



OWEB Easement Guide

Developing Conservation Easements to be Submitted for OWEB Funding

The Oregon Watershed Enhancement Board considers applications for Conservation Easements that protect existing high quality habitat, protect and restore habitat, and protect and restore habitat in partnership with continued forest, farm or ranch uses. Applicants and landowners typically begin negotiating proposed Easements long before submission to OWEB for funding. This document is intended to assist applicants in their drafting of Easements by making OWEB's expectations and requirements more clearly defined early on in the Easement development process.¹

In every case, the Conservation 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 the Oregon Watershed Enhancement Board. OWEB and its attorneys will review draft Easements and may request language changes in order to protect OWEB's investment of public funds and to improve the legal enforceability of the habitat protection and restoration provisions. The following comments should be used as a guide in preparing your proposed Conservation Easement.

I. General Conservation Easement Language and Format

In general, OWEB recommends that any Conservation Easement proposed for funding include the following provisions:

- Recitals, including legal description, property description, qualifications of Grantee, and other issues related to the proposed acquisition (fund restrictions, landowner intent, etc.).
- Conservation Values, including a list that matches the ecological and habitat values described in the OWEB grant application.
- Purpose statement.
- Rights of Grantee, including protection of Conservation Values, enforcement, and right of entry.
- Prohibited Uses, including a prohibition against impairment of the Conservation Values. These should be as detailed and specific as possible so that there is little ambiguity as to what specific activities can, and can not, occur on the property. A provision for preparation and approval of a management plan should be considered as an option for describing how restoration or management activities, that may appear to be a prohibited use, will be carried out.
- Reserved Rights. If reserved rights may adversely affect the Conservation Values, the Easement should describe how the Grantor will protect against adverse effects, and if possible, describe how Grantee and a third party can measure adverse effects.
- Notice and Approval including Grantee approvals.

¹ OWEB strongly encourages applicants to review the OWEB Conservation Easement template and consider using the template as a starting point in preparing a proposed Conservation Easement. A copy can be found online at www.oregon.gov/OWEB/GRANTS/acquisition_grants.shtml. One of the most time-consuming and costly aspects of considering and approving an application involves negotiations concerning the final form of the Conservation Easement. Applicants that propose Conservation Easements based on the OWEB template (with the addition of OWEB's third party right of enforcement language and other language recommended in Section II) will save significant time and money. OWEB will accept proposed Conservation Easements that are not based on the OWEB template.

- Mediation, Arbitration, or Dispute Resolution provisions. OWEB will not accept binding arbitration provisions.
- Grantee's Remedies, including notice of violation, injunctive relief, damages, emergency enforcement, forbearance, etc.
- Access.
- Costs, Liabilities, Taxes and Environmental Compliance.
- Valuation, Extinguishment and Condemnation.
- Assignment and Subsequent Transfers, including OWEB's approval of Grantee transfers and OWEB's "no-profit" rule (see Section II for language).
- Notices.
- Recordation.
- General Legal Provisions including liberal construction, severability, joint obligation, successors, counterparts, etc.
- Third Party Right of Enforcement (see Section II for more detail).

As a general reference for Easements, and for sample Easement language, OWEB recommends the Land Trust Alliance (www.lta.org) Conservation Easement Handbook (to be updated in 2005) and Model Conservation Easement.

II. OWEB Required or Recommended Language

If you receive an OWEB grant award to assist with the purchase of a Conservation Easement, the Board takes a third party right of enforcement in the Easement to protect its investment of public funds. This section contains the language that OWEB has determined must be included and issues that must be addressed in any funded Easement. Where OWEB has identified issues to be addressed, examples are provided.

Applicants should discuss these provisions with the landowner and other project participants during negotiations and ensure that they are acceptable. These provisions should be included in the proposed Conservation Easement submitted to OWEB. If not included in the draft attached to the application, these provisions must be included in the version submitted for Due Diligence review. If the following language is not acceptable, attach a description of the modifications you are requesting to the proposed Easement with an explanation of why those modifications are necessary. The proposed modifications should not be lengthy.

A. Recitals

The following language must be added:

“This Easement is acquired in part with a grant from OWEB, agency of the State of Oregon whose statutory mission includes providing funding to support the acquisition of lands and waters, or interests therein from willing sellers, for the purpose of maintaining or restoring watersheds, fish and wildlife habitat, and native salmonids. Interests in these lands and waters may be held by local, state and federal agencies, tribes, not-for-profit land conservation organizations and trusts, state institutions of higher education, independent not-for-profit 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 is a third-party beneficiary of certain rights under this Easement.”

B. Valuation/Condemnation/Extinguishment

The proposed Conservation Easement should include a section describing how the market value of the Easement will be determined over time. Typically this is a constant ratio of the value of the Easement at the time of the Easement acquisition to the value of the Property unencumbered by the Easement.

The proposed Easement should also include language in this section acknowledging that when condemnation or extinguishment of the Easement results in payments to Grantee, then Grantee is required to pay OWEB a percentage of the payment received equal to the percentage of OWEB’s investment in the purchase of the Easement.

Example: “In the event of condemnation, pursuant to Section X, or extinguishment, pursuant to Section Y, of the Easement, OWEB is entitled to Z% of any proceeds attributable to the value of the Easement.”

C. Amendments

OWEB must be listed as a party to any amendment of the Easement.

Example: “If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement; provided **that Grantor and Grantee first obtain the written consent of OWEB...**”

D. Assignment

In addition to OWEB’s required Third Party language in Section IIE, the Easement must include language requiring the Grantee to obtain OWEB’s approval of any assignment of the Easement.

Example: “This Easement is transferable, but Grantee may assign its rights and obligations under this Easement, **with prior approval of OWEB**, only to another “qualified organization,” within the meaning of Section 170(h) of the Internal Revenue Code of 1954, as amended, or any successor provision...”

The following language related to OWEB’s “no profit” rule and the OWEB grant agreement is also required:

“Approval from OWEB will not be granted if a profit, as defined in OAR 695-045-0150, as amended from time to time, will result from conveyance of the Easement. As condition of such transfer, Grantee shall require that assignee comply with the terms of that certain watershed acquisition grant agreement (#xxx-xxx) between OWEB (“OWEB Grant Agreement”) and Grantee.”

E. Third Party Right of Enforcement

When OWEB awards a grant for purchase of a Conservation Easement, the Board takes a third party right of enforcement in the Easement. The following language is required:

“OWEB is an intended third party beneficiary of this Easement and, pursuant to ORS 271.715, OWEB is hereby granted third party right of enforcement. As such, OWEB may exercise all of the rights and remedies provided to Grantee herein, and is entitled to all of the indemnifications provided to Grantee in this Easement. OWEB and Grantee each have independent authority to

enforce the terms of this Easement; provided, however, that OWEB expects that Grantee shall have primary responsibility for monitoring and enforcement of the Easement. In the event that OWEB and Grantee do not agree as to whether the Grantor is complying with the terms of the Easement, OWEB or Grantee may proceed with enforcement actions without the consent of the other. If OWEB elects to enforce the terms of this Easement, it shall first follow the provisions applicable to Grantee, including notice of violation, opportunity to cure and mediation as appropriate; provided, however, that OWEB shall not be obligated to repeat any non-judicial dispute resolution steps already taken by Grantee. This third party right of enforcement will automatically transfer to another State agency charged with maintaining or restoring watersheds, fish and wildlife habitat, water quality and native salmonids in the event OWEB is dissolved or reorganized.

In accordance with OAR 695-045-0150, in the event that the Easement is transferred or assigned by Grantee without the consent of OWEB, OWEB may require that OWEB funds shall be repaid by the Grantee with interest due and payable from the effective date of the OWEB Grant Agreement at the rate provided for in ORS § 82.010, as may be amended from time to time.

In the event that the Property is used by Grantor in a manner that is not consistent with the Purpose and Objectives of this Easement, the terms of that certain OWEB Grant Agreement, or the purposes specified in Section 4(b), Article XV of the Oregon Constitution, and OWEB in its sole discretion determines that the Conservation Values of the Property have been diminished to the extent that the purpose of the OWEB grant can no longer be accomplished, then OWEB shall have the right, in addition to any other remedies described in this Easement, to require that Grantor pay to OWEB the sum that would otherwise be recoverable by OWEB as a result of a condemnation or extinguishment of the Easement under Section X. Upon payment under this paragraph, Grantee and OWEB agree to record an amendment to this Easement releasing all of OWEB's third-party enforcement rights under the Easement.”

F. Joint Enforcement

OWEB recommends adding either an independent section, or another paragraph to the Third Party language, to address how Grantee and OWEB will jointly exercise their rights under the Easement.

Example: See Exhibit A.

G. Notices: Add OWEB with the following contact information:

Executive Director
Oregon Watershed Enhancement Board
775 Summer Street NE, Suite 360
Salem, Oregon 97301-1290
503-986-0178

III. Additional Easement Considerations

In addition to including the above language, you should also consider adding the following language to your proposed Easement.

A. Maintenance/Management Plans

For a Conservation Easement project that protects existing important habitats, OWEB recommends that the Easement describe how the specific Conservation Values will be monitored by the Grantee, including type and frequency of monitoring. The Easement or a management plan should address how

existing habitats will be maintained and how public access, if any, will be managed to ensure protection of the Conservation Values.

For a Conservation Easement project that includes both the protection and restoration of important habitats, the Easement should require development of a management plan that describes how the conservation values will be enhanced or restored. The management plan, or Easement, should also include provisions for monitoring by the Grantee, including type and frequency of monitoring.

For a Conservation Easement project that involves restoration, protection and continued economic use, OWEB will require development of a management plan that addresses how continued commercial uses (forestry, farming or ranching) will be carried out in a manner that ensures protection of the Conservation Values. The Easement, or management plan, should also include a monitoring component to describe how Grantee will evaluate the effect of commercial uses on the Conservation Values. The required management plan should be updated at least every five years to incorporate monitoring results.

B. Updating Baseline Documentation

If requesting funding for an Easement on a property to both protect existing habitat, and restore or enhance potential habitats, OWEB recommends that you add a provision in the Easement to update the baseline documentation once restoration or enhancement activities have occurred to improve protection of that enhanced habitat or function through the term or life of the Easement (Exhibit B).

C. Working Farm, Ranch or Forest Easement Options

Lands that are to be protected for conservation purposes and retain some economic use can be complicated documents to prepare to meet both landowner and OWEB needs. One option is to identify zones on the property that identify where economic uses will occur, including zones where habitat protection and/or restoration is the primary purpose, with explicit Conservation Values and prohibited uses for each of those zones. Another option is to identify specific ecological or habitat goals and a method for regular evaluation of those goals in conjunction with the retained economic uses. For example, the Purpose section of the Easement could identify the protection of a specific habitat type present on the property, describe annual monitoring of the condition of that habitat type, and identify how the results of the monitoring are used to review management activities in the farm, ranch or forestry operation plan.

If the proposed working farm, ranch or forest Easement also includes restoration or enhancement of habitat types, the Grantee should also include a provision in the Easement to periodically update the baseline condition documentation as conditions improve (see Exhibit B).

Exhibit A

Joint Enforcement Language Example 1 (Grantee and OWEB)

Before either Grantee or OWEB exercises its rights to undertake mediation or legal action as provided for in Sections (*insert remedies section*), the party contemplating such action agrees to confer with the other party as to whether they will join the mediation or legal action and share costs and expenses related to such action; provided, however, that this agreement to confer shall not be construed as a limitation on the ability of Grantee or OWEB to exercise its enforcement and other rights under this Easement. If Grantee and OWEB decide to join in the action and share costs and expenses related to the action, the parties joining in the action and sharing costs and expenses related to the action shall apply any recovery to reimburse such parties for their costs and expenses provided that any amount received (a) based on loss of value to the Easement, or (b) resulting from condemnation and/or extinguishment of the Easement shall be shared with OWEB as described in Section (*insert reference to Valuation section – see Section IIB*) only after reimbursing each party for its costs and expenses.

If Grantee or OWEB chooses not to undertake mediation or legal action as provided for in Sections (*insert remedies section*), and/or share costs and expenses related to such action, such party shall not be entitled to any recovery for enforcement costs; provided, however, that any amount received (a) based on loss of value to the Easement, or (b) resulting from condemnation and/or extinguishment of the Easement shall be shared with OWEB as described in Section (*insert reference to Valuation section – see Section IIB*) only after first reimbursing any party for its costs and expenses that are not otherwise separately paid as part of any award or judgment.

Joint Enforcement Language Example 2 (Three Parties)

Before either Grantee, OWEB or the (*insert party*) exercises its rights to undertake mediation or legal action as provided for in Sections (*insert remedies section*), the party contemplating such action agrees to confer with the other parties holding enforcement rights under this Easement as to whether they will join the mediation or legal action and share costs and expenses related to such action; provided, however, that this agreement to confer shall not be construed as a limitation on the ability of Grantee, OWEB or the (*insert party*) to exercise its enforcement and other rights under this Easement. If Grantee, OWEB and/or the (*insert party*) decide to join in the action and share costs and expenses related to the action, the parties joining in the action and sharing costs and expenses related to the action shall apply any recovery to reimburse such parties for their costs and expenses provided that any amount received (a) based on loss of value to the Easement, or (b) resulting from condemnation and/or extinguishment of the Easement shall be shared by OWEB and the (*insert party*) as described in Section (*insert reference to Valuation section – see Section IIB*) only after reimbursing such parties for their costs and expenses.

If Grantee, OWEB and/or the (*insert party*) chooses not to undertake mediation, arbitration or legal action as provided for in Sections (*insert remedies section*), and/or share costs and expenses related to such action, such party shall not be entitled to any recovery for enforcement costs; provided, however, that any amount received (a) based on loss of value to the Easement, or (b) resulting from condemnation and/or extinguishment of the Easement shall be shared by OWEB and the (*insert party*) as described in Section (*insert reference to Valuation section – see Section IIB*) only after first reimbursing any party for its costs and expenses that are not otherwise separately paid as part of any award or judgment.

Exhibit B
Updating Baseline Documentation Language Example

Every (*insert number*) years after the Effective Date of this Easement until (*insert condition trigger*), Grantee shall prepare a new baseline report to update the Baseline Documentation (“Updated Baseline Report”). The purpose of each Updated Baseline Report is to inventory and assess the condition of the (*insert*) habitats and ecological functions on the Property, in order to establish new and updated Baseline Documentation for identifying the then current Conservation Values to be protected hereunder. If Grantor and OWEB concur in writing that the updated Baseline Report is an accurate representation of the Property, then the Grantor, Grantee, and OWEB shall execute and record an Acknowledgement of Conservation Easement Baseline Documentation and this Updated Baseline Report shall supplant all previous reports and be incorporated into this Easement as the current Baseline Documentation by this reference. Failure to timely compile or record any Updated Baseline Report shall not affect the enforceability or validity of any other provisions of this Easement.