



OWEB Easement Guide

Developing Conservation Easements for OWEB Funding

The Oregon Watershed Enhancement Board (OWEB) considers grant applications for conservation easements that protect and restore high-quality OWEB priority ecosystems, plant communities, and species. Information about OWEB acquisition priorities is available from OWEB staff and online at: http://www.oregon.gov/OWEB/GRANTS/acquisition_grants.shtml.

Negotiating the final form of a conservation easement is one of the most time-consuming and potentially costly aspects of obtaining easement funding from OWEB. OWEB strongly encourages project participants to review its conservation easement template. The template is available from OWEB staff and online at the web site specified above.

OWEB will fund a conservation easement that is not based on OWEB's template if the easement contains all of the elements OWEB requires to protect the property's conservation values and OWEB's investment of public funds. Conservation easements submitted for OWEB funding must provide specific legal protections for the conservation values that are proposed for protection or for restoration and protection. For general guidance on writing conservation easements, OWEB suggests that project participants consult *The Conservation Easement Handbook* (ISBN 978-1-932807-00-4), written by Elizabeth Byers and Karin Marchetti Ponte, and published in 2005 by the Land Trust Alliance and the Trust for Public Land.

Conservation easements submitted for OWEB funding must grant a third party right of enforcement to OWEB and contain other mandatory terms. OWEB and its attorneys will review proposed easements and may require changes to protect OWEB's investment of public funds and improve the legal enforceability of the habitat protection and restoration provisions.

The remainder of this guide provides specific information about OWEB's requirements and recommendations for conservation easements. The requirements and recommendations use the terms "Grantor" and "Grantee," to identify the landowner and easement holder, respectively. Most applicants propose easements that do not encumber all of the acreage owned by the landowner. Therefore the guide uses the term "Easement Property" to distinguish the acreage encumbered by the easement from the larger property. However, applicants may use the term "Property" to indicate the acreage encumbered by the easement, if preferred.

Applicants should discuss the contents of this guide with the landowner and other project participants early in the development of an OWEB grant application for easement funding. If the provisions or the mandatory text described below are not acceptable to project participants, the applicant may submit requested modifications, with an explanation of why the modifications are necessary. The proposed modifications should not be extensive, and will not necessarily be accepted by OWEB. The mandatory text contains defined terms that are commonly used in conservation easements, but which are not defined in the text itself. In these cases, OWEB expects that the terms will be defined elsewhere in the easement.

Recitals (Required Provision; Some Mandatory Text)

- Include the qualifications of the grantee, the easement property's legal description or a reference to an easement exhibit that contains the legal description, the purpose of the easement, the grantor's intent, and other recitals, as appropriate.
- Include the following mandatory text:

“This Easement is acquired in part with a grant from the State of Oregon acting by and through its Oregon Watershed Enhancement Board (OWEB) whose statutory mission includes providing funding to support the acquisition of lands and waters, or interests therein from willing sellers, for the purpose of protecting and 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 Article XV, Section 4b of the Oregon Constitution. OWEB is a third-party beneficiary of certain rights under this Easement.”

Conservation Values (Required Provision; No Mandatory Text)

- Include an explanation of why the easement property is worthy of protection by a conservation easement.
- List the OWEB priority ecosystems, plant communities, and species (“Conservation Values”) the grantor and grantee will protect, or restore and protect, consistent with OWEB's guidance document entitled *OWEB Ecological Priorities for Land Acquisition by Basin* and the OWEB grant application. OWEB's acquisition priorities are available from OWEB staff or online at http://www.oregon.gov/OWEB/GRANTS/acquisition_grants.shtml.

Rights of the Grantee (Required Provision; No Mandatory Text)

- Include the grantee's right to protect the easement property's conservation values, enforce the easement, enter the easement property, and use the easement property for educational purposes, as appropriate. Include other grantee rights, as appropriate.

Prohibited Uses (Required Provision; No Mandatory Text)

- Include a general statement that any use of the easement property that is inconsistent with the purpose and terms of the easement is prohibited.

Example text: “Any use of the Easement Property inconsistent with the Purpose and terms of this Easement is prohibited, and Grantor acknowledges and agrees that Grantor will not conduct, engage in, or permit any such use.”
- Follow the general statement with a list of specific prohibited uses, accompanied by the statement that the list is not exhaustive.

Example text: “The following uses of the Easement Property, though not an exhaustive list of inconsistent uses, are inconsistent with the Purpose and terms of this Easement and are therefore prohibited.”
- The list of prohibited uses should be as detailed as possible to minimize ambiguity about what specific activities must not be undertaken on the easement property.
- Refer to OWEB's conservation easement template for a list of activities that OWEB typically prohibits or restricts to adequately protect the conservation values of properties that are a priority for OWEB easement funding. In general, OWEB prohibits or restricts the following: division,

construction, commercial activities, vegetation alteration, land surface alteration, dumping, water course and wetland alteration, off-road vehicle use, firearms use, hazardous materials release, public access, billboards and signs, and domestic and farm animals.

- Ensure that the prohibited uses are consistent with the grantor's reserved rights. The easement must state that to the extent the prohibited uses are inconsistent with the grantor's reserved rights, the grantor's reserved rights are subordinate to the prohibited uses.

Ecosystems Services Credits (Required Provision; Mandatory Text)

- When OWEB grants funds for a conservation easement, it imposes limitations on the sale of ecosystems services credits derived from the easement property's conservation values.
- Include the following mandatory text, with the bracketed portions altered as necessary to convey the agreement reached by grantor and grantee as to which party is entitled to sell ecosystem services credits not restricted by OWEB:

“Ecosystem Services Credits. [*insert Grantor, Grantee or Grantor and Grantee*] may, upon OWEB's written approval, sell mitigation credits, wetland credits, carbon credits, habitat credits, species credits, and other similar types of mitigation or conservation credits (“*Ecosystems Services Credits*”) generated from the enhancement of Conservation Values beyond the values indicated in the Baseline Inventory Documentation. [*insert Grantor, Grantee or Grantor and Grantee*] shall submit a written request for OWEB's approval at least 30 days prior to the next regularly scheduled public business meeting of OWEB's governing body. [*insert Grantor's, Grantee's or Grantor's and Grantee's*] request shall describe in detail (including as appropriate maps, photographs, inventories, or other documentation) how the enhanced Conservation Values exceed those described in the Baseline Inventory Documentation. Where applicable, [*insert Grantor's, Grantee's or Grantor's and Grantee's*] request shall also demonstrate how the sale of Ecosystem Services Credits complies with any restrictions associated with funding used to achieve the enhanced Conservation Values.”

Cultural Resources (Required Provision; Mandatory Text)

- Include the following mandatory text, regardless of whether or not cultural resources are known to exist on the easement property:

“Grantor shall comply with all state and federal laws related to “archeological objects,” “archeological sites” and “cultural resources” as defined in ORS 358.905 and OAR 736-018-0020. Specifically, Grantor shall not, by any act or omission, excavate, injure, destroy, remove, or alter any archaeological object, archaeological site, or cultural resources located on the Easement Property, unless that activity is authorized by a permit issued under ORS 390.235.”

Reserved Rights of the Grantor (Optional Provision)

- List the rights, if any, reserved by the grantor.
- If grantor reserved rights are included, the easement must state that to the extent the grantor's reserved rights are inconsistent with protection of the Conservation Values or the prohibited uses, the grantor's reserved rights are subordinate to the protection of the Conservation Values and the prohibited uses.
- If any of the uses prohibited or restricted in OWEB's easement template are reserved by the grantor, carefully structure the reserved right to ensure and clarify that exercise of the reserved right will not adversely affect the Conservation Values.

Baseline Inventory Documentation (Required Provision; No Mandatory Text)

- OWEB requires baseline inventory documentation for a conservation easement. The baseline inventory documentation must describe the condition of the easement property at the time the easement is recorded, for the purpose of monitoring compliance with the terms of the easement. Include in the easement a reference to the date of the baseline inventory documentation, a description of the contents of the documentation, an acknowledgement by the grantor and grantee of the accuracy of its content, and a statement that the documentation is on file with the grantor, grantee and OWEB.
- Include in the easement an exhibit signed by the grantor and the grantee that acknowledges and agrees that the baseline inventory documentation is an accurate representation of the condition of the easement property as of the date of the easement. Refer to OWEB's easement template for suggested text for the exhibit.
- Refer to OWEB's guidance for baseline inventory documentation, available from OWEB staff or online at http://www.oregon.gov/OWEB/GRANTS/acquisition_grants.shtml, for further information about OWEB requirements for baseline inventory documentation.
- Example of text for baseline inventory documentation:

“The specific existing Conservation Values of the Easement Property are documented in an inventory of relevant features of the Easement Property, dated *[insert]*, on file with Grantor, Grantee, and OWEB, and incorporated into this Easement by this reference (“Baseline Inventory Documentation”). The Baseline Inventory Documentation consists of reports, maps, photographs, and other documentation that provide, collectively, a mutually agreed representation of inventoried relevant features of the Easement Property at the time of this Easement. Grantor, Grantee and OWEB intend the Baseline Inventory Documentation to serve as an objective informational baseline for purposes of monitoring Grantor's compliance with the terms of this Easement. Grantor, Grantee and OWEB have reviewed and accepted the Baseline Inventory Documentation. Grantor and Grantee have signed an acknowledgement of the Baseline Inventory Documentation, attached to this Easement as Exhibit *[insert]*.”

Required Restoration (Conditionally Required Provision; No Mandatory Text)

- If the grant application states that an OWEB investment of acquisition funds will catalyze significant restoration of a degraded property, OWEB requires completion of the restoration as a condition of its funds. Although OWEB recognizes that the grantor and grantee may rely on other organizations to assist in accomplishing the restoration, the grantor and grantee are ultimately responsible for ensuring that the restoration is completed. When OWEB requires restoration as a condition of its funds, the easement must:
 - Require the grantor and grantee to complete the restoration;
 - State the condition to which the easement property will be restored;
 - Require the grantor and grantee to document the restoration activities;
 - State that required habitat documentation, a mutually agreed written description of habitat condition to which the easement property must be restored, will be used for the purpose of monitoring compliance with the terms of the easement when restoration is complete.
 - Include a reference to the date of the required habitat documentation, a description of the contents of the documentation, an acknowledgement of the documentation by the grantor

and grantee, and a statement that the documentation is on file with the grantor, grantee, and OWEB.

- State that a memorandum of understanding, which documents the restoration roles and responsibilities of the grantor and grantee and any organizations that have agreed to assist with the restoration, has been signed by the parties and is on file with the grantor, grantee, any assisting organizations, and OWEB.
- Include in the easement an exhibit signed by the grantor and grantee in which each acknowledges and agrees that the required habitat documentation represents the condition that the easement property will be restored to by a specified date. Refer to OWEB's easement template for suggested text for the exhibit.
- The required habitat documentation must contain plans, maps, descriptions, and other documentation to provide, collectively, a representation of the habitat condition that the parties agree the easement property will be restored to by a specified date.
- Include in the easement an exhibit signed by the grantor, grantee, and any organizations that have agreed to assist with the restoration, that acknowledges and agrees that the memorandum of understanding accurately portrays the manner in which the parties will cooperate to accomplish the restoration described in the required habitat documentation.

Example of text for required habitat documentation.

“In addition to preserving and protecting the existing Conservation Values described in the Baseline Inventory Documentation, Grantor and Grantee shall undertake and complete the habitat restoration activities documented in a description of the required habitat condition of the Easement Property, dated *[insert]*, on file with Grantor, Grantee, and OWEB and incorporated into this Easement by this reference (“Required Habitat Documentation”). The Required Habitat Documentation consists of plans, maps, descriptions, and other documentation that provide, collectively, a mutually agreed representation of the habitat condition to which the Easement Property is required to be restored by *[insert planned completion date]*. Grantor, Grantee and OWEB intend the Required Habitat Documentation to serve as an objective measure of required habitat condition for purposes of monitoring Grantor's compliance with the terms of this Easement. Grantor, Grantee, and OWEB have reviewed and accepted the Required Habitat Documentation. Grantor and Grantee have signed an acknowledgement of the Required Habitat Documentation, attached to this Easement as Exhibit *[insert]*.

A Memorandum of Understanding (“MOU”), dated *[insert]*, describes Grantor and Grantee's roles and responsibilities in restoring the Easement Property to the conditions described in the Required Habitat Documentation, and the manner in which the parties will cooperate to accomplish the work. [If other organizations have agreed to assist with the restoration, add: The MOU also describes the roles and responsibilities of *(insert names of organizations that will assist with restoration)*, which will assist Grantor and Grantee with the required habitat restoration.] Grantor, Grantee, [and: *insert names of organizations that will assist with restoration, if any*] have signed an acknowledgement of the MOU, attached to this Easement as Exhibit *[insert]*. The MOU is on file with Grantor, Grantee, OWEB, [and: *insert names of organizations that will assist with restoration, if any*].

When habitat restoration activities have been completed and the habitat condition described in the Required Habitat Documentation has been achieved to OWEB's reasonable

satisfaction, OWEB, Grantor, and Grantee shall execute a written confirmation that Grantor and Grantee have achieved the habitat condition described in the Required Habitat Documentation, subject to any specific exceptions noted in the confirmation. Grantee and OWEB shall base subsequent compliance monitoring on the habitat condition of the Easement Property referenced in the confirmation.”

Management Plan (Required Provision; Some Mandatory Text)

- OWEB requires that the grantor and grantee develop and implement a management plan for any property in which OWEB invests acquisition funds. The management plan must contain an adequate framework for protection, (restoration if applicable), and monitoring of the property’s conservation values in a manner consistent with the terms of the conservation easement and the commitments made in the grant application.
- If an easement allows farming, ranching, forestry, or other economic uses, the management plan must address the economic uses and specifically address how the activities will be carried out. The activities must be implemented in a manner that clearly protects the easement property’s conservation values.
- The management plan must be approved by OWEB.
- For information about OWEB-required management plans, refer to OWEB’s management plan guidance, available online at http://www.oregon.gov/OWEB/GRANTS/acquisition_grants.shtml or from OWEB staff.
- Include the following mandatory text:
 - “Grantor and Grantee shall propose to OWEB a management plan (“**Proposed Management Plan**”) that describes how Grantor and Grantee shall [*insert “restore and” if the easement is being purchased to catalyze significant restoration of a degraded property*] protect the Conservation Values of the Easement Property. The Proposed Management Plan must be consistent with OWEB’s established guidelines for management plans, and address [*insert land-use activities that are reserved rights of the Grantor, threats to conservation values such as invasive species and trespassing, and restoration and other activities proposed in the grant application*]. The Proposed Management Plan must include monitoring and evaluation activities and a schedule for implementation.
 - a. Grantor and Grantee shall submit the Proposed Management Plan to OWEB within 12 months after the Effective Date of this Easement.
 - b. Grantor, Grantee, and OWEB shall work together to revise the Proposed Management Plan, as appropriate, until the Proposed Management Plan is acceptable to Grantor, Grantee, and OWEB and has been approved by OWEB. When approved by OWEB, the Proposed Management Plan will then be an approved management plan (“**Approved Management Plan**”). OWEB shall not withhold its approval of a Proposed Management Plan unless it believes, in good faith: 1) that the Proposed Management Plan inadequately addresses material issues related to the [*insert “restoration and” if the easement is being purchased to catalyze significant restoration of a degraded property*] protection of the Conservation Values; and 2) that reasonable alternative provisions will result in better [*insert “restoration and” if the easement is being purchased to catalyze significant restoration of a degraded property*] protection of the Conservation Values. If Grantor, Grantee, and OWEB do not agree on specific provisions of an Approved Management Plan within 18 months

after the Effective Date of this Easement, the parties shall resolve their disagreement using the dispute resolution provisions described in this Easement.

- c. Grantor and Grantee shall not conduct any habitat restoration activities described in the Proposed Management Plan until OWEB either approves the Proposed Management Plan or OWEB expressly permits the specific activities in writing.
- d. If Grantor and Grantee fail to submit a Proposed Management Plan to OWEB within 12 months after the Effective Date of this Easement, OWEB may prepare its own management plan, or contract with a third party to prepare a management plan which, upon being approved by OWEB, will become the Approved Management Plan. Grantor and Grantee shall pay all of OWEB's costs and expenses for preparation of the plan.
- e. After the Proposed Management Plan or a plan prepared by a contractor hired by OWEB has received final approval by OWEB, Grantor shall manage the Easement Property in a manner consistent with the terms of the Approved Management Plan and this Easement.
- f. Grantor and Grantee may propose changes to an Approved Management Plan at any time by submitting a joint written request to OWEB. OWEB shall endeavor to review and comment on the proposed changes within 60 days after receiving the proposed changes. OWEB shall approve or reject the proposed changes according to the standards set forth above in (b). If OWEB fails to approve the proposed changes by the end of the 60-day period, the proposed changes are rejected. If Grantor, Grantee, and OWEB do not agree on specific provisions of the proposed changes, the parties shall resolve the dispute using the dispute resolution process described in this Easement."

Duration and Burdens (Required Provision; No Mandatory Text)

- Include a statement that the easement is binding on the grantor and the grantee and their successors and assigns, and runs with the easement property in perpetuity.
- Example text:
"This Easement binds the Grantor, the Grantee, their successors and assigns, and runs with the Easement Property in perpetuity."

Valuation, Condemnation, and Extinguishment (Required Provision; Mandatory Text)

- Include the following mandatory text, which states that if condemnation or extinguishment of the Easement results in payments to the grantee, the 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.

"If all or any part of the Easement Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, corporate, or other authority, Grantor, Grantee and OWEB shall act jointly to recover the full value of the interests in the Easement Property subject to the taking or in lieu purchase and of all resulting direct or incidental damages. As among Grantor, Grantee and OWEB, OWEB shall receive the Liquidation Value of the Easement Property or portion condemned. After OWEB has received Liquidation Value, Grantee may recover its funds [*insert definition of the Grantee's funds if not previously defined*]. After Grantee has recovered its funds, OWEB, Grantee and Grantor shall pay from remaining condemnation proceeds, if any, all expenses reasonably

incurred by Grantor, Grantee and OWEB in connection with the taking or in lieu purchase from the amount recovered.

“Liquidation Value” takes into account both increases and decreases in the fair market value of the Easement Property over time, and is calculated as follows:

- a. the fair market value of the Easement Property at the time the Liquidation Value is to be determined, as if unencumbered by the Easement, and unencumbered by any other lien or mortgage on the Easement Property;
- b. less the value (if any) of any capital improvements Grantor or Grantee made to the Easement Property after the Effective Date, if the improvements are otherwise permitted under this Easement;
- c. multiplied by [*insert fraction equal to the consideration OWEB paid for its interest in the Easement divided by the fair market value of the Easement Property at the time of the grant of the Easement*].

For example, assume that at the time of the grant of this Easement the Easement Property is appraised at \$500,000 and OWEB contributes \$300,000 towards the grant. If the fair market value of the Easement Property at the time the Liquidation Value is to be determined is \$1,000,000, and the value of Grantor’s and Grantee’s capital improvements made after the Effective Date is \$200,000, and OWEB’s grant equaled 60% (i.e. \$300,000 / \$500,000) of the fair market value of the Easement Property at the time the grant was made, the Liquidation Value is:

$$(\$1,000,000 - \$200,000) \times .60 = \$480,000.”$$

Amendments (Required Provision; Some Mandatory Text)

- OWEB-funded easements may be amended, provided that OWEB issues prior written approval.
- OWEB will approve only amendments that are consistent with protection of the easement property’s conservation values; Article XV, Section 4b of the Oregon Constitution; and the grant agreement.
- Include the following mandatory text:
“Grantor and Grantee shall obtain OWEB’s prior written consent before entering into any amendment to this Easement.”

Assignment (Required Provision; Mandatory Text)

- Include the following mandatory text pertaining to assignments:
“Grantee’s interest in the Easement is transferable, but Grantee shall not assign its interest i) until it obtains OWEB’s prior written approval; and ii) unless the assignee is a “qualified organization,” within the meaning of Section 170(h) of the Internal Revenue Code of 1954, as amended, or any successor provision. After Grantee gives notice, OWEB shall consider Grantee’s proposed transfer of the Easement interest at the next regularly scheduled public business meeting of OWEB’s governing body. In accordance with ORS 541.376, OWEB shall not approve Grantee’s request if a profit will result from a transfer of the Easement interest. As a condition of an approved transfer, Grantee shall require that the assignee comply with the terms of that certain grant agreement [*insert OWEB grant number*] between OWEB (“OWEB Grant Agreement”) and Grantor and Grantee.”

Notice and Approval (Required Provision; Mandatory Text)

- Include a process for notices and approvals.
- Include the following mandatory OWEB contact information:
Executive Director
Oregon Watershed Enhancement Board
775 Summer Street NE, Suite 360
Salem, Oregon 97301-1290
503-986-0178

Dispute Resolution Provisions (Required Provision; Some Mandatory Text)

- Describe the process by which disputes will be resolved, including measures such as mediation and arbitration.
- If the easement provides for alternative dispute resolution, include the following mandatory language:
“OWEB will not accept and may not be subjected to binding arbitration.”

Grantee’s Remedies (Required Provision; No Mandatory Text)

- Include provisions for notice of violation, injunctive relief, recovery of damages, emergency enforcement, forbearance, rights of action against third parties, and other matters pertaining to remedies, as appropriate.

Third Party Right of Enforcement (Required Provision; Mandatory Text)

- Include the following mandatory text:
“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. OWEB may exercise all of the rights and remedies provided to Grantee (except for the right to recover attorney fees) 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 Grantee is primarily responsible for monitoring and enforcement of the Easement. Consistent with [*insert cite to paragraph on Joint Enforcement*], if OWEB and Grantee do not agree whether Grantor is complying with the terms of this Easement, either 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; but OWEB is not obligated to i) repeat any non-judicial dispute resolution steps already taken by Grantee or ii) engage in binding arbitration. If Grantee has failed to monitor or enforce Grantor’s compliance with this Easement, OWEB may require Grantee to, and Grantee shall if required by OWEB: i) pay damages equal OWEB’s reasonable costs of monitoring, enforcing, or monitoring and enforcing this Easement, and ii) transfer this Easement to a party designated or approved by OWEB. This third party right of enforcement automatically transfers to another State of Oregon agency charged with maintaining or restoring watersheds, fish and wildlife habitat, water quality and native salmonids if OWEB is dissolved or reorganized.

Consistent with OAR 695-045-0140, if Grantor uses, or knowingly allows the Easement Property to be used in a manner that is inconsistent with this Easement; the OWEB Grant Agreement; the OWEB Grant Application; or Article XV, Section 4b of the Oregon Constitution, and OWEB in its sole discretion determines that the Conservation Values of the Easement Property have been harmed to the extent that the purpose of the OWEB grant can no longer be accomplished, OWEB shall have the right to recover the greater of the following:

- a. OWEB funds with interest due and payable from the effective date of the Easement at the rate provided for in ORS 82.010. The required repayment will not exceed five times the OWEB funds; or
- b. the Liquidation Value.

Consistent with OAR 695-045-0150, if Grantee transfers or assigns its interest in the Easement without OWEB's prior written consent then Grantee shall repay OWEB funds with interest due and payable from the effective date of the Easement at the rate provided for in ORS 82.010. The required repayment will not exceed the greater of five times the OWEB funds or the Liquidation Value.”

Joint Enforcement (Required Provision; Mandatory Text)

- As either an independent section or another paragraph in the Third Party Right of Enforcement section, add text that addresses how the grantee and OWEB will jointly exercise rights under the easement.
- Mandatory text for two-party joint enforcement (grantee and OWEB):

“Before either Grantee or OWEB exercises its rights to undertake mediation or legal action as provided for in Section [*insert Remedies section number*], the party contemplating the mediation or legal action shall discuss with the other party whether it will join the mediation or legal action and share the related costs and expenses. The obligation to confer is not a limitation on the ability of Grantee or OWEB to exercise any of its rights under the Easement.

If Grantee and OWEB decide to join in the action and share costs and expenses related to the action and OWEB determines the Conservation Values have been harmed to the extent that the purpose of the OWEB grant can no longer be accomplished, then the parties must first pay to OWEB from any amounts recovered the greater of the following:

- a. OWEB funds with interest due and payable from the effective date of the Easement at the rate provided for in ORS 82.010. The required repayment will not exceed five times the OWEB funds; or
- b. the Liquidation Value.

Upon OWEB's receipt of the amount provided for above, OWEB shall execute and record a document terminating its interest in this Easement.

After OWEB has recovered the amount provided for above, Grantee may recover its funds [*insert definition of Grantee's funds if not previously defined*]. After Grantee has recovered its funds, OWEB and Grantee may recover pro rata from remaining amounts recovered, if any, all expenses reasonably incurred by Grantee and OWEB in connection with the action.

If Grantee or OWEB chooses not to undertake mediation or legal action as provided for in Section *[insert Remedies section number]*, and share costs and expenses related to such action, the party not participating is not entitled to any recovery for enforcement costs, if any.”

- **Mandatory** text for three-party joint enforcement (grantee, OWEB, and additional funder):
“Before Grantee, OWEB or *[insert name of additional funder]* exercises its rights to undertake mediation or legal action as provided for in Section *[insert Remedies section number]*, the party contemplating the mediation or legal action shall confer with the other parties holding enforcement rights under this Easement whether they will join the mediation or legal action and share costs and expenses related to such action. This obligation to confer is not a limitation on the Grantee, OWEB or *[insert name of additional funder]* to exercise its rights under this Easement.

If Grantee, OWEB and *[insert name of additional funder]* decide to join in the action and share costs and expenses related to the action and OWEB determines the Conservation Values have been harmed to the extent that the purpose of the OWEB grant can no longer be accomplished, then the parties must first pay to OWEB from any amounts recovered the greater of the following:

- a. OWEB funds with interest due and payable from the effective date of the Easement at the rate provided for in ORS 82.010. The required repayment will not exceed five times the OWEB funds; or
- b. the Liquidation Value

Upon OWEB’s receipt of the amount provided for above, OWEB shall execute and record a document terminating its interest in this Easement.

After OWEB has recovered the amount provided for above, Grantee and *[insert name of additional funder]* may recover their funds *[insert definition of Grantee’s and additional funder’s funds if not previously defined]*. After Grantee and *[insert name of additional funder]* have recovered their funds, OWEB, Grantee and *[insert name of additional funder]* may recover pro rata from remaining amounts recovered, if any, all expenses reasonably incurred by Grantee, *[insert name of additional funder]* and OWEB in connection with the action.

If Grantee, OWEB or *[insert name of additional funder]* chooses not to undertake mediation or legal action as provided in Section *[insert Remedies section number]*, and share costs and expenses related to such action, such party is not be entitled to any recovery for enforcement costs.”

Maintenance, Repair, Taxes, Assessments, and Environmental Compliance (Required Provision; No Mandatory Text)

- Include a provision that assigns responsibility for property maintenance, repair, taxes, assessments, and environmental compliance (typically responsibility goes to the grantor).

Indemnification (Required Provision; Mandatory Text)

- Include the following mandatory text:
“Grantor and Grantee shall indemnify and hold OWEB and the State of Oregon and their officers, employees, and agents harmless against all losses and liabilities arising out of or relating to the activities of Grantor and Grantee or their officers, employees, subcontractors, or agents on the Easement Property.”

To the extent permitted by Article XI, section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 to 30.300, OWEB shall indemnify and hold Grantor and Grantee and their officers, employees, and agents harmless against all losses and liabilities arising out of or relating to the activities of OWEB or its officers, employees, subcontractors, or agents on the Easement Property.”

Order of Precedence (Required Provision; No Mandatory Text)

- Include a provision that clarifies the relative precedence of the conservation easement without its exhibits, the exhibits and any deliverables under the conservation easement (e.g. the Approved Management Plan).

For example:

“The parties intend that whenever possible this Easement, its exhibits and any documents that are deliverables under this Easement, be construed in manner that is consistent. If, however, there is an inconsistency between this Easement, its exhibits or its deliverables (e.g. Approved Management Plan), then the parties intend that the inconsistencies are resolved in following order (with earlier document governing the later document): this Easement without its exhibits, then the exhibits in alphabetical order, and then deliverables under this Easement.”

Miscellaneous Legal Provisions (Optional Provisions)

- Include provisions for liberal construction, severability, the grantor’s representations regarding the easement property, and others as appropriate.

Signature blocks (Required Provision; No Mandatory Text)

- Include signature and notary blocks for each party to the easement.

Additional Guidance for Working Lands Easements (Optional)

- A working lands conservation easement protects a property’s conservation values while maintaining the right of the grantor to use the land for specified farming, ranching, or forestry activities. It is often complicated to structure a conservation easement that effectively achieves both protection of the property’s conservation values and continued economic use of the property.
- To simplify working lands easements, OWEB suggests the use of zones to separate farming, ranching, and forestry activities from areas designated for habitat protection or restoration and protection. If zones are used, the easement must state the allowed and prohibited activities for each zone, and clearly define in the easement or baseline inventory documentation the location of each zone. OWEB requires a statement that economic uses conducted in economic-use zones are permitted only to the extent that they do not directly or indirectly alter, degrade, or otherwise diminish the habitat protection zones.