and evidence. If the Dean concludes the grievance may satisfy the elements of a valid third party right of action (consistent w/ Sec. 2), the Dean will invoke the Advisory Committee in review of the submitted grievance. Should that invocation occur, the Advisory Committee will:
 - i. Categorize the grievance according to whether it believes the grievance corresponds to the 3rd Party Cause of Action elements in this document.
 - ii. Determine whether to review and discuss the grievance, with the aggrieved party present, at a meeting of the ESRF Advisory Committee (conducted in person or electronically). Unless there is full consent not to do so, the balance of the determination will be towards Committee review and discussion.
 - iii. Determine whether to make recommendations to the ESRF Executive Director and Dean and if so, make such recommendations and engage in advisory committee discussions through the Dean on how to resolve the grievance
 - iv. Document the outcome of its above decisions, deliberations, and/or recommendations, which would be included as part of the record in any court review of the 3rd party cause of action should it proceed to litigation.

- c. *Unsuccessful attempts to resolve the dispute:* An aggrieved party may proceed to initiation of litigation of a 3rd party cause of action claim in state circuit court with subject matter jurisdiction over the ESRF **after** and subject to the following:
 - i. the COF Dean declines the grievance without invoking the Advisory Committee’s review, or the Committee declines to engage in review of a filed grievance, and the aggrieved party is informed in writing;
 - ii. the Advisory Committee determines the claim meets the 3rd Party Cause of Action requirements but cannot reach resolution on recommendations;
 - iii. Advisory Committee recommendations are not adopted by the COF Dean, and the aggrieved party is informed in writing, **or**
 - iv. the aggrieved party remains unsatisfied with any proposed resolution or lack thereof (by the Committee, Dean, or otherwise) but has otherwise complied with the provisions of this Section and provides the Dean written notice of this at least 30 days before filing any litigation, such that the Dean may undertake any further discretionary non-judicial resolution efforts if desired.
- d. Filing of the qualifying 3rd party cause of action claim within 120 days of the Notice of Intent or rejection by the aggrieved party of any further non-judicial / outside-of-court dispute resolution process invoked by OSU, whichever of last occurs.
- e. Posting of a \$___ bond pursuant to ORS___ if a claim involves injunctive relief or relief that otherwise poses fiscal impairment to the ESRF’s operational viability.
- f. OSU will not proceed with active management that is the subject of a Notice of Intent filed in accordance with the provisions above for a period of 120 days after the unsuccessful conclusion of any dispute resolution process (whether in or outside of court) or OSU’s rejection of the grievance. OSU shall ensure any dispute resolution process beyond the provisions above is coordinated with Advisory Committee.

5. Relief and Attorney Fees:

- a. Parties asserting a qualifying 3rd party cause of action claim may seek the following relief
 - i. Declaratory—if alleged violations are based on the AFRM or completed action.
 - ii. Injunctive—if alleged violations are based on the AOP or ongoing actions.
 - iii. Mandamus—for alleged failure to act or implement Sec. 1 document provisions
- b. Attorney fees will be addressed in accordance with existing Oregon statues relevant to fee recovery in state Administrative Procedures Act claims.