

September 2025 OWEB ARE Committee Meeting
Land Acquisition Modernization Process
CONTEXT, EXPECTATIONS, AND PROBLEMS BEING ADDRESSED

Context and Expectations

Administrative rules for the OWEB land acquisition grant program were first adopted in 2005. Since that time, three additional rulemaking processes have been completed to update and refine program rules. In addition to those rulemaking processes, at least five separate processes—with the first occurring in 2013—involving surveys, work groups, and/or facilitated processes have occurred. The intent of these processes was to identify what was working well with the program, what challenges existed from the perspective of both OWEB and grantees/partners, and where mutual understanding and trust could be improved to ensure the land acquisition grant program was well utilized to advance conservation outcomes. Despite these collaborative efforts, partners continue to express significant concerns about challenges engaging with the program.

In late August 2024, Governor Tina Kotek sent OWEB executive director Sara O'Brien a letter outlining expectations of her as OWEB's new director. That letter included the following direction for the land acquisition grant program:

“Land Acquisition Funding. Acquisition of conservation easements and fee simple property interests was at the heart of the ballot measures responsible for the designation of lottery funds and the originating legislation of OWEB programs. It appears that grant program requirements for acquisitions (both application and required covenants on deeds for projects that are awarded funds) have grown more detailed and onerous over the 25 years of OWEB's program administration. Given the importance of this program, I am asking that you conduct a thorough review to eliminate non-essential requirements at both the front and back end of the process to better meet statutory and program intent.”

Since that time, Director O'Brien has outlined how she is translating direction from the Governor's letter—for both the land acquisition program and the agency more broadly—into action. Her focus includes more sustainable staffing for the agency, a more integrated program structure, and a more accessible grantee experience. These expectations are an important touchstone for the land acquisition modernization process as the agency—both board and staff—dig into persisting challenges and identify refined and alternative approaches that capitalize on opportunities to improve program utilization.

Problems Identified and Being Addressed

Over the course of several rulemakings and multiple continuous improvement processes, many challenges have been identified. Some challenges that were previously raised and addressed via these processes include:

- Eligibility for due-diligence, site stabilization, and other costs for OWEB funding
- Ability to receive non-purchase price costs from OWEB prior to closing
- Challenge of meeting required 25% match
- Technical assistance funding needed to scope land acquisitions
- Unclear program parameters
- Opportunity for applicants to respond to ecological reviews and public hearing comments
- Fit of working lands projects and drinking water source protection projects with Measure 76 criteria

However, other challenges that have been raised continue to persist:

- Questions about transparency and objectivity in review process
- Unclear program parameters (e.g., required habitat conditions)
- Multiple uses (e.g., recreation and access)
- Desire for a more streamlined grant-making process
- More flexibility in due diligence (e.g., minerals reservations)
- Tribal sovereignty considerations
- Risk tolerance and predictability (including role of DOJ)
- Conservation easement requirement, including challenges with co-funders

The land acquisition modernization process was launched in early 2025 to tackle these ongoing challenges. Four workstreams are occurring or planned within the modernization process: 1) ARE committee and full OWEB board work to delve into four foundational issues; these are a) use of conservation easements as title restriction; b) significant habitat and future conditions; c) other uses such as recreational, cultural uses, and working lands; and d) risk tolerance; 2) a Tribal workstream that specifically focuses on substantive and process issues of concern to Tribes; 3) minor streamlining in advance of launching the 2025 grant cycle (this work is complete); and 4) anticipated rulemaking beginning in 2026.

The role of the ARE committee includes helping describe the issues at hand to the full OWEB board and offering learnings and recommendations based on the committee's work. This responsibility ranges from sharing with the full board "deep-dive" information on substantive topics and helping summarize the board's decision space at various elevations (i.e., program guidance, administrative rule, and statute).

September 2025 ARE Committee meeting -- RISK MATRIX

Risk Category	Description	RISK SPECTRUM		
		Lower Risk Examples	<-- -->	Higher Risk Examples
Fiduciary	<i>Risk of financial loss</i>	Paying for grantee due diligence costs when a transaction doesn't end up closing	Incurring significant legal fees to defend OWEB interest in a property	Property is not utilized for intended conservation purposes and thus OWEB's investment is a loss
	<i>Compliance and legal risk, implementation of laws (OAR and ORS)</i>			Failing to comply with OAR and ORS and thus risking legal action
Operational	<i>Grantee capacity & project implementation such as grantee organizational processes, transaction structure, organizational performance, project design</i>	Inexperience in designing and implementing projects resulting in slower progress and increased costs	Lack of capacity or experience in creating sound legal documents (e.g., sale agreements, CEs) resulting in lesser protections for the buyer and/or the property	Lack of capacity to effectively hold and steward a property resulting in significant negative impacts to habitat conditions
	<i>Agency responsibility such as pre-application consultation, review of project files and title documentation, requiring transaction steps such as review appraisal and environmental site assessment</i>	Inadequate review of title documentation and project materials could result in missing key title issues, such as third party rights, that then result in project delays and increased costs	Not conducting a review appraisal could result in an inaccurate appraisal and OWEB paying above fair market value	Not requiring an environmental site assessment could result in significant financial and/or environmental consequences, potentially leading to project failure
Strategic/Policy	<i>Reputational damage, negative public perception, and political risks</i>	Inconsistent implementation of internal agency policies creates inequities, frustrates partners, and erodes trust in OWEB	Lack of grantee capacity to manage a property results in negative news coverage/public opinion about grantee organization and agency grant program	Non-compliance with statutory requirements (e.g., title restriction) by either grantee or OWEB resulting in legislative or public questions/concerns about accountability of public funding
Environmental & Ecological	<i>Managing and mitigating environmental & ecological risks presented by climate change, development pressure, habitat loss and degradation</i>	Disagreements on activities that were intended under the grant application and easement, and resultant resource-intensive enforcement costs that detract from resources for on-the-ground implementation of conservation	Unclear and/or challenging program requirements result in undersubscription, risking loss of opportunities to protect/secure habitat for native species	Unauthorized uses occur on property resulting in significant degradation of habitat conditions

September 2025 Meeting of OWEB ARE Committee

CONSERVATION EASEMENT MEMO

Introduction

OWEB's land acquisition grant program is created by Article XV Section 4b(2)(a) of the Oregon Constitution that requires the funding of long-term protection of lands and waters that provide significant habitats for native fish and wildlife from the funds in the Natural Resources subaccount of the Parks and Natural Resources Fund. The Constitution further requires that funding to be used for the acquisition of interests in land or water that will protect or restore native fish or wildlife habitats, which interests may include but need not be limited to fee interests, conservation easements, or leases.

OWEB's responsibilities in administering the watershed enhancement program are further detailed most specifically in 541.923-541.972. The land acquisition program is further elaborated on in Oregon Administrative Rule Chapter 695-005 and 695-045. The implementation of the land acquisition program has evolved over time, incorporating constitutional and statutory obligations, requirements and procedures outlined in the applicable administrative rule, and extensive programmatic guidance and requirements developed to ensure both that grant program implementation minimizes risk to the agency's investment of public funds and that funds are used on projects that meet the mandated purposes described above.

At the core of the land acquisition program's historical and current implementation is the use of conservation easements held by OWEB on fee acquisitions funded by the program to secure the investment and the long-term protection of native fish and wildlife. The history, rationale, and implementation specifics of OWEB's use of a conservation easement for this purpose is detailed below.

Conservation Easements on OWEB Funded Fee Acquisitions

Conservation Easements, Generally

Easements in general are a historical common law construct used primarily to benefit an adjacent property. Conservation easements, by contrast, benefit the public and give an entity that is not the neighboring landowner the ability to enforce the terms of the easement. Because conservation easements are different in important ways from historical common law easements – the beneficiary and enforcer are not adjacent to the property in question, and they are generally intended to restrict the property in perpetuity –

they must be specifically authorized by statute at the state level to be legally effective over time.

Oregon's conservation easement statute was first enacted in 1983, when most states were developing and enacting their own statutes enabling conservation agreements. Importantly, there are significant differences among statutes enabling conservation easements in different states, although they generally seek to address similar concerns arising from the common law requirements for the validity of these types of restrictions on land. For instance, Washington has a unique statute enabling conservation agreements including but not limited to conservation easements. The Washington statute broadly refers to an "easement, covenant, restriction, or other right," for conservation and specifically states that any of these is an interest in real property. Oregon's statute does not provide this same authority and flexibility to use mechanisms other than conservation easements to achieve conservation goals.

Generally, a conservation easement represents prohibitions on otherwise legal uses of a property to protect certain identified conservation values. Conservation easements are generally utilized when a private landowner wants to retain ownership and some uses of their land, while protecting the property for certain conservation purposes. The landowners work with a non-profit conservation organization, a municipality, or state or federal agency to develop a conservation easement that serves the needs of both.

In this context, there is an inherent need to tailor the easement to the circumstances and the landowner's particular needs. A guiding principle in easement development is that an easement should restrict activities to the degree necessary to protect the significant conservation values on the property. In general, easements can cover all or part of the property and restrict various parts of the property differently to account for varying conservation goals across the property. The holder of an easement accepts the responsibility of enforcing the restrictions set forth in the easement document. This is typically referred to as "stewardship of the easement." The standard practice of stewardship, as described by the Land Trust Alliance ("LTA") and land conservation practitioners across the county, involves regular monitoring visits (typically annually), during which the holder compares the condition of the property to the baseline conditions documented at the time the easement was granted.¹ This helps determine and document whether any changes to the property are allowed under the terms of the easement. These

¹ The Land Trust Alliance (LTA) includes this practice as an "accreditation indicator element" meaning that annual monitoring (of both properties a land trust holds in fee title and those upon which it has a conservation easement) is an important element of a land trust achieving and retaining accreditation through the LTA. LTA has a wealth of guidance materials for what this inspection should include, both for fee lands and conservation easements.

regular visits encourage communication between the landowner and the holder of the easement. If a violation of the easement is determined, the easement holder has the legal right and responsibility to enforce the easement according to its terms. Easements may also stipulate that the holder must review and approve certain activities existing on the land or called for in a management plan.

Management plans incorporated into the easement terms are generally a tool used to address affirmative rights and obligations related to land management (i.e., when specific actions may or are required to occur, contrasted with the easement itself which generally only restricts or prohibits specific actions), though other agreements such as leases, licenses, or management agreements are also used. Affirmative rights and obligations of this nature can complicate the easement and increase the stewardship requirements of holders. Prospective holders should consider carefully whether any permanent affirmative rights may render a conservation easement an inappropriate tool for the intended purpose.

Management plans are sometimes required by easements to govern resource management where intended activities may compromise conservation values. They can be tied to performance goals and could reduce the need for specific prescriptions in the easement. However, management plans are not applied in all instances when a conservation easement is utilized. Using management plans in conjunction with easements puts additional responsibility on the holder of the easement, as the terms of the plan become part of the easement itself and need to be monitored and enforced along with all other provisions in the easement. Management plans are an accepted tool that are commonly used where there is a farm, ranch, or forest use component of the property.

Conservation Easements, OWEB Use

OWEB is required by law to include title restrictions on any land purchased through a grant agreement to ensure the land is utilized for the appropriate purposes.² Historically and presently, OWEB utilizes a conservation easement to meet this requirement. Legal research over many years has concluded that conservation easements provide the greatest legal assurance that effective title restriction will be maintained. This is due in large part to

² ORS 541.960 “(1) Land purchased through a grant agreement with the Oregon Watershed Enhancement Board shall be subject to title restrictions that are consistent with the conservation purposes of the grant and give the board the authority to approve, approve with conditions or deny the sale or transfer of the land. The board may require conditions on the sale or transfer to: (a) Ensure consistency with the intent of the original grant; (b) Ensure the ability of the party receiving the land through the sale or transfer to carry out the obligations under the grant agreement; and (c) Address the disposition of proceeds from the sale or transfer, including any provisions for repayment, with interest, of any grant funds. (2) The board may not allow a sale or transfer that results in any profit to any person. (3) The board shall, by rule, define “profit” for the purpose of not allowing sales or transfers and shall specify the process and criteria that the board will use in considering whether to approve, approve with conditions or deny a sale or transfer.”

the statutory authorization and common law pitfalls described above. In general, common-law interpretations of property rights will tend to limit the effectiveness non-adjacent and/or perpetual claims of rights, unless they are specifically enabled in statute. In Oregon, unlike Washington, only conservation easements are specifically enabled in statute. Further, the legitimacy of conservation easements and the tool's ability to "run with the land"—that is, remaining in place to burden the land regardless of whether ownership resides with the landowner originally accepting the restriction—have consistently withstood legal challenge in Oregon.

It is unclear whether other instruments, such as deed restrictions, would meet the common law test to "run with the land", and even if they did, whether they would withstand other challenges over time. There remains legal ambiguity among Oregon court decisions as to whether courts would trend toward or adopt the American Law Institute's (ALI) current interpretation that a deed restriction need not benefit another parcel of property to be enforceable.³ To date, the Oregon law remains unclear as to whether a deed restriction must run with the land and benefit a neighboring property to be legally enforceable.⁴

OWEB has repeatedly evaluated the applicability of title restrictions other than a conservation easement to accomplish the requirements in ORS 541.960, consistently determining that there is ongoing uncertainty and, therefore, risk. As a result, OWEB has continued to utilize conservation easements over time. The use of a conservation easement to accomplish OWEB's statutory title restriction requirements is supported by the legislative history of the statute itself, which demonstrates constituents were concerned about risk to the OWEB investment that may result if a property were transferred from the original grantee. Legislators sought assurance that OWEB investments be protected in a manner that centers conservation as the purpose of any title restrictions on land purchased through OWEB grants, and that OWEB grants for land purchase be limited to conservation purposes.

OWEB's use of a conservation easement has minimized both risk to the agency for not meeting the title restriction requirements, and risk to the protected conservation values by ensuring that ongoing use of the property is for the specific conservation purposes of the grant. Conservation easements also allow OWEB to intervene if any dispositions of lands

³ See Restate (Third) of Property: Servitudes (2000), §§ 3.1 and 3.2 (formerly section 537 and 543) (Eliminating the common law requirement that an interest must touch and concern the land to run with the land, and therefore the requirement that there be a benefiting property).

⁴ Hudspeth v. Eastern Oregon Land Company, 247 Or. 372, 375 (1967); Huff v. Duncan, 263 Or. 408 (1972)

purchased through the program do not fulfill the conservation goals or may result in profit to any person.⁵

In Oregon, conservation easements provide the most legal certainty for protecting OWEB's investments and best align with OWEB's constitutional, statutory, and fiduciary obligations.

OWEB Land Acquisition Program Conservation Easement Practice and Implementation

OWEB's purpose as a conservation easement holder differs from that of the traditional conservation easement holder (e.g., a land trust), in that OWEB is using the conservation easement to accomplish constitutional, statutory, and policy requirements on land purchased through OWEB's land acquisition program. In most cases, the land itself is owned and managed by an organization with a specific charitable purpose of land conservation, though cities, counties, and soil and water conservation districts have also acquired land through the program. Despite these differences, OWEB has the same responsibility to enforce the conservation easement as nonprofit holders would in traditional conservation easements.

It is important to note that OWEB's land acquisition program does not exist in a vacuum; it requires matching funds from other sources be applied to projects. Sources often are other public agencies or private foundations. Each agency has its own directives, based in law and policy, that at times can present challenges for program participants when requirements may be in conflict.

For example, one prominent public funding program in Oregon typically includes the right of the funding agency to develop a transmission line in an undetermined location on properties purchased in fee simple with its funds. This requirement is not consistent with the purpose of OWEB's land acquisition program. If the funding agencies hold separate easements on a property, their terms may conflict, but must be reconciled in the event of an actual conflict. If OWEB were to rely on the title restriction provided by the easement held by the other agency in a scenario involving conflicting funding goals, there could be a significant loss of the conservation benefit required by the Constitution and statutes and paid for with public funds.

⁵ ORS 541.960 requires that board may not allow a sale or transfer that results in any profit to any person, and to define "profit" in rule for the purpose of not allowing sale and transfers. The resulting rule language defines "profit" as "the positive difference between the original purchase price for the property interest acquired with OWEB grant funds and a subsequent purchase price for the same property interest, minus the owner's improvement cost that, from an accounting or tax perspective, are capitalized and not expensed."

Other examples include language required by funding partners, either in the deed, as a stand-alone deed restriction, or in a conservation easement that could conflict with or compromise OWEB's rights as an easement holder, such as rights regarding ecosystems services credits, recovery of proceeds in the event of property condemnation, and recovery of funds if use of property no longer is consistent with funding requirements. These scenarios are challenging and require creativity and collaboration among all parties involved, as each party is bound to ensure their own obligations are met.

OWEB has developed a streamlined conservation easement template for fee simple projects and a set of provisions and approaches to conservation easements purchased by grantees. This includes language in the easement that is related, in part, to Board administrative rules. The rules lay out OWEB's right to enforce the easement and monitor the property, notice requirements, approval requirements and timelines, management plan obligations, and remedies if use of a property is inconsistent with the conservation purposes for which it was acquired. The latter is most directly tied to the constitutional and statutory obligations to protect the financial investment of the agency and ensure that use of the property is consistent with the constitutionally designated purpose of the funds – protecting significant fish and wildlife habitat.

OWEB's easement also incorporates desired future conditions (i.e., description of how the property will function in the future, once restoration has been completed), the requirement for a management plan that incorporates those future conditions, and approval requirements for ecosystems services projects.

In future meetings of the ARE committee, foundational questions about topics related to these additional provisions will be addressed, including: significant habitat and desired future conditions; balancing conservation with other uses such as recreation, cultural uses, and working lands; and risk tolerance.

Practical Considerations of OWEB-held Conservation Easement

The legal certainty that a conservation easement provides has had valuable practical applications for OWEB. The conservation easement gives OWEB the ability to review use requests from the landowner for consistency with the purpose of the easement, which incorporates the constitutional purposes of the funding and the specific conservation purposes of the project identified at the time of the grant. It also gives OWEB the ability to require the landowner to reduce the impacts from allowable uses, or activation of pre-existing rights such as transmission lines.

The easement's requirement for restoration and the description of restored conditions have allowed OWEB to hold acquisition grantees accountable for promises and agreements

related to restoration in the grant applications and grant agreements. This accountability has ensured that projects for which the board awarded funds, and the outcomes it expected, translate into tangible restoration and ecological uplift on the ground. These requirements have also been useful for grantees, where potentially competing uses from neighboring property owners or local jurisdictions have the potential to undermine the anticipated conservation outcomes of the project.

OWEB has a clear and specific legal obligation to ensure that property funded through the land acquisition grant program is not transferred without OWEB's prior approval, and that the conservation easement includes language to that effect. The intent is to ensure that the property is only transferred to an entity with the eligibility and capacity to manage it for the conservation outcomes intended by the funding and described in the grant application and conservation easement. OWEB has intervened when landowners have proceeded with transfer of a property prior to OWEB's approval. These instances had the potential of jeopardizing the conservation values on the property, as well as jeopardizing OWEB's need to determine that the transfer met the requirements imposed in ORS 541.960.

At times, uses allowed by or undertaken by landowners of grant-funded properties have conflicted with the purposes of OWEB's funding and the requirements in the easement. In these circumstances, the conservation easement has guaranteed OWEB's ability to require remediation and restoration where the conservation values have been impacted. This has ranged from unauthorized and unaddressed camping and dumping, and unauthorized and inappropriate bank stabilization, to failure to restore the property as promised or manage invasive species and weeds that resulted in negative impacts to the conservation values.

As noted above, foundational questions about OWEB's approach to desired future conditions, balancing conservation with other uses, and risk tolerance have been raised and will be the topic of discussion at future ARE committee meetings. Committee discussions will help differentiate requirements in the constitution and statute, board-approved requirements outlined in administrative rule, and policy and program guidance that has evolved through time.

Final Considerations for the ARE Committee

This memo describes both the legal protections afforded by conservation easements for OWEB investments, and how OWEB specifically has used and implemented conservation easements. It is important for the ARE committee to consider how to balance the greater legal protections and legal benefits provided by conservation easements with the specific challenges and limitations shared by grantees and program partners. In parallel, the committee must consider if the conservation easement instrument itself presents

challenges or if these challenges can be reasonably well addressed by changing the agency's approach to use and implementation of conservation easements.

Comparison of Potential Title Restriction Instruments for Land Purchased through OWEB Grant Agreement

This table is intended to provide a high-level summary of a representative set of the types of title restriction instruments. These instruments have been mentioned or suggested during past and current land acquisition processes as options for OWEB’s requirements under the “title restrictions” required in ORS 541.960. A “title restriction” is an entry made on the deed of a property in favor of those who want to protect their interests in a property. All the instruments below are examples of “title restrictions.” Currently, when a fee-simple transaction is funded by OWEB, the agency holds a conservation easement on the property to meet the statutory title restriction requirement.

The term “deed restriction” is a contractual right, where a conservation easement is considered a property interest. Certain instruments detailed below could be crafted to continue upon transfer of the land, but under Oregon law it is not clear whether a court would enforce a restriction placed in a deed for the purposes of preserving natural resource values without a specific benefiting parcel of property. It is also possible that an agreement that includes promises about the use of land, that continues upon the transfer of that land, and is enacted for conservation purposes, is in effect a conservation easement (if it meets the other statutory requirements), regardless of what it is called. It is therefore important to consider that any agreement used for the purpose of meeting the obligations in ORS 541.960 must be considered not only in the context of what it is called, but the content it ultimately contains.

Under current law, a conservation easement is the mechanism that provides the most assurance that it will run with the land and hold up as a property interest to protect conservation values over time.

Instrument	Elements	Special Considerations
Conservation Easement (ORS 217.715 to 271.795)		
Conservation Easement	Statutorily created to be legally enforceable despite not meeting certain traditional common law requirements	<ul style="list-style-type: none"> Highest level of protection for the property and OWEB due to legal certainty
Deed Restrictions - category of contractual agreements between two parties in which one party gives the other certain promises and assurances, and is attached to the use of a parcel of real estate (common law principles, i.e. not codified and defined in statute)		
Equitable Servitude (ES)	<p>To run with the land in Oregon:</p> <ul style="list-style-type: none"> Binding, concerns the land in a direct way, and subsequent owner has notice. The agreement must also demonstrate that the parties intended to establish an ES and for it to run with the land. Typically enforced by requiring action on the part of the offender, rather than money damages 	<ul style="list-style-type: none"> Can be perpetual Can run with the land
Real Covenant	<p>To run with the land in Oregon:</p> <ul style="list-style-type: none"> Must be in writing Creator must have intended it to do so Must touch and concern the use, occupation, or enjoyment of both burdened and benefitted property that is direct, not collateral Must be privity of estate between the promise-maker and their successors Typically enforced through monetary damages 	<ul style="list-style-type: none"> Can be perpetual Can run with the land

Types of Agreements that May Be Appropriate Title Restrictions under Certain Conditions (e.g., Specific Structure and/or Content)		
Management Agreement	Could be either an ES or a Covenant, depending on the remedy and whether meets the other elements.	<ul style="list-style-type: none"> • Can run with the land (but legally uncertain) • Can be perpetual
Notice of Grant Requirements/Agreement	<ul style="list-style-type: none"> • Could be drafted similar to an ES or a Covenant • Often required by federal agencies. (Example of North American Wetland Conservation Act notice of grant requirements can be made available.) 	<ul style="list-style-type: none"> • Typically reference the grant agreement, grant application, or other such project-specific documents to capture the obligations that are intended to be managed into perpetuity. In an effect, this could make certain aspects of the grant agreement part of the title restriction. • NOTE: A grant agreement (perpetual or not) that is not recorded on title of the property would not be considered a deed restriction or a title restriction as contemplated under 541.960
Memorandum of Understanding	<ul style="list-style-type: none"> • Non-binding agreement (unenforceable) that outlines the intentions, roles, and objectives of two or more parties • Represents a commitment to collaborate in good faith but does not create legally enforceable obligations • Can contain whatever terms deemed necessary and agreeable to the parties to the agreement • Must be recorded on title to be considered a “title restriction” 	<ul style="list-style-type: none"> • MOUs are not typically considered appropriate for recording on title • Type of agreement that is intended to be non-binding, contrary to the requirements for any agreement concerning land to “run with the land”